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United States District Court,
W.D. New York.

Deevine J. COLON, Plaintiff,
v.
Michael J. ASTRUE, Commissioner of Social Security, Defendant.

No. 11–CV–210A.
|
May 21, 2013.

**Attorneys and Law Firms**

Lewis L. Schwartz, Myers Quinn & Schwartz LLP, Buffalo, NY, for Plaintiff.

Jane B. Wolfe, U.S. Attorney's Office, Buffalo, NY, for Defendant.

ORDER

RICHARD J. ARCARA, District Judge.

***1** The above-referenced case was referred to Magistrate Judge Jeremiah J. McCarthy, pursuant to 28 U.S.C. § 636(b)(1)(B). On April 23, 2013, Magistrate Judge McCarthy filed a Report and Recommendation, recommending that defendant's motion for judgment on the pleadings be denied and that plaintiff's motion for judgment on the pleadings be granted in part and denied in part.

The Court has carefully reviewed the Report and Recommendation, the record in this case, and the pleadings and materials submitted by the parties, and no objections having been timely filed, it is hereby

ORDERED, that pursuant to 28 U.S.C. § 636(b)(1), and for the reasons set forth in Magistrate Judge McCarthy's Report and Recommendation, defendant's motion for judgment on the pleadings is denied and plaintiff's motion for judgment on the pleadings is granted in part and denied in part.

The case is referred back to Magistrate Judge McCarthy for further proceedings.

SO ORDERED.

**REPORT AND RECOMMENDATION**

JEREMIAH J. McCARTHY, United States Magistrate Judge.

**INTRODUCTION**

This case was referred to me by Hon. Richard J. Arcara to hear and report in accordance with 28 U.S.C. § 636(b)(1) [9]. [1] Before me are the parties' cross-motions for judgment on the pleadings pursuant to Fed.R.Civ.P. ("Rule") 12(c) [15][16]. For the following reasons, I recommend that defendant's motion for judgment on the pleadings [16] be denied and that plaintiff's motion [15] be granted in part and denied in part.

**BACKGROUND**

Plaintiff (d.o.b.8/29/89) received disability benefits as a minor (T13). [2] He filed an application for continuation of his entitlement to child's insurance benefits as a disabled adult child on October 27, 2006 (id). When this claim was denied (T13, 67–70), he also filed a new application for Supplemental Security Income benefits ("SSI") (T13, 89).

On January 27, 2009, a hearing on both claims was held before Administrative Law Judge William E. Straub on January 27, 2009 (T13, 22–55). Plaintiff was represented at the hearing by Deborah A. Olszowka, Esq. (T13). [3] On February 20, 2009, ALJ Straub issued a decision denying plaintiff's claim (T20). ALJ Straub's determination became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review (T1–3). [4]

**A. THE ADMINISTRATIVE RECORD**

**1. Medical Evidence**

**a. Treatment History**

**i. Barbara Stouter, M.D.**

Dr. Stouter, of the Amherst University Health Center, treated plaintiff from November 12, 2003 to February 15, 2008 (T141–157, 269–288). In her January 16, 2006 progress notes, Dr. Stouter stated that plaintiff had "[c]hronic flat feet causing chronic low-grade back and leg pain" (T146). On November 16, 2006, Dr. Stouter noted that plaintiff suffered from "depression/ anxiety, [gastroesophageal reflux disease ("GERD") ] and medically treated, asthma under good control. Learning disabled with some unrealistic expectations for his future' " (T143). Dr. Stouter prescribed Prozac for plaintiff's depression and anxiety, but noted on December 7, 2006, that his "[a]nxiety and depression [had not improved] with low-dose Prozac. Continued weight loss which is very concerning. Abrasion on his hand secondary to punching a punching bag" (T282). Dr. Stouter also noted plaintiff's GERD was "improving with Prevacid" (*id.*).

***2** On May 23, 2007, Dr. Stouter noted that plaintiff had stopped taking Prozac and Prevacid (T277). At that time, plaintiff was "not feeling sad or depressed or suicidal. His stomach is a lot better today" (*id.*). Dr. Stouter noted that plaintiff's asthma is a "little bit worse right now", and that he continues to have chronic problems with his back, knees and legs (*id.*). Dr. Stouter noted that "[c]urrently he reads at about a second or third grade level" (*id.*). Her February 15, 2008 progress notes indicate that plaintiff's chronic problems were "Anxiety State Nos, Depressive Disorder Nec". "Esophageal Reflux", and "unspec asthma w/ acute exacerba" (T269).

**ii. Sheila Figliotti, LCSW–R**

Ms. Figliotti, a family counselor, provided family counseling to plaintiff regarding his separation from his father and his father's death (T159, 297). She counseled plaintiff from 2002 through January 2008 (T159, 297). During "the first couple of years ... [plaintiff] had significant delay in the areas of understanding and expressing language", but "he has demonstrated growth in these areas since high school" (T159).

**b. Consultative Examinations**

**i. Dr. Samuel Balderman, M.D.**

Dr. Balderman performed a consultative pediatric examination of plaintiff on December 18, 2006 (T160–169).[5] Dr. Balderman noted that plaintiff had a history of "[d]epression, learning disabilities, and asthma", has been treated by a mental health specialist once every two weeks, and had been in therapy for depression for six years (T160).

Dr. Balderman reported that plaintiff "relates to the examiner ... in an age-appropriate way. The child appeared to have normal attention span for age" (T161). Dr. Balderman diagnosed plaintiff with depression, asthma, learning disabilities, and fetal maternal drug exposure (T163). Dr. Balderman suggested that plaintiff "avoid environments which trigger active airway disease", but noted that "plaintiff has no other physical limitations" (*id* ). He also indicated that plaintiff was "still being treated for depression", and that his "learning disabilities appear to be significant" (*id* ).

**ii. Dr. Renee Baskin, Ph.D.**

Dr. Baskin completed both a "Child/Adolescent Psychiatric Evaluation" and a "Child/Adolescent Intelligence Evaluation" of plaintiff on December 18, 2006 (T170–177). Dr. Baskin reported that plaintiff's attention, concentration, and his recent and remote memory were "intact and ageappropriate" (T172). Dr. Baskin estimated plaintiff's cognitive intellectual functioning "to be in the below average to borderline range" (*id* ). She concluded that his "cognitive difficulties do not preclude his ability to function in an academic setting" (T176).

Dr. Baskin diagnosed plaintiff with "Learning disorder, NOS", "Depressive disorder, NOS", "Anxiety disorder, NOS", "Borderline intellectual functioning", "asthma", "Bone, muscle or joint problem (knees). History of frequent and severe ear infections. Complaints of leg, knee and stomach pain' " (T177).

***3** According to Dr. Baskin, plaintiff "would be able to attend to, follow and understand age-appropriate directions, complete age-appropriate tasks, adequately maintain appropriate social behavior, respond appropriately to changes in the environment, learn in accordance to cognitive functioning, ask questions and request assistance in an age-appropriate manner, be aware of danger and take needed precautions and interact adequately with peers and adults on a consistent basis" (Tl 72). Dr. Baskin concluded that, "[t]he results of the evaluation appear to be consistent with psychiatric and

  

cognitive problems but, in itself, this does not appear to be significant enough to interfere with plaintiff's ability to function on a daily basis" (T176–177).

**c. State Agency Review**

**i. Psychiatric Review and Mental Residual Functional Capacity**

M.S. Rahman, M.D., a state agency reviewing physician, completed a Psychiatric Review Technique (T230–243) and a Mental Residual Functional Capacity Assessment of plaintiff on March 15, 2007 (T244–247). Dr. Rahman found plaintiff to be "mildly limited" in "restriction of activities of daily living' ", had "difficulties in maintaining social functioning", and was "moderately limited" "in maintaining concentration, persistence or pace" (T240). Dr. Rahman noted that plaintiff did not experience repeated episodes of deterioration, each of extended duration (*id.*).

Dr. Rahman concluded that, "[a]s per psych CE on 12/18/06, his MSE are fairly intact. As per special ed. teachers [*sic* ] report on 2/2/07, [plaintiff] has very little difficulties when the task is easy but when the task is slightly challenging he attempts to avoid the tasks, he functions at a much higher rate of independence in the area of math and struggles in all other academic areas due to low reading ability. Based on the available MER, plaintiff appears able to understand and follow simple directions and perform simple rote tasks in low contact and low demand settings" (T246).

**ii. Physical Residual Functional Capacity**

C. deFreitas [6], a state agency disability analyst, completed a physical residual functional capacity assessment on March 16. 2007 (T248–253). Plaintiff's primary diagnosis was asthma, with a secondary diagnosis of "LD" and fetal maternal drug exposure (T248). No postural, manipulative, visual limitations, or communicative limitations were noted (T249–251).

Plaintiff had the residual functional capacity ("RFC") to occasionally lift and/or carry 20 pounds, frequently lift and/or carry 10 pounds, stand and/or walk (with normal breaks) for a total of 6 hours in an 8–hour workday, and sit (with normal breaks) for a total of 6 hours in an 8–hour workday (T249). It was noted that plaintiff had a "NORMAL MUSCULOSKELETAL EXAM. NO CYANOSIS NOR RESP. DISTRESS LUNGS CLEAR TO AUSCULTATION" (T249).

Due to plaintiffs asthma, it was noted that plaintiff should avoid concentrated exposure to extreme cold, extreme heat, wetness, humidity, fumes, odors, dusts, gases, and poor ventilation. (T251). However, plaintiff had no limitations regarding noise, vibration, or hazards (*id.*). The assessment noted that, "CLMT DID NOT GIVE ANY SPECIFIC PHYSICAL FUNCTIONAL LIMITATION" (*id.*).

**2. Educational Records and Testing**

**a. School Psychologist Jennifer Topolski**

***4** Jennifer Topolski [7] of the Niagara Falls City School District completed an evaluation dated March 3, 2000, stating that, "[plaintiff] is a ten-year-old fifth grade student who is currently identified as educationally handicapped due to a learning disability" (T224). Ms. Topolski's concluded that plaintiff

> "continues to struggle academically ... since his last evaluation his behavior has improved but he still has a difficult time sustaining attention. On the current evaluation, [plaintiff] displayed borderline to below average ability. He displayed his intelligence equally through verbal expression and comprehension and through the manipulation of concrete nonverbal stimuli. Based on his ability and scores obtained on the last standardized achievement test administered [plaintiff] continues to work significantly below expectancy. [Plaintiff's] classification appears appropriate. In addition, [plaintiff] seems to continue to need a small and structured environment to meet his educational needs" (T226).

**b. Woodcock–McGrew–Werder Mini–Battery of Achievement**

Plaintiff was administered the Woodcock–McGrew–Werder Mini–Battery of Achievement on January 13, 2006 (Tl 98). Plaintiff's performance on Basic Skills was noted as "comparable to that of the average individual at grade 3.7 from the normative sample", which is "within the very low range of scores obtained by others at his grade level" (Tl 98–199). Plaintiff's performance on reading was noted as "comparable to that of the average individual at

grade 2.7 from the normative sample", which is "within the very low range of scores obtained by others at his grade level" (*id.*). Plaintiff's performance on writing was noted as "comparable to that of the average individual at grade 2.9 from the normative sample", which is "within the very low range of scores obtained by others in his grade level" (*id.*). Plaintiff's performance on mathematics was noted as "comparable to that of the average individual at grade 6.7 from the normative sample", which is "within the low average range of scores obtained by others at his grade level" (*id.*).

**c. Individualized Education Program Records, Niagara Falls High School**

Plaintiff's January 2, 2007 through January 2, 2008 Individualized Education Program ("IEP") notes state that he "has a significant delay in reading comprehension, math concepts, written expression, which adversely affects academic performance" (T202), Among his need areas were to be able to follow oral and written directions (*id.*).

**d. Teacher Questionnaire, Ms. Jones** [8]

On February 2, 2007, Ms. Jones, a special education teacher, completed a teacher questionnaire regarding plaintiff (T178–185). Ms. Jones noted that while plaintiff was in 12th grade, his current instructional levels were 3rd grade for reading and written language, and 7th grade for math (T178). She noted that he "struggles" in all academic areas other than math "due to his low reading ability", and that when a "task is slightly 'challenging' he attempts to avoid tasks" (T179, 180).

**e. Certified School Psychologist, Michael Lewis, Ph. D.**

***5** On April 16, 2007 plaintiff was seen by Dr. Lewis, who noted that "[p]revious evaluations indicate low average cognitive ability with significant deficits in academic achievement and adaptive behavior. [Plaintiff's] overall cognitive ability was measured to be in the range of below average to low average" (T255). Dr. Lewis noted plaintiff as having "weak academic skills when compared to the average student his age" ranging "from 5 grade levels below to 10 grade levels below expectations" (*id.*).

**f. Niagara County Community College ("N.C.C.C."), Unofficial Transcript**

Plaintiff's unofficial transcript, dated January 14, 2008, shows a 0.00 GPA for the semester (T292).

**3. Vocational Evidence**

**a. Winship & Associates, Diagnostic Vocational Evaluation**

Plaintiff was referred by Davina Moss–King, Ph.D., from Vocational and Educational Services for Individuals with Disabilities ("VESID") to Winship & Associates for a Diagnostic Vocational Evaluation on August 18, 2008 (T257–260). Tests measured plaintiff's reading score at the 2.0 grade equivalent (T258).

Rhannon Yuscinsky, M.S. C.R.C., and Lisa Cooper, MS, CRC, noted that "[w]hen plaintiff initially presented for his evaluation, he stated an interest in RN, physical therapy, medical assistant and ambulance driver", but that in their opinion "further training would not be an appropriate direction for [plaintiff]" (T260). Instead, they recommended

> "that [plaintiff] continue in researching his vocational options. It would appear that a low stressful occupation that provides a structured environment that utilizes limited reading and math skills would be best. [Plaintiff] has shown some interest in the areas of Food Service, Animal Care and Personal Service. I would recommend that [plaintiff] go back into his interest test results to explore the options within those areas. Also, he could again explore his options within the medical field, but again, I would encourage him to be realistic as to what his abilities are to ensure that he chooses a vocational direction that not only matches with his interests but that he has the potential to be successful at" (*id.*).

In a September 18, 2008 addendum, it was noted that plaintiff wanted to become an ambulance driver, but that "it became evident that he was naive in regards to the job duties required of an ambulance driver" (T261). Plaintiff also discussed other driving positions, such as wheelchair van driver, stating that he would be having a driver evaluation in October 2008, and it was noted that this should provide a "clearer picture" of plaintiff's ability to work in this capacity (T261).

At this time, plaintiff was employed part-time as a "security/maintenance worker" with Parkway

Apartments. Counselor Yuscinsky concluded that plaintiff,

> "needs to focus on obtaining or maintaining employment that is within his abilities and offers him the greatest chance for success. [Plaintiff's] ideas about returning to college or working for an ambulance company would likely be setting him up for failure. It is my opinion that [plaintiff] may be able to work in the capacity of a driver given that it is structured and low stress. Besides wheelchair van driver, another option that [plaintiff] could explore would be shuttle driver or courier. As stated previously, another option for [plaintiff] would be to participate in training to earn his New York State security guard's license to assist him in feeling more comfortable at his present job" (T262).

**b. Davina Moss–King, Ph.D.**

***6** On December 23, 2008, Dr. Moss–King completed a "Medical Assessment of Ability to Do Work–Related Activities (Mental)" for plaintiff (T290–291) [9]. Dr. Moss–King rated plaintiff as "good" in his abilities to relate to coworkers, deal with the public, maintain personal appearance, behave in an emotionally stable manner, and demonstrate reliability; plaintiff was rated as "fair" in his abilities to follow work rules, use judgment, interact with supervisors, deal with work stresses, function independently, and relate predictably in social situations; and plaintiff was rated as "poor or none" in his abilities to maintain concentration, understand, remember, and carry out complex job instructions, and understand, remember, and carry out detailed, but not complex instructions (T290–291).

Plaintiff's "academic evaluations indicate there are severe deficits in the area of math, reading which will interfere w/ his ability to complete a task successfully in the area of employment.... [Plaintiff] does not handle stressful situations well and would not be successful in social situations that are not predictable w/ some uncertainty" (T290–291). Ms. Moss–King concluded that "[t]he evaluation results illustrate that [plaintiff] lacks the skill level & comprehension to successfully train on" (T291).

According to Dr. Moss–King's January 9, 2009 letter, plaintiff was attending remedial courses at N.C.C.C. during the Spring 2009 semester (T289). Dr. Moss–King also wrote that plaintiff is "currently reading at a second grade level and will need to receive remedial assistance to be successful at employment or pursuing education endeavors", also noting that he "resigned from his maintenance position because his health was compromised" (*id.*).

**c. Driver Evaluation Summary Report, Walter Arbutina**

VESID referred plaintiff for a driver evaluation on November 7, 2008, which concluded that he "appears to possess the potential to learn to become a safe, defensive driver. As a first time driver, [plaintiff] would benefit from proper individualized driver-training services" (T295).

**4. Administrative Hearing Conducted On February 20, 2009**

**a. Mariam Lopez's Testimony**

Ms. Lopez, plaintiff's mother, testified that her son had been living with her all of his life (T28). Plaintiff was on SSI when he was a child because he was deaf in his left ear, was a chronic asthmatic, and had behavioral and learning issues that required speech, occupational, and physical therapy (T32). She testified that VESID has been involved with plaintiff since high school and meets with him every two weeks (T37–38). According to Ms. Lopez, plaintiff is currently at a "[f]irst grade, second grade level" in terms of his math and reading (T38–39).

Ms. Lopez testified that plaintiff had stopped working as a maintenance worker at Parkway Towers after a few months because "[h]e kept on coughing a lot, getting asthma. getting sick" (T29), and attributed plaintiff's illness to the chemicals they were using and to him being outdoors (*id.*).

***7** Ms. Lopez testified that plaintiff is a chronic asthmatic on medication, but that he had been doing okay when he was in school (T29–30). She stated that plaintiff has arthritis in his feet, complains about back pains, and that his feet hurt when he stands or walks too much (T30). According to Ms. Lopez, plaintiff is depressed and locks himself in his room most of the time (T31). She testified that this depression became apparent to her when plaintiff failed his first semester at N.C.C.C, and when he was told that he could not be a pediatrician in high school (T31).

Ms. Lopez testified that she has to constantly repeat herself, tell plaintiff to focus, and remind him of things

or he will forget (T33). She stated that plaintiff assists by doing dishes, taking out the garbage, and by attempting to cook and clean (T33). Ms. Lopez testified that plaintiff does not do a good job, "but he tries" (T34). For example, Ms. Lopez explained that she sends plaintiff to the grocery store and gives him a list verbally, but pretty much every time he has to call and get the list item-by-item because he forgets. Ms. Lopez also stated that he sometimes loses grocery money (T35). Ms. Lopez also shops with plaintiff for his clothing and drives him to school because he does not have a driver's license (T35, 40). Ms. Lopez stated that plaintiff recently took the road test and failed (T36–37). Plaintiff likes to play video games with his friends, hang out at his house, and occasionally goes to the movies (T39–41).

**b. Plaintiffs Testimony**

Plaintiff testified that when he was working for Parkway Towers he was exposed to chemicals from mopping and being outside when it was cold, which made him cough (T43), and quit this job to avoid becoming really ill (*id.*). He testified that he has not looked for work since leaving this job (T43, 44), and that VESID has not made any suggestions to him about jobs that he might be able to perform (T43–44).

Plaintiff testified that he took five classes during his semester at N.C.C.C., but failed every class and earned no credits (T48–49). He testified that he wanted to be an ambulance driver, but was unable to write a report, and that he could not be a security guard because he did not have an eighth or ninth grade writing and reading level (T49).

Plaintiff testified that he thought he would be too nervous to take public transportation by himself, and that he has never tried to do so (T45). He testified that he was trying to see if he could get his drivers license with the help of additional lessons (T50), but stated that he was having a difficult time focusing while driving, and that it was confusing for him (*id.*). He testified that driving makes him "a little scared", and that he sometimes forgets to do things like look in mirrors (T50–51).

Plaintiff testified that he has difficulty focusing in his daily life. For example, he has a difficult time reading a book on his own (T51). Plaintiff testified that his difficulty focusing has resulted in complaints about his job performance (*id.*). He testified that he forgets to do things that his boss told him to do (*id* ). [10]

**5. ALJ Straub's Decision**

***8** ALJ Straub found that plaintiff had not engaged in substantial gainful activity since August 28, 2007, due to the fact that plaintiff resigned from his only job after a few months, and this work activity did not rise to the level of substantial gainful activity (T15–16).

ALJ Straub found that since August 28, 2007, plaintiff has had the following severe impairments: learning disability and asthma (T16). However, since August 28, 2007, plaintiff has not had an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 C.F.R. Part 404, Subpart P. Appendix I (T16–17).

ALJ Straub found plaintiff has the RFC "to perform a full range of work at all exertional levels but with the nonexertional limitations: he cannot work in poorly ventilated areas or areas where he would be exposed to dust, fumes, humidity, dampness, or temperature extremes; and he can work only in a job involving simple directions and simple rote tasks in a low contact and low demand setting" (T18).

ALJ Straub concluded that considering plaintiff's age, education, work experience, and RFC, plaintiff is able to perform jobs that exist in significant numbers in the national economy (T20). ALJ Straub found that plaintiff's nonexertional limitations have "little or no effect on the occupational base of unskilled work at all exertional levels" and that "a finding of 'not disabled' was therefore appropriate under the framework of section 204.00 in the Medical Vocational Guidelines" (*id.*).

## ANALYSIS

**A. Scope Of Judicial Review**

The Social Security Act states that, upon review of the Commissioner's decision by the district court, "[t]he findings of the Commissioner ... as to any fact, if supported by substantial evidence, shall be conclusive ..." 42 U.S.C. § 405(g). Substantial evidence is that which a "reasonable mind might accept as adequate to support a conclusion". *Consolidated Edison Co. of New York. Inc.*

*v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938).

Under this standard, the scope of judicial review of the Commissioner's decision is limited. This Court may not try the case *de novo,* nor substitute its findings for those of the Commissioner. *Townley v. Heckler,* 748 F.2d 109, 112 (2d Cir.1984). Rather, the Commissioner's decision is only set aside when it is based on legal error or is not supported by substantial evidence in the record as a whole. *Balsamo v. Chater,* 142 F.3d 75, 79 (2d Cir.1998). If supported by substantial evidence, the Commissioner's finding must be sustained "even where substantial evidence may support plaintiff's position and despite that the Court's independent analysis of the evidence may differ" from that of the Commissioner. *Martin v. Shalala,* 1995 WL 222059, *5 (W.D.N.Y.1995) (Skretny, J.) (*quoting Rosado v. Sullivan,* 805 F.Supp. 147, 153 (S.D.N.Y.1992)).

However, before deciding whether the Commissioner's determination is supported by substantial evidence, I must first determine "whether the Commissioner applied the correct legal standard." *Tejada v. Apfel,* 167 F.3d 770, 773 (2d Cir.1999). "Failure to apply the correct legal standards is grounds for reversal." *Townley,* 748 F.2d at 112.

**B. The Disability Standard**

***9** The Social Security Act provides that a plaintiff will be considered disabled "if he is unable to engage in any substantial gainful activity by reason of any medically detenninable physical or mental impairment which ... has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U .S.C. § 1382c(a)(3)(A). The impairments must be "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy ..." 42 U.S.C. § 1382c(a)(3)(B).

The determination of disability entails a five-step sequential evaluation process:

1. The Commissioner considers whether the claimant is currently engaged in substantial gainful activity.

2. If not, the Commissioner considers whether the claimant has a 'severe impairment' which limits his or her mental or physical ability to do basic work activities.

3. If the claimant has a 'severe impairment,' the Commissioner must ask whether, based solely on medical evidence, claimant has an impairment listed in Appendix 1 of the regulations. If the claimant has one of these enumerated impairments, the Commissioner will automatically consider him disabled, without considering vocational factors such as age. education, and work experience.

4. If the impairment is not 'listed' in the regulations, the Commissioner then asks whether, despite the claimant's severe impairment, he or she has residual functional capacity to perform his or her past work.

5. If the claimant is unable to perform his or her past work, the Commissioner then determines whether there is other work which the claimant could perform. The Commissioner bears the burden of proof on this last step, while the claimant has the burden on the first four steps.

*Shaw v. Chater,* 221 F.3d 126, 132 (2nd Cir.2000) (*citing DeChirico v. Callahan,* 134 F.3d 1177, 1179–80 (2nd Cir.1998)); *see* 20 C.F.R. §§ 404.1520, 416.920.

"[R]egulations ... limit the Commissioner's burden at step five. *See* 20 C.F.R. 404.1560(c) ... The Commissioner's step-four RFC determination (with the claimant bearing the burden of proof) now controls at both steps four and five.... The Commissioner applies the RFC determination from step four to meet his burden at step five. Using the claimant's RFC, the Commissioner must then show at step five that 'there is other gainful work in the national economy which the claimant could perform.' " *Spain v. Astrue,* 2009 WL 4110294, *3 (E.D.N.Y.2009).

Plaintiff moves for judgment on the pleadings, seeking "[a]t the very least" that the case be remanded. Plaintiff's Motion [15–1], p. 24. He argues that ALJ Straub erred by ignoring the opinion of Dr. Moss–King, failing to properly evaluate and explain the weight afforded to the state agency review physician, ignoring certain of plaintiff's impairments, failing to conduct a function-by-function RFC analysis, failing to utilize a vocational expert, and improperly assessing his credibility. *Id.,* pp. 9–24. The Commissioner cross-moves for judgment on the pleadings, arguing that his determination is supported

  

by substantial evidence. Commissioner's Memorandum of Law [17], pp. 17–25.

### C. Plaintiff's Arguments

#### 1. ALJ Straub Erred in Failing to Explain Why he Afforded No Weight to the Medical Opinion of Dr. Moss–King

***10** Plaintiff argues that ALJ Straub erred by failing to consider Dr. Moss–King's opinion because "Dr. Moss–King is not only a vocational expert, but also a psychologist by training" and "[a]s such, ... is ... a treating medical source." Plaintiff's Reply [18], p. 6; Plaintiff's Motion [15–1], pp. 9–12. The Commissioner responds that Dr. Moss–King is not an acceptable medical source since she was "not providing psychological treatment to plaintiff; rather, she was functioning in the capacity as a vocational rehabilitation counselor, as she stated under her signature". Commissioner's Reply Memorandum of Law [19], p. 2.

Even assuming that Dr. Moss–King was acting only in her capacity as a Vocational Rehabilitation Counselor, it did not entitle ALJ Straub to disregard her opinion without explanation. "[A] vocational rehabilitation counselor ... is not an acceptable medical source under the regulations" (*Deeley v. Astrue,* 2011 WL 454505, *4 n. 1 (N.D.N.Y.2011)), "but is an 'other source' as defined by 20 C.F.R. § 1513(d)." *Morris v. Astrue,* 2010 WL 3976291, *17 (N.D.Fla.2010), *adopted,* 2010 WL 3951961 (N.D.Fla.2010). According to Social Security Ruling ("SSR") 06–03p, opinions from "other sources" "are important and should be evaluated on key issues such as impairment severity and functional effects, along with the other relevant evidence in the file." 2006 WL 2329939, *3. "While the opinion[s] [of other sources] do[ ] not command the same weight as a physician's, [they are] nevertheless entitled to some consideration." *Marziliano v. Sullivan,* 771 F.Supp. 69, 75 (S.D.N.Y.1991).

"While the Commissioner is thus free to decide that the opinions of 'other sources,' ..., are entitled to no weight or little weight, those decisions should be explained." *Sears v. Astrue,* 2012 WL 1758843, *3 (D.Vt.2012). *See* SSR 06–03P, 2006 WL 2329939 at *6 ("the adjudicator generally should explain the weight given to opinions from these 'other sources,' or otherwise ensure that the discussion of the evidence in the determination or decision allows a claimant or subsequent reviewer to follow the adjudicator's reasoning, when such opinions may have an effect on the outcome of the case"). In evaluating the opinions of "other sources", "SSR 06–03p directs the Commissioner to use the same factors ... as are used to evaluate the opinions of 'acceptable medical sources,' including treating physicians.... These factors include but are not limited to the length of the treatment relationship, the frequency of evaluation, and the degree to which the opinion is supported and consistent with the record." *Id. (citing* 2006 WL 2329939 at *4). In fact, "[b]ased on the particular facts of a case, such as length of treatment, it may be appropriate for an ALJ to give more weight to a non-acceptable medical source than a treating physician." *Anderson v. Astrue,* 2009 WL 2824584, *9 (E.D.N.Y.2009).

***11** I recognize that the ALJ has the discretion to " 'choose between properly submitted medical opinions' " *Balsamo,* 142 F.3d at 81; *see Veino v. Barnhardt,* 312 F.3d 578, 588 (2d Cir.2002). However, this decision should be explained. *See Sears,* 2012 WL 1758843 at *3. It was an abuse of discretion for ALJ Straub to entirely ignore Dr. Moss–King's December 23, 2008 Medical Assessment of Ability to Do Work Related Activities (T290–291).

The Commissioner appears to argue that this failure is harmless since Dr. Moss–King's "assessment does not contradict the ALJ's residual functional capacity Finding .... that plaintiff was limited to performing jobs involving simple directions and simple rote tasks in a low contact and low demand setting". Commissioner's Reply Memorandum of Law [19], pp. 2–3. *See, e.g., Ryan v. Astrue,* 650 F.Supp.2d 207, 217 (N.D.N.Y.2009) ("courts have found harmless error where the ALJ failed to afford weight to a treating physician when an analysis of weight by the ALJ would not have affected the outcome"). However, the RFC reached by ALJ Straub ignores Dr. Moss–King's assessment that plaintiff had poor or no ability to maintain attention and concentration, and that his "severe deficits ... will interfere w/ his ability to complete a task successfully in the area of employment" (T290–291), which, if credited by ALJ Straub, would have resulted in a more limited RFC. Dr. Moss–King's assessment has a significant bearing on ALJ Straub's RFC determination since "limitations to simple, routine tasks or to unskilled work would not, standing alone, typically suffice to account for a claimant's moderate limitations in concentration". *Hudson v. Commissioner of Social Security,* 2011 WL

  

5983342, *10 (D.Vt.2011), adopted, 2011 WL 6002466 (*citing Winschel v. Commissioner of Social Security,* 631 F.3d 1176, 1180 (11th Cir.2011)). *See Bowers v. Astrue,* 271 Fed.Appx. 731, 733 (10th Cir.2008) ("Simple work ... can be ruled out by a vocational expert on the basis of a serious impairment in concentration and attention"). Therefore, I recommend that this case be remanded for the Commissioner to make findings regarding the weight, if any, to be assigned to Dr. Moss–King's assessment and to properly analyze the remaining steps of the sequential evaluation process in light of any changes made to the weight afforded to this assessment. [11]

**2. ALJ Straub Erred in Evaluating the Opinion of the State Agency Physician**

Plaintiff argues that ALJ Straub did not properly evaluate the opinion of the state agency physician when he merely stated, without any explanation, that he afforded significant weight to their opinions. Plaintiff's Motion [15–1], p. 13. Defendant responds that this was not erroneous because "no treating source proffered an opinion which was inconsistent with the ALJ's residual functional capacity finding". Commissioner's Reply Memorandum of Law [19], p. 5. I disagree.

***12** As discussed above, ALJ Straub was free to credit the state agency review physician's RFC assessment over the contradictory assessment of Dr. Moss–King, but had an obligation to explain his decision for doing so Therefore, I recommend that the case be remanded on this basis.

**3. ALJ Straub Erred in Failing to Assess Plaintiff's Adjustment Disorder, Depression, and Anxiety**

Plaintiff argues that ALJ Straub erred in failing to include plaintiff's "depression, anxiety, or adjustment disorder in his short list of impairments, neither as severe or non-severe". Plaintiff's Motion [15–1], p. 15. Defendant responds that "[p]laintiff has not shown that additional limitations were caused by the other impairments he claims the ALJ should have found to be severe." Commissioner's Reply Memorandum of Law [19], p. 6.

A severe impairment is an impairment or combination of impairments that "significantly limits [the claimant's] physical or mental ability to do basic work activities". 20 C.F.R. § 404.1520(c). "The analysis at this step may not accomplish more than screening out *de minimis* claims. If, however, the disability claim rises above the *de minimis* level, then the analysis must proceed to step three." *Mattei v. Barnhart,* 2003 WL 23326027, *6 (E.D.N.Y.2003) (*citing Dixon v. Shalala,* 54 F.3d 1019, 1030 (2d Cir.1995)). Nevertheless, "the combined effect of a claimant's impairments must be considered in determining disability; the SSA must evaluate their combined impact on a claimant's ability to work, regardless of whether every impairment is severe." *Dixon,* 54 F.3d at 1031.

The record is replete with references to these additional impairments. For example. Dr. Baskin diagnosed plaintiff with depressive disorder and anxiety disorder (T173), and Dr. Balderman diagnosed plaintiff with depression (T163). There is also evidence in the record that at least some of these impairments were more than *de minimis.* For example, it was noted that plaintiff had been in therapy for depression for six years (T160) and was getting counseling to help with his anger (T142). There were also reports of plaintiff sleeping excessively (T170), loss of appetite with significant weight loss (*id.*), and frequent anger (T32–33).

Notwithstanding these references, ALJ Straub failed to discuss these impairments in his decision, including whether they constitute severe impairments or in combination with his severe impairments exacerbate his limitations. Therefore, I recommend that the case be remanded on this basis.

**4. Plaintiff's Remaining Arguments**

Since the Commissioner fails to directly respond to plaintiff's arguments that ALJ Straub erred in failing to perform a function-by-function analysis in reaching his RFC determination (plaintiff's motion [15–1], pp. 17–18) and in failing to provide clear reasons for his assessment of plaintiff's credibility (*id.,* pp. 20–23), I will recommend that the case be remanded on these grounds as well.

## CONCLUSION

***13** For the following reasons, I recommend that the Commissioner's motion [16] for judgment on the pleadings be denied, that plaintiff's motion for judgment on the pleadings [15] be granted in part and denied in part, and that the case be remanded to the Commissioner for further proceedings consistent with this opinion.

  

Unless otherwise ordered by Judge Arcara. any objections to this Report and Recommendation must be filed with the clerk of this court by May 10, 2013 (applying the time frames set forth in Fed.R.Civ.P. ("Rules") 6(a)(1)(C), 6(d), and 72(b)(2)). Any requests for extension of this deadline must be made to Judge Arcara. A party who "fails to object timely ... waives any right to further judicial review of [this] decision". *Wesolek v. Canadair Ltd.,* 838 F.2d 55, 58 (2d Cir.1988); *Thomas v. Arn,* 474 U.S. 140, 155, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985).

Moreover, the district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance. *Patterson–Leitch Co. v. Massachusetts Municipal Wholesale Electric Co.,* 840 F.2d 985, 990–91 (1st Cir.1988).

The parties are reminded that, pursuant to Rule 72(b) and (c) of this Court's Local Rules of Civil Procedure, written objections shall "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection ... supported by legal authority", and must include "a written statement either certifying that the objections do not raise new legal/factual arguments, or identifying the new arguments and explaining why they were not raised to the Magistrate Judge". Failure to comply with these provisions may result in the district judge's refusal to consider the objections.

**All Citations**

Not Reported in F.Supp.2d, 2013 WL 2245457

Footnotes

1 Bracketed references are to CM/EMF docket entries.
2 "T" refers to the certified transcript.
3 The hearing transcript identifies plaintiff's attorney as Deborah "Ozoken" (T22).
4 The Notice of Appeals Council Action is undated (T1–3).
5 Dr. Balderman described plaintiff as a female, which appears contrary to the other aspects of the record (T160).
6 It is unclear from the record what qualifications C. deFreitas holds.
7 It is unclear from the record what qualifications Jennifer Topolski holds.
8 First name illegible (T185).
9 For this assessment, plaintiff's ability to function in different areas was rated from unlimited to very good, good (ability to function in this area is limited but satisfactory), fair (ability to function in this area is seriously limited, but not precluded), and poor or none (no useful ability to function in this area) (T290).
10 The remainder of plaintiff's testimony matches his mother's testimony.
11 Since this may have an impact on whether vocational expert testimony is necessary, 1 have not analyzed plaintiffs argument (plaintiff's motion [15–1], pp. 18–20) directed at ALJ Straub's failure to utilize a vocational expert. *See Mitchell v. Astrue,* 2009 WL 3096717, *23 (S.D.N.Y.2009) ("Limitations in concentration, persistence, and pace constitute nonexertional limitations under the Commissioner's regulations.... [O]nly if a claimant's nonexertional impairments 'significantly diminish his ability to work—over and above any incapacity caused solely from exertional limitations—so that he is unable to perform the full range of employment indicated by the medical vocational guidelines,' is the testimony of a vocational expert required").

2016 WL 3945814
Only the Westlaw citation is currently available.
United States District Court,
W.D. New York.

Deborah J. Holste, Plaintiff,
v.
Carolyn W. Colvin, Acting Commissioner of Social Security, Defendant.

Case # 15-CV-582-FPG
|
Signed 07/19/2016

**Attorneys and Law Firms**

Kenneth R. Hiller, Timothy Hiller, Law Offices of Kenneth Hiller, Amherst, NY, for Plaintiff.

Benil Abraham, Social Security Administration, New York, NY, for Defendant.

DECISION AND ORDER

HON. FRANK P. GERACI, JR., Chief Judge

***1** Deborah J. Holste ("Holste" or "Plaintiff") brings this action pursuant to the Social Security Act ("the Act") seeking review of the final decision of the Commissioner of Social Security ("the Commissioner") that denied her application for Supplemental Security Income ("SSI") under Title XVI of the Act. ECF No. 1. This Court has jurisdiction over this action under 42 U.S.C. §§ 405(g) and 1383(c)(3).

Both parties have moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. ECF Nos. 9, 10. For the reasons stated below, this Court finds that the Commissioner's decision is not in accordance with the applicable legal standards. Accordingly, Plaintiff's motion is GRANTED, the Commissioner's motion is DENIED, and this matter is REMANDED to the Commissioner for further administrative proceedings.

## BACKGROUND

On September 30, 2009, the Social Security Administration ("SSA") granted Holste Disability Insurance Benefits ("DIB") based on a prior application, but those benefits were terminated in April of 2012. Tr. [1] 157. Thereafter, on May 21, 2012, Holste protectively filed an application for SSI. [2] Tr. 139-49, 161. She alleged that she had been disabled within the meaning of the Act since April 1, 2010 due to bipolar disorder, lower back pain, lumbar disc disease, spinal stenosis, asthma, and arthritis in her lower back. *Id.* After her application was denied at the initial administrative level, a hearing was held before Administrative Law Judge Timothy M. McGuan ("the ALJ") on August 27, 2013 in which the ALJ considered Holste's application *de novo.* Tr. 41-57. Holste appeared at the hearing with her attorney and testified. *Id.* Jay Steinbrenner, a Vocational Expert ("VE"), also appeared and testified. Tr. 51-56. On January 30, 2014, the ALJ issued a decision finding that Holste was not disabled within the meaning of the Act. Tr. 21-38. That decision became the Commissioner's final decision when the Appeals Council denied Holste's request for review on May 1, 2015. Tr. 1-4. Holste commenced this action on June 29, 2015, seeking review of the Commissioner's final decision. ECF No. 1.

## LEGAL STANDARD

**I. District Court Review**

"In reviewing a final decision of the SSA, this Court is limited to determining whether the SSA's conclusions were supported by substantial evidence in the record and were based on a correct legal standard." *Talavera v. Astrue*, 697 F.3d 145, 151 (2d Cir. 2012) (internal quotation marks omitted); *see also* 42 U.S.C. § 405(g). The Act holds that a decision by the Commissioner is "conclusive" if it is supported by substantial evidence. 42 U.S.C. § 405(g). "Substantial evidence means more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moran v. Astrue*, 569 F.3d 108, 112 (2d Cir. 2009) (internal quotation marks omitted). It is not this Court's function to "determine *de novo* whether [the claimant] is disabled." *Schaal v. Apfel*, 134 F.3d 496, 501 (2d Cir. 1998) (internal quotation marks omitted); *see also Wagner v. Sec'y of Health & Human Servs.*, 906 F.2d 856, 860 (2d Cir. 1990) (holding that review of the Secretary's decision is not *de novo* and that the Secretary's findings are conclusive if supported by substantial evidence).

  

**II. Disability Determination**

***2** Determination of whether a claimant is disabled within the meaning of the Act requires an ALJ to follow a five-step sequential evaluation. *See Bowen v. City of New York*, 476 U.S. 467, 470-71 (1986). At step one, the ALJ must determine whether the claimant is engaged in substantial gainful work activity. *See* 20 C.F.R. § 404.1520(b). If so, the claimant is not disabled. If not, the ALJ proceeds to step two and determines whether the claimant has an impairment, or combination of impairments, that is "severe" within the meaning of the Act, meaning that it imposes significant restrictions on the claimant's ability to perform basic work activities. 20 C.F.R. § 404.1520(c). If the claimant does not have a severe impairment or combination of impairments, the analysis concludes with a finding of "not disabled." If the claimant does, the ALJ continues to step three.

At step three, the ALJ examines whether a claimant's impairment meets or equals the criteria of a listed impairment in Appendix 1 of Subpart P of Regulation No. 4 (the "Listings") 20 C.F.R. § 404.1520(d). If the impairment meets or medically equals the criteria of a Listing and meets the durational requirement (20 C.F.R. § 404.1509), the claimant is disabled. If not, the ALJ determines the claimant's residual functional capacity ("RFC"), which is the ability to perform physical or mental work activities on a sustained basis, notwithstanding limitations for the collective impairments. *See* 20 C.F.R. § 404.1520(e)-(f). The ALJ then proceeds to step four and determines whether the claimant's RFC permits him or her to perform the requirements of his or her past relevant work. 20 C.F.R. § 404.1520(f). If the claimant can perform such requirements, then he or she is not disabled. If he or she cannot, the analysis proceeds to the fifth and final step, wherein the burden shifts to the Commissioner to show that the claimant is not disabled. To do so, the Commissioner must present evidence to demonstrate that the claimant "retains a residual functional capacity to perform alternative substantial gainful work which exists in the national economy" in light of his or her age, education, and work experience. *See Rosa v. Callahan*, 168 F.3d 72, 77 (2d Cir. 1999) (quotation marks omitted); *see also* 20 C.F.R. § 404.1560(c).

**DISCUSSION**

**I. The ALJ's Decision**

The ALJ's decision analyzed Holste's claim for benefits under the process described above. At step one, the ALJ found that Holste had not engaged in substantial gainful activity since May 21, 2012, the application date. Tr. 26. At step two, the ALJ found that Holste has the following severe impairments: bipolar disorder, post-traumatic stress disorder, degenerative disc disease, grade 1 to 2 anterolisthesis, mild foraminal narrowing, and asthma. Tr. 26. At step three, the ALJ found that such impairments, alone or in combination, did not meet or medically equal an impairment in the Listings. Tr. 26-28.

Next, the ALJ determined that Holste retained the RFC to perform light work[3] with the following limitations; she must be afforded a sit/stand option after 45 minutes; she can occasionally interact with the general public; she can occasionally understand, remember, and carry out complex and detailed tasks; and she must avoid concentrated exposure to fumes, dust, odors, and extreme cold and hot temperatures. Tr. 28-31. At step four, the ALJ relied on the VE's testimony and found that this RFC prevents Holste from performing her past relevant work as a truck driver. Tr. 31.

***3** At step five, the ALJ relied on the VE's testimony and found that Holste is capable of making an adjustment to other work that exists in significant numbers in the national economy given her RFC, age, education, and work experience. Tr. 31-32. Specifically, the VE testified that Holste could work as a plastic molding machine operator or a small product assembler. Tr. 32. Accordingly, the ALJ concluded that Holste was not "disabled" under the Act. Tr. 32-33.

**II. Analysis**

Holste argues that the ALJ's RFC determination is not supported by substantial evidence because it was rendered without a medical opinion as to her functional abilities and limitations. ECF No. 9-1, at 11-17.[4] The Commissioner asserts that the ALJ's RFC determination is supported by substantial evidence, despite the absence of a medical opinion, because the medical evidence reflected minimal functional impairment and thus the ALJ was able to make a "common sense judgment

about functional capacity." ECF No. 10-1, at 11-14. For the reasons that follow, this Court finds that the RFC determination was not supported by substantial evidence, which requires remand of this matter for further administrative proceedings.

RFC is defined as "what an individual can still do despite his or her limitations." *Desmond v. Astrue*, No. 11-CV-0818 (VEB), 2012 WL 6648625, at *5 (N.D.N.Y. Dec. 20, 2012) (quoting *Melville v. Apfel*, 198 F.3d 45, 52 (2d Cir. 1999)). To determine a claimant's RFC "the ALJ considers a claimant's physical abilities, mental abilities, symptomatology, including pain and other limitations that could interfere with work activities on a regular and continuing basis." *Id.* (citing 20 C.F.R. § 404.1545(a)). "An RFC finding will be upheld when there is substantial evidence in the record to support each requirement listed in the regulations." *Id.* (citation omitted).

"[A]n ALJ is not qualified to assess a claimant's RFC on the basis of bare medical findings, and as a result an ALJ's determination of RFC without a medical advisor's assessment is not supported by substantial evidence." *Wilson v. Colvin*, No. 13-CV-6286P, 2015 WL 1003933, at *21 (W.D.N.Y. Mar. 6, 2015) (citation omitted). Thus, even though the Commissioner is empowered to make the RFC determination, "[w]here the medical findings in the record merely diagnose [the] claimant's exertional impairments and do not relate those diagnoses to specific residual functional capabilities," the general rule is that the Commissioner "may not make the connection himself." *Id.* (citation omitted); *Jermyn v. Colvin*, No. 13-CV-5093 (MKB), 2015 WL 1298997, at *19 (E.D.N.Y. Mar. 23, 2015) ("[N]one of these medical sources assessed Plaintiff's functional capacity or limitations, and therefore provide no support for the ALJ's RFC determination."). Depending on the circumstances, like when the medical evidence shows only minor physical impairments, "an ALJ permissibly can render a common sense judgment about functional capacity even without a physician's assessment." *Wilson*, 2015 WL 1003933, at *21 (citation omitted).

Here, the record lacks any medical opinion as to Holste's ability to engage in work at any exertional level on a regular and continuous basis in an ordinary work setting. There is no medical opinion regarding her capacity to sit, stand, walk, push, lift, and pull, which are necessary activities for light work. *See* 20 C.F.R. § 416.967(b). It appears that the only medical opinion sought was from reviewing psychiatrist D. Mangold, Ph.D. ("Dr. Mangold"). Tr. 31, 304-17. Without any explanation, the ALJ gave "significant weight" to Dr. Mangold's report that "there was insufficient evidence to render an opinion. [5] " Tr. 31 (citing Tr. 304).

***4** The remainder of the ALJ's decision merely summarizes the medical evidence and cites to treatment notes that contain bare medical findings and do not address how Holste's impairments affect her physical and mental ability to perform work-related functions. Tr. 29-30. The Commissioner argues that it was proper for the ALJ to rely on this raw evidence in making his RFC determination, because the medical evidence demonstrated that Holste suffered from minimal impairment and thus the ALJ was able to make a "common sense judgment about functional capacity." ECF No. 10-1, at 11-14. This Court disagrees, because the record treatment notes contain complex medical findings (*see*, *e.g.*, Tr. 240, 242-43, 248-51, 254-68, 270-303, 336-59) and the ALJ found that Holste had multiple severe physical and mental impairments (*i.e.* bipolar disorder, post-traumatic stress disorder, several back disorders, and asthma) (Tr. 26). *See, e.g.*, *Palascak v. Colvin*, No. 1:11-CV-0592 (MAT), 2014 WL 1920510, at *9 (W.D.N.Y. May 14, 2014) ("Given Plaintiff's multiple physical and mental impairments, this is not a case where the medical evidence shows 'relatively little physical impairment' such that the ALJ 'can render a common sense judgment about functional capacity.' ") (citation omitted). Accordingly, because there is no medical source opinion to support the ALJ's RFC finding, this Court concludes that it lacks substantial evidentiary support.

The ALJ also failed to conduct a function-by-function assessment of Holste's limitations. "The Act's regulations require that the ALJ include in his RFC assessment a function-by-function analysis of the claimant's functional limitations or restrictions and an assessment of the claimant's work-related abilities on a function-by-function basis." *Palascak*, 2014 WL 1920510, at *10 (internal quotation marks and citation omitted). This means that the ALJ "must make a function-by-function assessment of the claimant's ability to sit, stand, walk, lift, carry, push, pull, reach, handle, stoop, or crouch." *Id.* (citation omitted); 20 C.F.R. § 416.969a(a); S.S.R. 96-8p, 1996 WL 374184, at *5-6. Remand is not required, however, simply because the ALJ failed to conduct an

explicit function-by-function analysis. *Cichocki v. Astrue*, 729 F.3d 172, 177 (2d Cir. 2013). The ALJ's RFC determination may nonetheless be upheld when his or her analysis "affords an adequate basis for meaningful judicial review, applies the proper legal standards, and is supported by substantial evidence such that additional analysis would be unnecessary or superfluous." *Id.* But "[r]emand may be appropriate ... where other inadequacies in the ALJ's analysis frustrate meaningful review." *Id.* at 177-78 (citation omitted).

Here, the ALJ's RFC assessment simply recites Holste's testimony and summarizes the medical record without tying this evidence to the physical and mental functional demands of light work. Tr. 28-30. As to Holste's back impairments, for instance, the ALJ sets forth the relevant medical evidence, but he fails to explain how that evidence connects to the RFC determination that Holste can perform light work with a sit/stand option every 45 minutes. Tr. 28, 30. Similarly, the ALJ recites the medical findings related to Holste's asthma, but he provides no analysis relating those findings to the RFC determination that Holste must avoid concentrated exposure to fumes, dust, odors, and extreme hot and cold temperatures. Tr. 28, 30. It is unclear to this Court how the ALJ arrived at his RFC determination, because the ALJ's summary of the raw medical evidence fails to address Holste's functional abilities or link that evidence to the RFC. The ALJ's decision leaves this Court with many unanswered questions and does not afford an adequate basis for meaningful judicial review. Accordingly, remand is required.

Finally, this Court is troubled that the ALJ ultimately rationalizes his RFC determination by concluding that "[a]s for the opinion evidence, there are no treating sources who consider [Holste] to be either physically or mentally 'disabled[.]' " Tr. 31. The SSA's regulations provide that the Commissioner is responsible for determining whether a claimant is disabled under the Act. 20 C.F.R. 416.927(d)(1). In other words, a medical source statement that the claimant is "disabled" or "unable to work" does not mean the claimant is automatically disabled, and the lack of such a statement does not mean the claimant is able to work. *Id.* Thus, the ALJ's assertion is unpersuasive and once again fails to clarify his RFC determination.

## CONCLUSION

***5** For the reasons stated, Plaintiff's Motion for Judgment on the Pleadings (ECF No. 9) is GRANTED, the Commissioner's Motion for Judgment on the Pleadings (ECF No. 10) is DENIED, and this matter is REMANDED to the Commissioner for further administrative proceedings consistent with this opinion, pursuant to sentence four of 42 U.S.C. § 405(g). *See Curry v. Apfel*, 209 F.3d 117, 124 (2d Cir. 2000). The Clerk of Court is directed to enter judgment and close this case.

IT IS SO ORDERED.

**All Citations**

Slip Copy, 2016 WL 3945814

Footnotes

1 References to "Tr." are to the administrative record in this matter.

2 Holste also applied for DIB, but her application was denied because she did not have the requisite work credits. Tr. 81-83. Holste does not challenge this denial.

3 "Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, [the claimant] must have the ability to do substantially all of these activities. If someone can do light work, [the SSA] determine[s] that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time." 20 C.F.R. § 416.967(b).

4 Holste advances other arguments that she believes require reversal of the Commissioner's decision. However, because this Court disposes of this matter based on the improper RFC determination, those arguments need not be reached.

5 Upon review of Dr. Mangold's report, it appears that there was insufficient evidence to render an opinion because Holste did not respond to document requests and neither Holste nor her attorney could be reached by telephone. Tr. 316; *see*

  

*also* Tr. 59 ("Failure to Cooperate and Insufficient Medical Evidence" form). In some circumstances, the ALJ may make a disability determination based on the evidence before him or her "when, despite efforts to obtain additional evidence, the evidence is insufficient to determine whether [the claimant] is disabled." 20 C.F.R. § 416.920b(d). If this was the ALJ's rationale for affording Dr. Mangold's report "significant weight," he did not say so in his decision. It is also unclear whether the ALJ took any action to resolve the insufficiency of the record. *See* 20 C.F.R. § 416.920b(c)(1)-(4) (stating that, if the record evidence is insufficient to make a disability determination, the ALJ may recontact medical sources, request additional existing records, ask the claimant to undergo a consultative exam, or ask the claimant or others for more information). On remand, this Court reminds Holste that she is obligated to provide medical and other evidence to the SSA upon request. *See* 20 C.F.R. § 416.916 (stating that the claimant must cooperate with the SSA by providing available medical or other evidence about his or her impairment).

**End of Document**

2017 WL 213363
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publication in West's Federal Reporter.



United States Court of Appeals,
Second Circuit.

Cindy Monroe, Plaintiff–Appellant,
v.
Commissioner of Social
Security, Defendant–Appellee,

16–1042–cv
|
January 18, 2017

**Synopsis**

**Background:** Claimant sought judicial review of decision of Commissioner of Social Security denying her application for disability insurance benefits. The United States District Court for the Northern District of New York, D'Agostino, J., 2016 WL 552364, affirmed. Claimant appealed.

**Holdings:** The Court of Appeals held that:

[1] substantial evidence supported ALJ's decision not to give controlling weight to opinion of claimant's treating physician, and

[2] substantial evidence supported ALJ's determination of claimant's residual functional capacity (RFC).

Affirmed.

Appeal from a judgment of the United States District Court for the Northern District of New York (D'Agostino, *J.*).

**UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the judgment of the district court is **AFFIRMED**.

**Attorneys and Law Firms**

For Appellant: Scot G. Miller, Esq., Coughlin & Gerhart, LLP, Binghamton, NY.

For Appellee: Peter W. Jewett, Special Assistant United States Attorney, for Richard S. Hartunian, United States Attorney for the Northern District of New York.

PRESENT: PETER W. HALL, CHRISTOPHER F. DRONEY, Circuit Judges, J. PAUL OETKEN, * District Judge.

**Opinion**

***1** Plaintiff–Appellant Cindy Monroe appeals the decision of the district court affirming the Commissioner of Social Security's denial of her application for disability insurance benefits. Monroe protectively filed an application for disability insurance benefits, claiming inability to work as a result of her bipolar disorder. Following exhaustion of administrative procedures, the district court affirmed the Administrative Law Judge's ("ALJ") decision denying benefits because Monroe maintained a residual functional capacity ("RFC") to "perform a full range of work at all exertional levels." On appeal, Monroe argues (1) that the ALJ improperly failed to assign "controlling weight" to Dr. Wolkoff's medical opinion under the "treating physician" rule and (2) that the ALJ's RFC determination is not supported by "substantial evidence." We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

We "conduct a plenary review of the administrative record to determine if there is substantial evidence, considering the record as a whole, to support the Commissioner's decision and if the correct legal standards have been applied." *Burgess v. Astrue*, 537 F.3d 117, 128 (2d Cir.

2008) (internal quotation marks omitted). "Substantial evidence means more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Moran v. Astrue*, 569 F.3d 108, 112 (2d Cir. 2009) (internal quotation marks omitted). "[I]t is not our function to determine *de novo* whether [a plaintiff] is disabled." *Brault v. Soc. Sec. Admin., Comm'r*, 683 F.3d 443, 447 (2d Cir.2012) (per curiam) (quoting *Pratts v. Chater*, 94 F.3d 34, 37 (2d Cir. 1996)).

**I. "Treating Physician" Rule**

Monroe asserts that the ALJ failed to give "controlling weight" to Dr. Wolkoff's medical opinion as required by the Social Security Administration's "treating physician" rule. *See Shaw v. Chater*, 221 F.3d 126, 134 (2d Cir. 2000) (the "treating physician" rule mandates that the medical opinion of a claimant's treating physician is given controlling weight if it is well supported by medical findings and not inconsistent with other substantial record evidence); *see also* 20 C.F.R. § 404.1527(c)(2) ("If we find that a treating source's opinion on the issue(s) of the nature and severity of [the claimant's] impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight."). "While the opinions of a treating physician deserve special respect, they need not be given controlling weight where they are contradicted by other substantial evidence in the record." *Veino v. Barnhart*, 312 F.3d 578, 588 (2d Cir. 2002) (internal citations omitted); *accord Halloran v. Barnhart*, 362 F.3d 28, 32 (2d Cir. 2004) ("Although the treating physician rule generally requires deference to the medical opinion of a claimant's treating physician, the opinion of the treating physician is not afforded controlling weight where ... the treating physician issued opinions that are not consistent with other substantial evidence in the record ...." (internal citations omitted)). "Genuine conflicts in the medical evidence are for the Commissioner to resolve." *Veino*, 312 F.3d at 588.

***2** When controlling weight is not given to a treating physician's assessment, the ALJ must consider the following factors to determine the weight to give the opinion: (1) the length of treatment relationship and frequency of examination; (2) the nature and extent of the treatment relationship; (3) the evidence in support of the opinion; (4) the opinion's consistency with the record as a whole; (5) whether the opinion is that of a specialist; and (6) any other relevant factors. 20 C.F.R. § 404.1527(c). The ALJ must then "comprehensively set forth [her] reasons for the weight assigned to a treating physician's opinion." *Burgess*, 537 F.3d at 129.

**[1]** Here, the administrative record demonstrates that the ALJ's decision not to give controlling weight to Dr. Wolkoff's opinion under the "treating physician" rule was proper considering the substantial evidence contradicting Dr. Wolkoff's assessment. Not only did the ALJ find that Dr. Wolkoff's medical source statement contained internal inconsistencies, but she also determined that his treatment notes contradicted his RFC assessment. [1] While Dr. Wolkoff's RFC assessment said that Monroe would be "off task" between thirty and fifty percent of the time during a typical workday due to her bipolar disorder, it also described Monroe's mood as "stable most of [the] time." Moreover, although Dr. Wolkoff's treatment notes indicate that Monroe's mood was anxious and sad on a number of occasions, the ALJ found his notes more frequently included evaluations describing Monroe's mood as "stable" or "good" and not suicidal. In fact, the treatment notes indicate that during one evaluation, Monroe even expressed that she loved life. Finally, in assessing Dr. Wolkoff's opinion that Monroe had little ability to deal with stress or the public and was limited in behaving in a stable manner in social situations, the ALJ also determined that the finding was refuted by the fact that Monroe had engaged in a range of recreational activities around the same time, including snowmobiling trips to Ontario and Quebec, horseback riding, four-wheeling, and multiple vacation cruises.

The ALJ comprehensively explained her reasons for discounting Dr. Wolkoff's medical source statement; in so doing, she complied with the dictates of the treating physician rule. *See Burgess*, 537 F.3d at 129. While Dr. Wolkoff's medical source statement is supported by *some* evidence, the ALJ's decision to disregard his opinion is nevertheless substantially supported by the record. The ALJ did not impermissibly "substitute [her] own expertise or view of the medical proof for the treating physician's opinion." *Greek v. Colvin*, 802 F.3d 370, 376 (2d Cir. 2015). Rather, the ALJ rejected Dr. Wolkoff's opinion because she found it was contrary to his own treatment notes. As did the district court, we defer to the ALJ's well-supported determination. *See Veino*, 312 F.3d at 588

("Genuine conflicts in the medical evidence are for the Commissioner to resolve.").

**II. RFC Determination**

***3** **[2]** Monroe makes the related argument that the ALJ's RFC determination is not supported by substantial evidence. She specifically contends that, because the ALJ rejected Dr. Wolkoff's opinion, there was no competent medical opinion that supported the ALJ's RFC determination. Where, however, "the record contains sufficient evidence from which an ALJ can assess the [claimant's] residual functional capacity," *Tankisi v. Comm'r of Soc. Sec.*, 521 Fed.Appx. 29, 34 (2d Cir. 2013) (summary order), a medical source statement or formal medical opinion is not necessarily required, *see id.*; *cf Pellam v. Astrue*, 508 Fed.Appx. 87, 90 (2d Cir. 2013) (summary order) (upholding ALJ's RFC determination where he "rejected" physician's opinion but relied on physician's findings and treatment notes).

Here, although the ALJ ultimately rejected Dr. Wolkoff's medical assessment, she relied on Dr. Wolkoff's treatment notes dating back before the alleged onset date. Not only do Dr. Wolkoff's notes include descriptions of Monroe's symptoms, but they also provide contemporaneous medical assessments of Monroe's mood, energy, affect, and other characteristics relevant to her ability to perform sustained gainful activity. The ALJ also considered Dr. Wolkoff's well-documented notes relating to Monroe's social activities relevant to her functional capacity —such as snowmobile trips, horseback riding, and going on multiple cruise vacations. Because the ALJ reached her RFC determination based on Dr. Wolkoff's contemporaneous treatment notes—while at the same time rejecting his *post hoc* medical opinion ostensibly based on the observations memorialized in those notes —that determination was adequately supported by more than a mere scintilla of evidence. *See Tankisi*, 521 Fed.Appx. at 34 (affirming ALJ's RFC determination based on extensive medical record despite the fact that the record did not include formal opinions as to claimant's RFC); *cf.* 20 C.F.R. § 1527(d)(2) ("Although we consider opinions from medical sources on issues such ... [as a claimant's] residual functional capacity ... the final responsibility for deciding [this] issue[ ] is reserved to the Commissioner.").

Likewise, because the ALJ based its RFC determination on Dr. Wolkoff's years' worth of treatment notes, it was not necessary for the ALJ to seek additional medical information regarding Monroe's RFC. *See Rosa v. Callahan*, 168 F.3d 72, 79 n.5 (2d Cir. 1999) ("[W]here there are no obvious gaps in the administrative record, and where the ALJ already possesses a complete medical history, the ALJ is under no obligation to seek additional information." (internal quotation marks omitted)); *see also Pellam*, 508 Fed.Appx. at 90 (2d. Cir. 2013) (summary order) (concluding that ALJ had no obligation to supplement record by acquiring additional medical information where ALJ had all of the claimant's treating physician's treatment notes and consulting examining physician's opinion supported ALJ's assessment of RFC).

Finally, we find no merit in Monroe's argument that the ALJ committed reversible error by concluding that the state agency psychologist's opinion was "inconsistent" with that of Dr. Wolkoff's when, in fact, the state psychologist found there was "insufficient evidence" to conclude whether a mental impairment existed. As also concluded by the district court, we agree that any such error was harmless, since Monroe has not identified any prejudice and the record establishes that the error did not affect the ALJ's decision. *Cf. Zabala v. Astrue*, 595 F.3d 402, 409 (2d Cir. 2010) ("Where application of the correct legal principles to the record could lead only to the same conclusion, there is no need to require agency reconsideration." (internal quotations marks and alterations omitted)). The ALJ's decision to give little weight to Dr. Wolkoff's RFC assessment is grounded in the substantial evidence contradicting his opinion; the ALJ's decision does not rest on the misconception that Dr. Wolkoff's opinion conflicts with that of the state psychologist.

***4** For all the foregoing reasons, the district court's order affirming the ALJ's decision denying Monroe's application for disability insurance benefits is **AFFIRMED**.

**All Citations**

--- Fed.Appx. ----, 2017 WL 213363

Footnotes

  

* Judge J. Paul Oetken, of the United States District Court for the Southern District of New York, sitting by designation.

1 A medical source statement is "[a] statement about what [the claimant] can still do despite [her] impairment(s) based on the acceptable medical source's findings on the factors under paragraphs (b)(1) through (b)(5) of [§ 404.1513] (except in statutory blindness claims)." 20 C.F.R. § 404.1513. An RFC assessment is used to determine if a claimant can do past relevant work, when the claimant's impairment does not meet or equal a listed impairment under the Commissioner's regulations. *See id.* § 404.1520(e). "[R]esidual functional capacity [is] based on all the relevant medical and other evidence in [the claimant's] case." *Id.*

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United States District Court,
N.D. New York.

Katrina Ann PERYEA, Plaintiff,
v.
COMMISSIONER OF SOCIAL SECURITY, Defendant.

No. 5:13–CV–0173 (GTS/TWD).
|
Signed Aug. 20, 2014.

**Attorneys and Law Firms**

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***DECISION and ORDER***

GLENN T. SUDDABY, District Judge.

***1** Currently before the Court, in this action filed by Katrina Ann Peryea ("Plaintiff") against the Social Security Commissioner ("Defendant" or "Commissioner") pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3) seeking Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"), is the Report–Recommendation of United States Magistrate Judge Therese Wiley Dancks, issued pursuant to 28 U.S.C. § 636(b) and Local Rule 72.3 of the Local Rules of Practice for this Court, recommending that the Court affirm the final decision of the Commissioner denying Plaintiff's request for DIB and SSI. (Dkt. No. 19.) Plaintiff has not filed an Objection to the Report–Recommendation, and the deadline by which to do so has expired. (*See generally* Docket Sheet.) After carefully reviewing the relevant filings in this action, the Court can find no clear error in the Report–Recommendation: Magistrate Judge Dancks employed the proper standards, accurately recited the facts, and reasonably applied the law to those facts. (Dkt. No. 28.) As a result, the Report–Recommendation is accepted and adopted in its entirety, and the decision of the Commissioner is affirmed.

**ACCORDINGLY,** it is

**ORDERED** that Magistrate Judge Dancks' Report–Recommendation (Dkt. No. 19) is ***ACCEPTED*** and ***ADOPTED*** in its entirety; and it is further

**ORDERED** that the Commissioner's decision is ***AFFIRMED;*** and it is further

**ORDERED** that the Complaint (Dkt. No. 1) is ***DISMISSED.***

***REPORT AND RECOMMENDATION***

THÉRÈSE WILEY DANCKS, United States Magistrate Judge.

This matter was referred to the undersigned for report and recommendation by the Honorable Glenn T. Suddaby, United States District Judge, pursuant to 28 U.S.C. § 636(b) and Northern District of New York Local Rule 72.3. This case has proceeded in accordance with General Order 18 of this Court which sets forth the procedures to be followed when appealing a denial of Social Security benefits. Both parties have filed briefs. Oral argument was not heard. For the reasons discussed below, it is recommended that the decision of the Commissioner be affirmed.

**I. BACKGROUND AND PROCEDURAL HISTORY**

Plaintiff is thirty-nine years old. (T. at 334.)[1] Plaintiff was part of a special education program throughout elementary and high school and received a IEP Diploma. (T. at 335–36.) Beginning in 1997, Plaintiff worked for a hospital call center until 2002, utilizing the help of a job coach for the first two of her five years there. (T. at 339.) In 2002, Plaintiff was dismissed from that position for missed work due to illness. (T. at 340.) Plaintiff later worked briefly as a babysitter, but she quit

doing so for reasons unrelated to her alleged limitations. (T. at 346–47.) Plaintiff alleges disability due to mild mental retardation, borderline diabetes, hyperthyroidism, hyperlipidism, obesity, and an ankle injury. [2] (T. at 333.)

***2** Plaintiff applied for disability insurance benefits and SSI on May 18, 2010. (T. at 21.) The application was denied on July 30, 2010. *Id.* Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). *Id.* The hearing was initiated on May 17, 2011, but Plaintiff was granted a continuance to obtain counsel. (T. at 309, 316.) A second continuance was granted for the same purpose on November 3, 2011. (T. at 321.) After the second continuance, the ALJ ordered a consultative psychiatric examination, which was conducted by Dr. Noia before the final hearing. (T. at 209.) The final hearing occurred on March 15, 2012. (T. at 21.) After this hearing, but before the record was closed, a second consultative examination was ordered in error, and performed by Dr. Caldwell. (T. at 155.) On June 8, 2012, the ALJ made a finding of not disabled. (T. at 29.) The ALJ's decision became the final decision of the Commissioner when the Appeals Council denied Plaintiff's request for review on November 9, 2012. (Dkt. No. 1.) Plaintiff commenced this action on February 14, 2013. *Id.*

## II. APPLICABLE LAW

### A. Standard for Benefits

To be considered disabled, a plaintiff seeking disability insurance benefits or SSI disability benefits must establish that he or she is "unable 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 twelve months." 42 U.S.C. § 1382c(a)(3)(A) (2014). In addition, the plaintiff's

> physical or mental impairment or impairments [must be] of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

§ 1382c(a)(3)(B).

Acting pursuant to its statutory rulemaking authority (42 U.S.C. § 405(a) (2014)), the Social Security Administration ("SSA") promulgated regulations establishing a five-step sequential evaluation process to determine disability. 20 C.F.R. § 416.920 (2014). "If at any step a finding of disability or non-disability can be made, the SSA will not review the claim further." *Barnhart v. Thomas,* 540 U.S. 20, 24, 124 S.Ct. 376, 157 L.Ed.2d 333 (2003).

> At the first step, the agency will find nondisability unless the claimant shows that he is not working at a "substantial gainful activity." [20 C.F.R.] §§ 404.1520(b), 416.920(b). At step two, the SSA will find nondisability unless the claimant shows that he has a "severe impairment," defined as "any impairment or combination of impairments which significantly limits the claimant's physical or mental ability to do basic work activities." [20 C.F.R .] §§ 404.1520(c), 416.920(c). At step three, the agency determines whether the impairment which enabled the claimant to survive step two is on the list of impairments presumed severe enough to render one disabled; if so, the claimant qualifies. [20 C.F.R.] §§ 404.1520(d), 416.920(d). If the claimant's impairment is not on the list, the inquiry proceeds to step four, at which the SSA assesses whether the claimant can do his previous work; unless he shows that he cannot, he is determined not to be disabled. If the claimant survives the fourth stage, the fifth, and final, step requires the SSA to consider so-called "vocational factors" (the claimant's age, education, and past work experience), and to determine whether the claimant is capable of performing other jobs existing in significant numbers in the national economy. [20 C.F.R.] §§ 404.1520(f), 404.1560(c), 416.920(f), 416.9630(c).

***3** *Thomas,* 540 U.S. at 24–25 (footnotes omitted).

The plaintiff-claimant bears the burden of proof regarding the first four steps. *Kohler v. Astrue,* 546 F.3d 260, 265 (2d Cir.2008) (quoting *Perez v. Chater,* 77 F.3d 41, 46 (2d Cir.1996)). If the plaintiff-claimant meets

his or her burden of proof, the burden shifts to the defendantCommissioner at the fifth step to prove that the plaintiff-claimant is capable of working. *Id.*

**B. Scope of Review**

In reviewing a final decision of the Commissioner, a court must determine whether the correct legal standards were applied and whether substantial evidence supports the decision. *Featherly v. Astrue,* 793 F.Supp.2d 627, 630 (W.D.N.Y.2011) (citations omitted); *Rosado v. Sullivan,* 805 F.Supp. 147, 153 (S.D.N.Y.1992) (citing *Johnson v. Bowen,* 817 F.2d 983, 985 (2d Cir.1987)). A reviewing court may not affirm an ALJ's decision if it reasonably doubts whether the proper legal standards were applied, even if the decision appears to be supported by substantial evidence. *Johnson,* 817 F.2d at 986.

A court's factual review of the Commissioner's final decision is limited to the determination of whether there is substantial evidence in the record to support the decision. 42 U.S.C. § 405(g); *Rivera v. Sullivan,* 923 F.2d 964, 967 (2d Cir.1991). An ALJ must set forth the crucial factors justifying his findings with sufficient specificity to allow a court to determine whether substantial evidence supports the decision. *Roat v. Barnhart,* 717 F.Supp.2d 241, 248 (N.D.N.Y.2010); *Ferraris v. Heckler,* 728 F.2d 582, 587 (2d Cir.1984).

"Substantial evidence has been defined as 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Williams ex rel. Williams v. Bowen,* 859 F.2d 255, 258 (2d Cir.1988) (citations omitted). It must be "more than a mere scintilla" of evidence scattered throughout the administrative record. *Featherly,* 793 F.Supp.2d at 630; *Richardson v. Perales,* 402 U.S. 389, 401, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971) (quoting *Consol. Edison Co. v. NLRB,* 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938)). "To determine on appeal whether an ALJ's findings are supported by substantial evidence, a reviewing court considers the whole record, examining the evidence from both sides, because an analysis of the substantiality of the evidence must also include that which detracts from its weight." *Williams,* 859 F.2d at 258 (citations omitted). However, a reviewing court cannot substitute its interpretation of the administrative record for that of the Commissioner if the record contains substantial support for the ALJ's decision. *Blalock v. Richardson,* 483 F.2d 773, 775 (4th Cir.1972); *see also Rutherford v. Schweiker,* 685 F.2d 60, 62 (2d Cir.1982).

**III. THE ALJ'S DECISION**

Here, the ALJ found Plaintiff not disabled at step four of the five step analysis, because she had a residual functional capacity ("RFC") sufficient to perform her past relevant work at the hospital call center as she had actually performed it. (T. at 28.)

***4** In the ALJ's decision, he addressed three sources of medical opinion evidence with regard to Plaintiff's mental limitations: the opinions of Dr. Nobel, Dr. Noia, and Dr. Caldwell. (T. at 21–29.) During the initial review of Plaintiff's application, the SSA conducted a psychiatric review, and psychiatric consultant Dr. Nobel rendered an opinion that Plaintiff had a severe cognitive impairment, but could perform "simple work tasks." (T. at 193.) Dr. Noia's consultative examination concluded generally that Plaintiff was capable of performing simple work. (T. at 213.) Dr. Caldwell, on the other hand, concluded that Plaintiff's cognitive limitations would make it difficult for Plaintiff to do simple work. (T. at 300.)

The ALJ relied heavily on the hearing testimony to determine what weight to give to the conflicting medical sources. (T. at 23–28.) Both Plaintiff and her mother testified extensively about Plaintiff's practical capabilities and limitations. (T. at 331–72.) Both Plaintiff and her mother testified that she lost the job at the call center because surgery caused her to miss too much work, and not because of her mental limitations. (T. at 340, 370.) Plaintiff testified that if she had been given more time, she could have continued working at that job. (T. at 341.) Her mother testified that other than Plaintiff's absences, her employer had been happy with her work. (T. at 370.) Her mother also testified that Plaintiff was an able caretaker of children. (T. at 368.)

In handling conflicting consultative examinations, the ALJ adopted the opinion of Dr. Noia and gave Dr. Caldwell's opinion less weight, finding that the latter was not consistent with the SSA's initial psychological review findings by Dr. Noble, nor with Plaintiff's presentation during the hearings. (T. at 27–28.)

**IV. THE PARTIES' CONTENTIONS**

  

Plaintiff claims that the ALJ erred by: (1) failing to make proper credibility findings as to hearing testimony; (2) failing to give Dr. Caldwell's medical opinion proper weight; (3) failing to account for Plaintiff's limitations to concentration, persistence, and pace in determining Plaintiff's RFC; and (4) failing to seek vocational expert testimony in determining whether Plaintiff could perform her past relevant work as a customer service representative. (Dkt. No. 11.) Plaintiff seeks remand for reconsideration of these issues. *Id.* Defendant contends that the ALJ's decision applied the correct legal standards and is supported by substantial evidence and thus should be affirmed. (Dkt. No. 18.) For the reasons outlined below, I recommend that the decision of the Commissioner be affirmed.

## V. DISCUSSION

### A. Credibility Determinations of Hearing Testimony

The Court reviews an ALJ's findings of fact under a substantial evidence standard. "It is the function of the Commissioner, not the reviewing courts, to resolve evidentiary conflicts and to appraise the credibility of witnesses, including the claimant." *Aponte v. Sec'y, Dept. of Health & Human Servs.,* 728 F.2d 588, 591 (2d Cir.1984) (citation omitted). In making a credibility determination, the hearing officer is required to take the claimant's reports of pain and other limitations into account. 20 C .F.R. § 416.929 (2014). To satisfy the substantial evidence rule, the ALJ's credibility assessment must be based on a two-step analysis of pertinent evidence in the record. 20 C.F.R. § 404.1529 (2014); *Genier v. Astrue,* 606 F.3d 46, 49 (2d Cir.2010); SSR 96–7p, 1996 WL 374186, at *5 (S.S.A. July 2, 1996) [3] . The ALJ is required to consider all of the evidence of record in making his credibility assessment. *Genier,* 606 F.3d at 50 (citing 20 C.F.R. §§ 404.1529, 404.1545(a)(3) (2014)).

***5** First, the ALJ must consider whether there is an underlying medically determinable physical or mental impairment(s) that could reasonably be expected to produce the claimant's pain or other symptoms. SSR 96–7p. This finding does not involve a determination as to the intensity, persistence, or functionally limiting effects of the claimant's pain or other symptoms. *Id.* If no impairment is found that could reasonably be expected to produce pain, the claimant's pain cannot be found to affect the claimant's ability to do basic work activities. An individual's statements about his pain are not enough by themselves to establish the existence of a physical or mental impairment, or to establish that the individual is disabled. *Id.*

Once an underlying physical or mental impairment that could reasonably be expected to produce the claimant's pain or other symptoms has been established, the second step of the analysis is for the ALJ to consider the extent to which the claimant's symptoms can reasonably be accepted as consistent with objective medical evidence and other evidence. *Genier,* 606 F.3d at 49; *see also Poupore v. Astrue,* 566 F.3d 303, 307 (2d Cir.2009) (finding that claimant's subjective complaints of pain were insufficient to establish disability because they were unsupported by objective medical evidence tending to support a conclusion that he has a medically determinable impairment that could reasonably be expected to produce the alleged symptoms); see also SSR 96–7p ("One strong indication of the credibility of an individual's statements is their consistency, both internally and with other information in the case record."). This includes evaluation of the intensity, persistence, and limiting effects of the pain or symptoms to determine the extent to which they limit the claimant's ability to perform basic work activities. *Genier,* 606 F.3d at 49.

The ALJ must consider all evidence of record, including statements the claimant or others make about her impairments, her restrictions, daily activities, efforts to work, or any other relevant statements the claimant makes to medical sources during the course of examination or treatment, or to the agency during interviews, on applications, in letters, and in testimony during administrative proceedings. *Genier,* 606 F.3d at 49 (citing 20 C . F.R. § 404.1512(b)(3) (2014)). A claimant's symptoms can sometimes suggest a greater level of severity than can be shown by the objective medical evidence alone. SSR 96–7p. When the objective evidence alone does not substantiate the intensity, persistence, or limiting effects of the claimant's symptoms, the ALJ must assess the credibility of the claimant's subjective complaints by considering the record in light of the following symptom-related factors: (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. 20 C.F.R. §§ 404.1529(c)(3); 416.929(c)(3).

***6** "An [ALJ] may properly reject [subjective complaints] after weighing the objective medical evidence in the record, the claimant's demeanor, and other indicia of credibility, but must set forth his or her reasons 'with sufficient specificity to enable us to decide whether the determination is supported by substantial evidence.' " *Lewis v. Apfel,* 62 F.Supp.2d 648, 651 (N.D.N.Y.1999) (quoting *Gallardo v. Apfel,* Civ. No. 96–9435, 1999 U.S. Dist. LEXIS 4085, at *15, 1999 WL 185253, at *5 (S.D.N.Y. Mar.25, 1999) (citing *Aponte,* 728 F.2d at 599; *Ferraris,* 728 F.2d at 582)). "A finding that a [claimant] is not credible must ... be set forth with sufficient specificity to permit intelligible plenary review of the record. *Williams,* 859 F.2d at 260–61 (citation omitted) (finding that failure to make credibility findings regarding claimant's critical testimony undermines the Secretary's argument that there is substantial evidence adequate to support his conclusion that claimant is not disabled). "Further, whatever findings the ALJ makes must be consistent with the medical and other evidence." *Id.* at 261 (citation omitted) ("[A]n ALJ must assess subjective evidence in light of objective medical facts and diagnoses.").

"Even where the administrative record may also adequately support contrary findings on particular issues, the ALJ's factual findings 'must be given conclusive effect' so long as they are supported by substantial evidence." *Genier,* 606 F.3d at 49 (citing *Schauer v. Schweiker,* 675 F.2d 55, 57 (2d Cir.1982)). An ALJ's evaluation of a plaintiff's credibility is entitled to great deference if it is supported by substantial evidence. *Murphy v. Barnhart,* Civ. No. 00–9621, 2003 U.S. Dist. LEXIS 6988, at *29–30, 2003 WL 470572, at *10 (S.D.N.Y. Jan.21, 2003) (citing *Bischof v. Apfel,* 65 F.Supp.2d 140, 147 (E.D.N.Y.1999); *Bomeisl v. Apfel,* Civ. No. 96–9718, 1998 U.S. Dist. LEXIS 11595, at *19, 1998 WL 430547, at *6 (S.D.N.Y. July 30, 1998) ("Furthermore, the ALJ has discretion to evaluate a claimant's credibility ... and such findings are entitled to deference because the ALJ had the opportunity to observe the claimant's testimony and demeanor at the hearing.")).

Here, Plaintiff contends that the ALJ "failed to demonstrate how Plaintiff's limited abilities to perform arithmetic and video games demonstrate her ability to work a regular and continuing basis (eight hours a day, five days a week, or equivalent)." (Dkt. No. 11 at 11.) This argument grossly understates the capabilities and limitations for which the ALJ accounted in his decision. The ALJ acknowledges that Plaintiff "has difficulty balancing a checkbook and gets some assistance from her mother in understanding letters that come in the mail and caring for her personal needs," but that she:

> is able to maintain her personal hygiene, read/write a simple note, read Harry Potter books with some difficulty with harder words, do simple addition and subtraction, use a microwave to prepare food, do laundry, help clean, use a computer, play video games, and socialize with friends and family.

***7** (T. at 25.) He also notes that she was capable of babysitting multiple children until at least 2009. *Id.*

In any case, whether or not the ALJ applied certain facts in determining whether the Plaintiff was capable of working eight hours a day for five days a week is a question of RFC determination, not credibility. Therefore, this argument will be discussed below. In stating these limitations and capabilities in the decision, the ALJ has at least made some determination of the credibility of the source testimony.

Plaintiff's second point, that the ALJ failed to make a determination of credibility for Plaintiff's mother's testimony, is equally invalid. The Commissioner argues that the ALJ need not evaluate the credibility of third party witnesses, only the claimant. (Dkt. No. 18 at 11.) This argument is not necessary. The ALJ *did* evaluate the credibility of Plaintiff's mother. In his decision, he writes, "The claimant's mother reports that her daughter has difficulty remembering things and finishing tasks," but that "the statements concerning the intensity, persistence, and limiting effects of [Plaintiff's symptoms] are not fully credible to the extent that they are inconsistent with the evidence of record." (T. at 26.) Although not explicit, the second statement clearly encompasses statements made by Plaintiff's mother as well as those by Plaintiff herself. Therefore, the ALJ made a ruling that Plaintiff's mother's testimony was not credible where it was inconsistent with the evidence of record.

  

For the purposes of credibility assessment, the ALJ followed the proper legal standard by first determining that Plaintiff's alleged symptoms could be caused by her underlying medically determinable mental impairment, and then making findings of credibility on the statements of the intensity, persistence, and limiting effects of those symptoms. (T. at 26.) The legal standard does not require *that he find such statements credible,* only that he make a finding of credibility. He has done so. Insofar as "the report of a consultative examiner may constitute substantial evidence to support an ALJ's decision" (*Mongeur v. Heckler,* 722 F.2d 1033, 1039 (2d Cir.2983)), the credibility findings are supported by the substantial evidence of Dr. Noia's consultative examination.

**B. Dr. Caldwell's Medical Opinion**

Plaintiff objects to the ALJ's decision to accord the opinion of Dr. Caldwell less weight because it is inconsistent with other evidence in the record. (Dkt. No. 11 at 8.)

The medical opinions of a treating physician are given "controlling weight" as long as they are "well-supported by medically acceptable clinical and laboratory diagnostic techniques" and are not inconsistent with other substantial evidence contained in the record. 20 C.F.R. § 404.1527(d)(2) (2012). However, the regulations differentiate between a "treating relationship" and an "examining relationship." 20 C.F.R. § 404.1527(c)(1)-(2). In fact, an ALJ should not rely heavily on the findings of consultative physicians after a single examination. *Selian v. Astrue,* 708 F.3d 409, 419 (2d Cir.2013).

***8** However, there is no treating source in this case. Plaintiff has not been tested for her mental impairments since graduating high school. (T. at 324.) Therefore, the ALJ was left with only two contradicting consultative examiners and the State agency medical consultant.

State agency medical consultants are "highly qualified physicians and psychologists who are also experts in Social Security disability evaluation." 20 C.F.R. §§ 404.1527(f)(2)(I), 416.927(f)(2)(I). Unlike the opinions of treating physicians, opinions of State agency medical consultants are not presumptively entitled to any particular weight. *See* 20 C.F.R. §§ 404.1527(f)(2)(i), 416.927(f)(2)(I) ("Administrative law judges are not bound by any findings made by State agency medical or psychological consultants [.]"). However, such opinions must be evaluated according to the criteria governing all medical opinions. *See* 20 C.F.R. §§ 404.1527(f)(2)(ii), 416.927(f)(2)(ii). Moreover, "unless [a] treating source's opinion is given controlling weight, the administrative law judge must explain in the decision the weight given to the opinions of a State agency medical or psychological consultant[.]" *Id.*

"An ALJ is entitled to rely upon the opinion of a State agency medical consultant, since such a consultant is deemed to be a qualified expert in the field of social security disability ... Such reliance is particularly appropriate where, as here, the opinion of the State agency physician is supported by the weight of the record evidence, including the medical findings of Plaintiff's examining and treating physicians." *Hildebrandt v. Barnhart,* No. 06–CV–0166, 2008 U.S. Dist. LEXIS 17973, at *27, 2008 WL 657258, at *9 (N.D.N.Y. March 7, 2008). *See also Leach ex. Rel. Murray v. Barnhart,* No. 02 Civ. 3561, 2004 U.S. Dist. LEXIS 668, at *26, 2004 WL 99935, at *9 (S.D.N.Y. Jan.22, 2004) ("State agency physicians are qualified as experts in the evaluation of medical issues in disability claims. As such, their opinions may constitute substantial evidence if they are consistent with the record as a whole.").

In evaluating a medical opinion, an ALJ must consider: (1) whether it is a treating or examining relationship; (2) whether it is supported by the evidence cited; (3) whether it is consistent with the record as a whole; (4) whether the opinion was offered by a specialist; and (5) other factors brought to his attention. 20 C.F.R. § 404.1527(c). As to the third factor, the opinions of Dr. Noia and Dr. Nobel are consistent with one another and the rest of the record, with the exception of Dr. Caldwell's opinion, which is inconsistent. On the other four factors, the three medical opinions are roughly equal: none are treating physicians, and both Noia and Caldwell are examining physicians; they all support their own opinions with their own observations; all three specialize in psychology; and no other factors have been brought to the ALJ's attention.

***9** As to consistency with the record, testimony shows that Plaintiff was capable of performing her duties at her previous customer service position independently for three years before she was dismissed. (T. at 337–41.) Nowhere in the record has Plaintiff shown any reason that she would be less able to perform those duties today. In fact, she

  

testified that she could have continued at that job if not for unrelated medical issues that caused her to miss work. (T. at 341.) Therefore, it is fully within the ALJ's discretion to assign less weight to Dr. Caldwell's opinion insofar as it is inconsistent with the record, which shows both contradictory testimony and two contradictory medical opinions. "It is up to the agency, and not this court, to weigh the conflicting evidence in the record." *Clark v. Comm'r of Soc. Sec.,* 143 F.3d 115, 118 (2d Cir.1998).

The legal standard indicates that the ALJ is required to explain the weight he has chosen to give to each medical opinion. 20 C.F.R. § 416.927(e)(2)(ii). He has done so. (T. at 26–28.) As above, Dr. Noia's consultative examination may serve as substantial evidence. *Mongeur,* 722 F.2d at 1039. It is not sufficient to argue that Dr. Caldwell's opinion is *also* substantial evidence, because "[i]f the court finds that there is substantial evidence to support the Commissioner's determination, the decision must be upheld, even if there is substantial evidence for the plaintiff's position." *Losquadro v. Astrue,* No. 11–CV–1798 (JFB), 2012 U.S. Dist. LEXIS 135703, at *16, 2012 WL 4342069, at *6 (E.D.N.Y. Sept.21, 2012) (citing *Yancey v. Apfel,* 145 F.3d 106, 111 (2d Cir.1998); *Jones v. Sullivan,* 949 F.2d 57, 59 (2d Cir.1991)).

**C. Concentration, Persistence, and Pace**

The RFC can only be established when there is substantial evidence of each physical requirement listed in the regulations. *Whittaker v. Comm'r of Soc. Sec.,* 307 F.Supp.2d 430, 440 (N.D.N.Y.2004) (citation omitted). An RFC assessment must first identify the individual's functional limitations or restrictions and assess his or her work related abilities on a function-byfunction basis. 20 C.F.R. §§ 404.1545, 416.945 (2012). Each finding must be considered separately and the ALJ must specify the functions Plaintiff is capable of performing; conclusory statements regarding Plaintiff's capacities are not sufficient. *Roat,* 717 F.Supp.2d at 267 (citation omitted); SSR 96–8p, 1996 WL 374184, at *5 (S.S.A. July 2, 1996) [4] . Each assessment must include a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts and non-medical evidence. SSR 96–8p.

Here, Plaintiff argues that the ALJ failed to account for his own finding that Plaintiff suffers from "moderate limitations in concentration, persistence, or pace" when determining her RFC. (Dkt. No. 11 at 10.) Plaintiff appears to be suggesting that this specific language should appear in the ALJ's RFC analysis.

***10** During Step Three, the ALJ must consider whether a claimant's mental impairment is sufficiently severe to meet the requirements of listing 12.05. 20 C.F.R. § 404.1501 etseq. pt. 404P, app. 1 (2012). If a claimant's disability meets listing 12.05, then the claimant is disabled. If not, then the process proceeds to step four. Because Plaintiff has an IQ between sixty and seventy, the requirements to find disability are at least two of the following:

> (1) marked restriction of activities of daily living; or
>
> (2) marked difficulties in maintaining social functioning; or
>
> (3) marked difficulties in maintaining concentration, persistence, or pace; or
>
> (4) repeated episodes of decompensation, each of extended duration.

*Id.* In the ALJ's analysis, he determined that Plaintiff's impairment in (3) was only "moderate," one step lower than the required level of "marked." (T. at 25.) The other three were all "mild" or nonxistent. *Id.*

These determinations are strictly for the purposes of a step two and step three analysis of the severity of the impairment, and as the ALJ notes in his decision, "the mental [RFC] assessment used at steps 4 and 5 of the sequential evaluation process requires a more detailed assessment by itemizing various functions contained in the broad categories found in ... the Listing of Impairments." (T. at 25.) There is no requirement that an ALJ use the same language from step two or three in the RFC analysis, so the absence of the words "concentration, persistence, or pace" in the ALJ's RFC assessment is not *per se* error. On the contrary, such a statement would be merely a conclusory statement about Plaintiff's abilities, and would thus be insufficient. *Roat,* 717 F.Supp.2d at 267.

However, an ALJ is required to consider all symptoms and the extent to which said symptoms can be reasonably accepted as consistent with the objective medical evidence and other evidence. 20 C.F.R. §§ 404.1529, 416.929. If it can be shown that the itemized evidence which led to the finding of a moderate limitation on "concentration,

persistence, or pace" was ignored during the RFC assessment, then this would be error. This is not the case. Specifically, the ALJ made his determination based on the psychological analysis performed by Dr. Nobel, the State agency medical consultant, who also found "moderate difficulties in maintaining concentration, persistence or pace." (T. at 26.) Nevertheless, Dr. Nobel believed in spite of this determination that Plaintiff was capable of simple work. (T. at 193.) Therefore, the same evidence that supports the ALJ's finding of a moderate limitation on concentration, persistence or pace also supports a finding of not disabled. The ALJ did consider these factors, and Plaintiff's argument is without merit.

**D. Past Relevant Work**

To satisfy the statutory definition of disability, the claimant must be not only unable to do their previous work but also unable to engage in any other kind of substantial gainful work which exists in the national economy. 42 U.S.C. § 1382c(a)(3)(B). At step four of the five step process the ALJ asks whether the claimant can perform former relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f) (2014). A disability claimant bears the burden of proving that she cannot return to her past relevant work, either as it is performed in the national economy, or as she actually performed it. 20 C.F.R. §§ 404 .1520(f), 416.920(f); *see Diaz v. Shalala,* 59 F.3d 307, 315 (2d Cir.1995) (denying a claim where the plaintiff retained the ability to perform her former job as a seamstress). "[E]ven if the claimant cannot work the equivalent of 8 hours a day, for 5 days a week, '[p]art-time work that was substantial gainful activity, performed within the past 15 years, and lasted long enough for the person to learn to do it constitutes past relevant work, and an individual who retains the RFC to perform such work must be found not disabled.' " *Melville v. Apfel,* 198 F.3d 45, 52 (2d Cir.1999) (citing SSR 96–8p at *8).

***11** Past relevant work, especially part-time work, is not relevant unless it was substantial gainful activity. *Id.* at 53–54. "[P]roper assessment of whether past work was substantial gainful activity requires evaluation of, inter alia, how well the claimant performed her duties, whether those duties were minimal and made little or no demand on her, what her work was worth to the employer, and whether her income was tied to her productivity. *Id.* at 54.

Here, Plaintiff argues that the ALJ's errors in determining credibility and RFC make his determination that Plaintiff can still perform her past relevant work unsupported by substantial evidence. (Dkt. No. 11 at 12.) As discussed above, the ALJ committed no error with regard to credibility. The only remaining possible source of error is Plaintiff's earlier claim that the ALJ did not assess Plaintiff's capability to work on a "regular and continuing basis," that is, "eight hours a day, five days a week, or equivalent." *Id.* at 11.

First, the SSR that Plaintiff cites, which explains that RFC should be assessed with regard to working "eight hours a day, five days a week, or equivalent," also goes on to say that a part time job that falls short of this schedule may still be considered past relevant work if it was substantial gainful activity and the claimant worked there long enough to learn how to do the job. SSR 96–8p at *8. The mere fact that the ALJ did not reference a "regular and continuing basis" is not necessarily fatal. Furthermore, the ALJ's analysis was concerned specifically with Plaintiff's job at the hospital call center, which she testified *was* a full time job and which she remained at long enough to be able to work independently. (T. at 338–39.) Therefore, the ALJ *was* considering Plaintiff's RFC with regard to a job which had a full time schedule, and he determined her RFC was sufficient for her to perform the job as she actually performed it. (T. at 28.) He also determined that for the final three years of her time in that position, it was "substantial gainful activity" because she worked independently, full time, and her limitations did not impair her. *Id.*

Plaintiff then argues that the testimony of a vocational expert is required because Plaintiff has alleged non-exertional impairments which limit her range of work beyond her exertional impairments (here, there are no exertional impairments). (Dkt. No. 11 at 12.) Plaintiff is incorrect. A vocational expert or other vocational evidence is only required at step five of the five step analysis once the Plaintiff has met her burden through step four. *Butts v. Barnhart,* 388 F.3d 377, 383–84 (2d Cir.2004) (quoting *Rosa v. Callahan,* 168 F.3d 72, 82 (2d Cir.1999)). Plaintiff was found not disabled at step four, and thus vocational expert testimony was never needed.

The Commissioner argues repeatedly that Plaintiff has not met her burden. (Dkt. No. 18 at 1–2, 5, 9, 12.) This is correct. Plaintiff bears the burden of proving that she can no longer perform her past relevant work at the

hospital call center as she actually performed it. 20 C.F.R. §§ 404.1520(f), 416.920(f). Plaintiff worked independently for three years at that job, and the record is devoid of any indication that her mental limitations have in any way worsened since she was dismissed. The job still exists under a different name. (T. at 338.) There is no medical evidence of any accident or deterioration that might indicate a worsening of her mental state, and nowhere in the record has Plaintiff described any change in her capabilities since 2002, when she was fired. The only accident which occurred since then was Plaintiff's ankle injury in 2003, the same year as the alleged onset date in her application, and the ALJ ruled out Plaintiff's claims with regard to that injury as unsupported by medical evidence. (T. at 27.) In fact, both the Plaintiff and her mother testified that her employers were happy with her work and that she could have continued at that job if not for missed time due to surgery. (T. at 341, 370.) Plaintiff has failed to meet her burden.

***12** The ALJ utilized proper legal standards at all stages of his analysis, and the finding of not disabled is supported by substantial evidence. For the reasons outlined above, I recommend that the final decision of the Commissioner be affirmed.

**WHEREFORE,** it is hereby

**RECOMMENDED,** that the decision of the Commissioner be affirmed.

Pursuant to 28 U.S.C. § 636(b)(1), the parties have fourteen days within which to file written objections to the foregoing report. Such objections shall be filed with the Clerk of the Court. ***FAILURE TO OBJECT TO THIS REPORT WITHIN FOURTEEN DAYS WILL PRECLUDE APPELLATE REVIEW.*** *Roldan v. Racette,* 984 F.2d 85 (2d Cir.1993) (citing *Small v. Sec'y of Health and Human Servs.,* 892 F.2d 15 (2d Cir.1989)); 28 U.S.C. § 636(b)(1); Fed.R.Civ.P. 72.

Dated: July 15, 2014.

**All Citations**

Not Reported in F.Supp.3d, 2014 WL 4105296

Footnotes

1 All citations to the record on appeal refer to the transcript. (Dkt. No. 9.)

2 The ALJ found that only Plaintiff's mild mental retardation qualified as a "severe impairment." (T. at 23–24.) Plaintiff's argument points to error in (1) the ALJ's consideration of psychiatric evidence; (2) the ALJ's failure to hear evidence from a vocational expert for Plaintiff's mental limitations; and (3) the ALJ's credibility determinations. (Dkt. No. 11.) At no point in these arguments does Plaintiff dispute the finding of the ALJ that only the mental limitation is at issue. Therefore, this Court does not review that finding.

3 There is no Lexis citation for this source.

4 There is no Lexis citation for this source.

2011 WL 9518014
Only the Westlaw citation is currently available.
United States District Court,
S.D. New York.

Carlos M. VARGAS, Plaintiff,
v.
Michael J. ASTRUE, Commissioner
of Social Security, Defendant.

No. 09 Civ. 6606(BSJ)(DF).
|
Nov. 8, 2011.

**REPORT AND RECOMMENDATION**

DEBRA FREEMAN, United States Magistrate Judge.

***1 TO THE HONORABLE BARBARA S. JONES, U.S.D.J.:**

## *INTRODUCTION*

Plaintiff Carlos M. Vargas, Jr. ("Plaintiff") seeks review of the final decision of Administrative Law Judge Mark Hecht (the "ALJ") in favor of Defendant, the Commissioner of Social Security ("Defendant" or the "Commissioner"), denying Plaintiff Supplemental Security Income ("SSI") benefits under the Social Security Act (the "Act") on the ground that Plaintiff's impairments did not constitute a disability for the purposes of the Act. Defendant has moved pursuant to Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings affirming the decision of the ALJ (Dkt.10), and Plaintiff has cross-moved for judgment on the pleadings reversing the ALJ's decision (Dkt.12).

For the reasons set forth below, I respectfully recommend granting Defendant's motion for judgment on the pleadings and denying Plaintiff's cross-motion.

## *BACKGROUND* [1]

### A. *Plaintiff's Personal and Employment History*

Plaintiff was born on May 18, 1987 and was 18 years old on the date he alleges his disability began. [2] (R. at 11.) He was in a special education program until the ninth grade, when he was forced to leave school because of learning difficulties and bad behavior. (*Id.* at 28, 77.) Plaintiff has always lived with his grandmother. (*Id.* at 27.) He has two children, both of whom reside with their mother. (*Id.*)

Prior to leaving school, Plaintiff had been assessed for his learning disabilities at least twice. In a May 30, 2001 psychological evaluation, School Psychologist Zari Brasero reported that Plaintiff was "resistive and uncooperative" and refused to complete the tasks requested by the examiner. (*Id.* at 119.) The report also indicates that Plaintiff appeared to be "inattentive and disruptive and confrontational with adults" and was functioning below grade level because of "excessive absences and frequent class cutting." (*Id.* at 120.) At the time Plaintiff left school, his grade point average was 51.76. (*Id.* at 77.)

A second evaluation completed a week later on June 7, 2001 reports a change in Plaintiff's attitude but similar results in educational capacity. (*Id.* at 122.) In that evaluation, Educational Evaluator Doris Fuentes described Plaintiff as "a polite, compliant young man" and wrote that he was "attentive during the entire testing session." Ms. Fuentes reported that he "worked diligently to complete all of the tasks that were presented ." (*Id.*) The report concludes that, although Plaintiff had been in the ninth grade, his reading skills were at the lower fifth grade level, his writing skills at the lower second grade level, and his math skills at the lower sixth grade level. (*Id.* at 125.)

At the time of the hearing, Plaintiff had worked at four separate jobs since leaving school. (*Id.* at 28–31.) Most recently, he had worked in construction, installing sheet rock. (*Id.* at 29.) In his hearing before the ALJ, he testified that, after working for four months, he left that job on his own accord in January 2007 because of pain in his hands and legs from bone tumors. (*Id.* at 29, 31.) Plaintiff testified that, since high school, he had also worked in a factory "putting stuff in [a] machine (*id.* at 30)," he had worked as an "Elderly Aide" in a Senior Citizen Center (*id.* at 30, 141), and he had also done office work. (*Id.* at 30.) He reported difficulty in each of these positions due to either nervousness or an inability to stand because of swelling in his legs. (*Id.*) At the time of his hearing before the ALJ, Plaintiff was 21 years old and had not worked in a year and a half. (*Id.* at 31.)

**B. *Plaintiff's Medical History***

**1. *Medical Records***

***2** Plaintiff's initial disability report indicates that Plaintiff claimed that multiple osteochondromatosis,[3] asthma, and a learning disability limited his ability to work. (*Id.* at 140.)Plaintiff's medical records show that he was treated in the emergency room for his asthma on May 22, 2007. (*Id.* at 172.) During that visit, the attending registered nurse reported that Plaintiff was "complaining of shortness of breath" and exhibiting "lungs with wheezing" and "mild respiratory distress." (*Id.*) The attending doctor ordered an "asthma protocol" and continued monitoring. (*Id.*) For his asthmatic condition, Plaintiff has been proscribed albuterol, asmacort, and prenisone. (*Id.* at 144.)

Plaintiff's medical records also contain a handwritten letter from Dr. Jyothi Kudakandira of Martin Luther King Jr. Health Center, confirming that Plaintiff had multiple osteochondromatosis. (*Id.* at 185.) Dr. Kudakandira's note explains that, as a result of "pain in the lower limbs due to the bony tumor (swelling)," Plaintiff required a cane "most of the time he walk[ed]." (R. at 185.)

**2. *Consultative Examinations***

**a. *Dr. Barbara Akresh***

On October 24, 2007, Dr. Barbara Akresh, an SSA consultative physician, conducted an examination of Plaintiff. (*Id.* at 176.) Dr. Akresh noted that Plaintiff had pain in his right ankle and both knees that prevented him from walking more than 10 blocks or two flights of steps without experiencing pain and swelling. (*Id.*) Plaintiff informed Dr. Akresh that he had been told about a tumor on his left leg "which should have some surgery." (*Id.*) He had not consulted with his orthopedist, however, since 2004—three years earlier. (*Id.*) In examining Plaintiff's extremities, Dr. Akresh reported "several abnormalities," including bony prominences on Plaintiff's arms and legs, and deformities on his hands and feet. (*Id.* at 179.) Although Plaintiff's deformities included shortened fingers on both hands, his hand and finger dexterity was intact and his "grip strength" was reported as "5/5 bilaterally."[4] (*Id.*)

Dr. Akresh observed that Plaintiff had a "normal gait," yet could not walk on his toes or heels. (*Id.* at 178.) Plaintiff used a cane that his doctor had given him four years before the exam, but Dr. Akresh noted that his "[g]ait with and without [the] device [was][the] same." (*Id.*) Dr. Akresh opined that the "cane [was] not medically necessary at least for short distances," and noted that Plaintiff needed no help in rising from his chair, nor in changing for the exam. (*Id.*)

During the examination, Plaintiff reported that, since childhood, he had a history of asthma, which was "exacerbated by exposure to smoke, pollens, change of season, or if he had an upper respiratory infection." (*Id.* at 176.) Plaintiff had never been hospitalized for this condition. (*Id.*) He had, however, been hospitalized for a "left thoracotomy and rib resection" at the age of two, as well as for a fractured left leg in 2002. (*Id.*) At some point Plaintiff also suffered a fractured right forearm, but he was not hospitalized for that injury. (*Id.*) Dr. Akresh's report indicates that Plaintiff smoked cigarettes and marijuana. (*Id.* at 177.) Plaintiff reported that, since 2003, he had smoked marijuana three times a week and had smoked up to a pack of cigarettes per day. (*Id.*) Plaintiff told Dr. Akresh that he had been drinking since 2003, and, at the time of the examination, he reported drinking a quart of beer or liquor twice a week. (*Id.*)

***3** Dr. Akresh reported that, in Plaintiff's daily life, Plaintiff had "moderate limitations in his ability to lift and carry heavy objects or stand for any length of time." (*Id.* at 180.) According to Dr. Akresh, Plaintiff was able to help his grandmother shop and did "a little cleaning once a week." (*Id.* at 176.) When shopping, however, Plaintiff did not carry groceries. (*Id.*) Plaintiff reported that he was able to shower and dress himself, and that he went out and socialized with friends. (*Id.*) Dr. Akresh advised Plaintiff to follow up with his physicians because of his asthmatic condition and limitations in mobility. (*Id.* at 180.)

**b. *Dr. Edward Hoffman***

Psychologist Dr. Edward Hoffman examined Plaintiff as part of an SSA consultative intelligence evaluation on December 14, 2007. (*Id.* at 186.) In assessing Plaintiff's behavior, Dr. Hoffman described plaintiff as having a pleasant demeanor and maintaining good eye contact. (*Id.* at 187.) Dr. Hoffman indicated, though, that Plaintiff was unable to follow test directions well and demonstrated below average attention and concentration. (*Id.*) In the

  

course of the examination, Dr. Hoffman administered the Wechsler Adult Intelligence Scale, Third Edition (WAIS–III), a standardized intelligence test. (*Id.*) On this assessment, Plaintiff scored a 70 on the "Verbal Scale IQ," a 63 on the "Performance Scale IQ," and a 64 on the "Full Scale IQ." (*Id.*) Dr. Hoffman noted that scores of this nature in the verbal and performance areas indicated, respectively, that Plaintiff was "borderline mentally deficient" and had "deficient ranges of intelligence." (*Id.*)

Dr. Hoffman reported that, in Plaintiff's daily activities, Plaintiff cooked, did laundry, shopped, and took public transportation by himself. (*Id.* at 187–88.) According to Dr. Hoffman's report, Plaintiff was also able to shower independently, select his clothes in the morning, and use the telephone (*id.* at 188), although he was not able to manage his funds independently (*id.* at 189). Dr. Hoffman opined that, in totality, these characteristics were evidence of "adequate adaptive functioning and socialization skills." (*Id.* at 188.)

Dr. Hoffman's report appears to be somewhat inconsistent with respect to Plaintiff's ability to follow directions and maintain attention (*compare* "Behavioral Observation," noting that "[Plaintiff] was not able to follow test directions well. His attention and concentration were below average" (*id.* at 187), *with* "Medical Source Statement," noting that "[v]ocationally, [Plaintiff] appears to be able to understand and follow simple and complex directions ... He can maintain attention and concentration for rote tasks" (*id.* at 188)), although it is unclear whether the different sections of the report that touch on this subject relate to different evaluative tests or call for different criteria to be applied.

***4** The "Medical Source Statement" portion of Dr. Hoffman's report indicates abilities not mentioned in other parts of the report. For example, Dr. Hoffman reported there that Plaintiff could "perform simple tasks independently" and that he could "regularly attend to a routine, and maintain a schedule." (*Id.*) Additionally, Dr. Hoffman reported that Plaintiff could "learn new rote tasks," as well as "relate to other people appropriately" and "make simple decisions." (*Id.*) In the course of the examination, Plaintiff told Dr. Hoffman that he smoked marijuana every day and used cocaine twice a month, but that he did not have a history of alcoholism. (*Id.* at 186.) Overall, Dr. Hoffman diagnosed Plaintiff with "cannabis abuse with learning problems," mild mental retardation, asthma, and bone disease. (*Id.* at 188.) Dr. Hoffman recommended that Plaintiff enter a substance abuse program and "be encouraged to study for his GED and that his grandmother be involved with him in family counseling." (*Id.*) Dr. Hoffman stated that, with "continued intervention and support," Plaintiff would find "symptom relief and maximize his abilities." (*Id.*)

#### c. *Dr. E. Kamin*

On January 4, 2008, Plaintiff was given a Psychiatric Review by SSA psychologist Dr. E. Kamin. (*Id.* at 190–207.) In evaluating the Section 12.05 criteria for mental retardation, [5] Dr. Kamin diagnosed Plaintiff as exhibiting mild mental retardation (*id.* at 194), although Dr. Kamin's report appears to evince conflicting opinions as to whether Plaintiff satisfied the criteria of that section. At the top of page five of the "Psychiatric Review Technique," Dr. Kamin checked boxes listing the requirements for Section 12.05, suggesting that Plaintiff met the requirements under this section. Dr. Kamin, however, also checked the box indicating "[a] medically determinable impairment is present that does not precisely satisfy the diagnostic criteria above." (*Id.*)

In the "Summary Conclusions" portion of Dr. Kamin's "Mental Residual Functional Capacity Assessment," Dr. Kamin indicated that Plaintiff was "Not Significantly Limited" in 17 of the categories listed, and only "Moderately Limited" in three of the categories. (*Id.* at 204–05.) In the report's "Remarks" section, Dr. Kamin also opined that, although Plaintiff had difficulty following the test directions, he was "able to maintain attention/concentration" and could understand simple instructions to complete tasks. (*Id.* at 205–06.) Dr. Kamin further wrote that Plaintiff showed "adequate adaptive function and socialization skills" and that his impairments were "severe but do not meet or equal [the] listing level." (*Id.* at 206.) Ultimately, Dr. Kamin found that Plaintiff was able to "do entry level [substantial gainful activity]." (*Id.*)

### C. *Procedural History*

#### 1. *Plaintiff's Application for Benefits*

Plaintiff filed an application for Supplemental Security Income on September 4, 2007 (*id.* at 60), in which he claimed that the onset date of his disability was June 15, 2005 (*id.*). Based on Dr. Kamin's evaluation, as described

above, the Social Security Administration ("SSA") denied Plaintiff's application on January 16, 2008. (*See id.* at 40–43.) The SSA determined that Plaintiff's condition was not severe enough to keep him from working, and that the medical evidence and other relevant information demonstrated that Plaintiff could perform light work at a job involving simple tasks. (*Id.* at 43.) Subsequently, Plaintiff requested a hearing on the matter before an Administrative Law Judge. (*Id.* at 44–46.)

**2. *The Administrative Hearing***

***5** On November 18, 2008, Plaintiff appeared *pro se* before the ALJ. (*Id.* at 24.) After confirming that Plaintiff understood the hearing and review process (*id.* at 24–26), the ALJ questioned him about his level of independence. (*Id.* at 27.) Plaintiff testified that he had always lived with his grandmother and had never lived alone. (*Id.*) He also indicated that he was unmarried, but had two small children who lived with their mother. Plaintiff stated that he was able to use public transportation by himself, but did not drive. (*Id.* at 27–28.)

The ALJ then questioned Plaintiff about his education and employment background. (*Id.* at 28.) Plaintiff testified that he had completed the ninth grade, but had then been "kicked out" of school for "behavior" when he was about 17 years old. (*Id.*) During his schooling, Plaintiff had been placed in special education classes. (*Id.*) At the time of the hearing, Plaintiff had not attended school in four years. (*Id.*) During that period, he had worked at the four jobs noted above, but, at the time of his hearing, he had not worked for a year and a half. (*Id.* at 28–31.)

The ALJ next asked Plaintiff about his drug use. (*Id.* at 31–32.) Plaintiff testified that he used marijuana four or five times a month for the pain he experienced. (*Id.* at 32.) He also admitted to using cocaine. (*Id.*) When asked how he payed for the drugs, Plaintiff said that his friends would give drugs to him. (*Id.*)

The ALJ also questioned Plaintiff about his medical history. (*Id.* at 33.) Plaintiff stated that he was born with a bone condition that caused him to have pain in his extremities. (*Id.*) When asked where, specifically, he experienced the pain, he stated, "[i]t's in my ankles, my knees, all the long bones, my arms, my hands." (*Id.*) Plaintiff testified that he was prescribed Tylenol for his pain, but it did not really help him. (*Id.*) The ALJ then questioned Plaintiff regarding his history of asthma. (*Id.* at 34.) Plaintiff stated that he was affected by it when the weather was changing and that he had last received asthma treatment about a year previously. (*Id.*)

Finally, the ALJ asked about Plaintiff's physical limitations. (*Id.*) Plaintiff testified that, while he did not have difficulty sitting in one place, he did have trouble standing for more than an hour. (*Id.* at 34–35.) Plaintiff stated that he used a cane "once in a while," when his legs swelled up, but that he had not used one on the day of the hearing because he had taken the train. (*Id.* at 35.) Plaintiff estimated that he could lift or carry about 15 pounds. (*Id.*) He also testified that he was able to go grocery shopping by himself and that he played video games to occupy himself. (*Id.*) When asked by the ALJ whether he could work in a position similar to those he had held before, Plaintiff said he could not because the standing would cause his legs to swell. (*Id.* at 36.) When asked, however, whether he could work in a job sitting down that would not require him to lift more than 10 pounds, Plaintiff responded, "Yeah. I could find, get a job like that." (*Id.* at 36–37.)

***6** At the end of the hearing, Plaintiff mentioned that doctors had "found a bone that's up there in [his] head," which was causing him headaches. (*Id.* at 37.) Although these headaches were not severe, Plaintiff testified that he experienced them "most of the time." (*Id.*) There does not appear to be any additional information in the record concerning this particular condition.

**3. *The ALJ's Decision***

By Notice of Decision dated January 23, 2009, the ALJ affirmed the Social Security Administration's initial denial of benefits, finding that Plaintiff was not disabled within the meaning of the Act and pertinent regulations. (*Id.* at 8–21.) In particular, the ALJ found that, while Plaintiff might not have been able to perform any of his past relevant work, he nonetheless retained the residual functional capacity to perform sedentary work, as defined in 20 C.F.R. 416.967(a). (*Id.* at 13–14.)

In his written decision, the ALJ found that Plaintiff's "medically determinable mental impairment of borderline mental deficiency and mentally deficient range of intelligence does not cause more than minimal limitation in the claimant's ability to perform basic mental work activities and is therefore nonsevere." (*Id.* at 13.) The ALJ supported this finding by noting that Plaintiff

had demonstrated no limitations in daily living, social functioning, concentration, or decompensation. (*Id.*) Specifically, the ALJ pointed to Plaintiff's ability to carry out basic activities such as cooking, doing laundry, shopping, using public transportation independently, and caring for his personal hygiene. (*Id.*)

Moreover, the ALJ accepted the conclusions of the SSA examiners, detailed above, concerning the extent of Plaintiff's physical limitations. (*Id.* at 20.) While the ALJ found that Plaintiff exhibited symptoms of physical challenges, the ALJ further found that Plaintiff's "statements concerning the intensity, persistence and limiting effects of these symptoms were not credible to the extent they were inconsistent with the above residual functional capacity assessment." (*Id.* at 15.) Based on the opinions of the examiners, the ALJ determined that Plaintiff had retained the capacity to perform the demands of the full range of sedentary work. (*Id.* at 21.) Ultimately, based on Plaintiff's residual functional capacity, as well as his age, education, and work experience, the ALJ concluded that the applicable Medical–Vocational Rule 201.24 directed the finding that Plaintiff was not disabled. (*Id.*)

### D. *The Motions Before This Court*

Currently before the Court are the parties' cross-motions for judgment on the pleadings. In his moving papers, Defendant argues that the ALJ's determination that Plaintiff was not disabled was supported by substantial evidence and that the determination must therefore be upheld. (*See generally* Def. Mem.; Reply Memorandum of Law in Opposition to Plaintiff's Cross–Motion for Judgment on the Pleadings and in Further Support of the Commissioner's Motion for Judgment on the Pleadings, dated Jul. 21, 2010 ("Def. Reply Mem.") (Dkt.15).) Plaintiff, for his part, argues that the record lacks substantial evidence to support the ALJ's determination. (*See generally* Plaintiff's Memorandum of Law in Opposition to Defendant's Motion for Judgment on the Pleadings and in Support of his Motion for Judgment on the Pleadings, dated Jun. 4, 2010 ("Pl.Mem.") (Dkt.13); Plaintiff's Reply Memorandum of Law in Support of His Motion for Judgment on the Pleadings, dated Aug. 16, 2010 ("Pl. Reply Mem.") (Dkt.16).) In particular, Plaintiff contends that (1) the ALJ failed to make a proper assessment of the listing requirements for mental retardation under 20 C.F.R. Pt. 404, Subpt. P, App. 1, 12.05(C) (Pl. Mem., at 10–14; Pl. Reply Mem., at 1–5); (2) the ALJ failed to develop the record (Pl. Mem., at 15–18; Pl. Reply Mem., at 6–9); and (3) the Commissioner failed to meet his burden of proof that Plaintiff was capable of performing other work in the national economy, and, in connection with determining whether the Commissioner had met this burden, the ALJ did not evaluate whether Plaintiff's severe nonexertional impairments significantly diminished his ability to work. (Pl. Mem., at 18–21; Pl. Reply Mem., at 11–13.)

## *DISCUSSION*

### I. *APPLICABLE LEGAL STANDARDS*

#### A. *Standard of Review*

***7** Judicial review of a decision of the Commissioner is limited. The Commissioner's decision is final, provided that the correct legal standards are applied and findings of fact are supported by substantial evidence. 42 U.S.C. § 405(g); *Shaw v. Chater,* 221 F .3d 126, 131 (2d Cir.2000). " 'Where an error of law has been made that might have affected the disposition of the case, this [C]ourt cannot fulfill its statutory and constitutional duty to review the decision of the administrative agency by simply deferring to the factual findings of the ALJ.' " *Townley v. Heckler,* 748 F.2d 109, 112 (2d Cir.1984) (citation omitted). Thus, the Court must first ensure that the ALJ applied the correct legal standards. *See Tejada v. Apfel,* 167 F.3d 770, 773 (2d Cir.1999); *Johnson v. Bowen,* 817 F.2d 983, 986 (2d Cir.1987).

The Court must then determine whether the Commissioner's decision is supported by substantial evidence. *See Tejada,* 167 F.3d at 773. 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) (citation omitted). The Court must consider the record as a whole in making this determination, but it is not for this Court to decide *de novo* whether the plaintiff is disabled. *See Veino v. Barnhart,* 312 F.3d 578, 586 (2d Cir.2002) ("Where the Commissioner's decision rests on adequate findings supported by evidence having rational probative force, we will not substitute our judgment for that of the Commissioner."); *Schaal v. Apfel,* 134 F.3d 496, 501 (2d Cir.1998); *Beauvoir v. Chater,* 104 F.3d 1432, 1433 (2d Cir.1997). The Court will uphold the Commissioner's decision upon a finding of substantial evidence, even

where contrary evidence exists. *See Alston v. Sullivan,* 904 F.2d 122, 126 (2d Cir.1990) ("Where there is substantial evidence to support either position, the determination is one to be made by the factfinder."); *see also DeChirico v. Callahan,* 134 F.3d 1177, 1182–83 (2d Cir.1998) (affirming an ALJ decision where substantial evidence supported both sides).

**B.** ***The Five–Step Procedure for Evaluating a Claim of Disability***

To be entitled to benefits under the Act, a plaintiff must establish that he or she has a "disability." *See Balsamo v. Chater,* 142 F.3d 75, 79 (2d Cir.1998). The term "disability" is defined in the Act as an "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. § 423(d)(1)(A); *see also* 42 U . S.C. § 1382c(a)(3)(A); *Balsamo,* 142 F.3d at 79. Moreover,

> [a]n individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

***8** 42 U.S.C. § 423(d)(2)(A); *see also* 42 U.S.C. § 1382c(a)(3)(B).

In evaluating a disability claim, the ALJ must follow the five-step procedure set out in the regulations governing the administration of Social Security benefits. *See* 20 C.F.R. § 404 .1520 (2010); *Diaz v. Shalala,* 59 F.3d 307, 311 n. 2 (2d Cir.1995); *Berry v. Schweiker,* 675 F.2d 464, 467 (2d Cir.1982) (per curiam). First, the ALJ must determine whether the claimant is engaged in substantial gainful activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the second step requires the ALJ to consider whether the claimant has a "severe" impairment or combination of impairments that significantly limit his or her physical or mental ability to do basic work activities. *Id.* §§ 404.1520(a)(4)(ii), (c), 416.920(a)(4)(ii), (c). If the claimant does suffer from such an impairment, then the third step requires the ALJ to determine whether this impairment meets or equals a listed impairment in Appendix 1 of the regulations. *Id.* §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the claimant's impairment meets or equals one of those listed, the claimant is presumed to be disabled "without considering [the claimant's] age, education, and work experience." *Id.* §§ 404.1520(a)(4)(iii), (d), 416.920(a)(4)(iii), (d). If the presumption does not apply, then the fourth step requires the ALJ to determine whether the claimant is able to perform his or her "past relevant work." *Id.* §§ 404.1520(a)(4)(iv), 416.920(a)(4) (iv). Finally, if the claimant is unable to perform his or her past relevant work, the fifth step requires the ALJ to determine whether the claimant is capable of performing "any other work" that exists in the national economy. *Id.* §§ 404.1520(a)(4)(v), (g), 416.920(a)(4)(v), (g).

In making a determination by this process, the ALJ must consider four sources of evidence: " '(1) the objective medical facts; (2) diagnoses or medical opinions based on such facts; (3) subjective evidence of pain or disability testified to by the claimant or others; and (4) the claimant's educational background, age, and work experience.' " *Brown v. Apfel,* 174 F.3d 59, 62 (2d Cir.1999) (quoting *Mongeur v. Heckler,* 722 F.2d 1033, 1037 (2d Cir.1983) (per curiam)).

Under the procedure set out in the governing regulations, "[t]he claimant bears the initial burden of showing that his impairment prevents him from returning to his prior type of employment." *Berry,* 675 F.2d at 467 (citation omitted); *see* 20 C.F.R § 404.1520. Once it has been determined that the claimant cannot perform his past relevant employment, the Commissioner then has "the burden of proving that the claimant still retains a residual functional capacity to perform alternative substantial gainful work which exists in the national economy." *Rosa v. Callahan,* 168 F .3d 72, 77 (2d Cir.1999) (quoting *Bapp v. Bowen,* 802 F.2d 601, 604 (2d Cir.1986)); *see also Mimms v. Heckler,* 750 F.2d 180, 185 (2d Cir.1984) ("The burden of proving disability is on the claimant. However, once the claimant has established a prima facie

case by proving that his impairment prevents his return to his prior employment, it then becomes incumbent upon the [Commissioner] to show that there exists alternative substantial gainful work in the national economy which the claimant could perform, considering his physical capability, age, education, experience and training.") (citation omitted)).

### C. *The ALJ's Obligation To Develop a Complete Record*

***9** Because a hearing on disability benefits is a non-adversarial proceeding, the ALJ generally has an affirmative duty to develop the administrative record. *Perez v. Chater,* 77 F.3d 41, 47 (2d Cir.1996) (citing *Echevarria v. Secretary of Health & Human Services,* 685 F.2d 751, 755 (2d Cir.1982)). The Secretary's regulations describe this duty by stating that, "[b]efore we make a determination that you are not disabled, we will develop your complete medical history ... [and] will make every reasonable effort to help you get medical reports from your own medical sources when you give us permission to request the reports." 20 C.F.R. § 404.1512(d); *see also* 20 C.F.R. § 416.912(d). Failure to develop the record may be a ground for remand. *Snell v. Apfel,* 177 F.3d 128, 133 (2d Cir.1999). Additionally, if the information obtained from the medical sources is insufficient to make a disability determination or the Commissioner is unable to seek clarification from treating sources, the regulations provide that the Commissioner should ask the claimant to attend one or more consultative evaluations. 20 C.F.R. §§ 404.1512(f), 416.912(f).

## II. *THE ALJ'S DECISION*

### A. *The ALJ's Application of the Five–Step Procedure*

In this case, the ALJ, after proceeding through each of the steps listed above, determined that Plaintiff was not disabled. First, the ALJ found, and it is undisputed, that Plaintiff had not engaged in substantial gainful work activity since the alleged onset date of his claimed disability, September 4, 2007. (R. at 13.) Second, while the ALJ found that Plaintiff's mental retardation was "mild" and "nonsevere," the ALJ concluded that Plaintiff's multiple osteochondromatosis, combined with his mild mental retardation, as well as his asthma, created a "severe impairment." (*Id.*)[6] Third, the ALJ found that, despite Plaintiff's medically determinable mental impairment, Plaintiff did not have an impairment or combination of impairments that met or equaled one of the impairments listed in 20 C.F.R. Part 404, Subpart P, Appendix 1. (*Id.* at 14.) As this meant that Plaintiff was not presumed to be disabled, the ALJ was required to continue to the fourth and fifth steps of the analysis. At the fourth step, the ALJ determined that Plaintiff did not have any past relevant work. (*Id.* at 20.) Fifth, with the burden shifted to the Commissioner to demonstrate that Plaintiff retained the residual functional capacity to perform substantial gainful work existing in the national economy, the ALJ found that Plaintiff had the functional capacity to perform the full range of sedentary work under 20 C.F.R. § 404.967(a). (*Id.* at 14–20.)

Plaintiff now argues that the ALJ erred at step three, or alternatively, at step five. At step three, Plaintiff argues that the ALJ did not properly assess the evidence concerning Plaintiff's deficits in adaptive functioning and altogether failed to evaluate whether Plaintiff met the requirements for the listed impairment of mental retardation, as set out in 20 C.F.R. Pt. 404, Subpt. P, App. 1, § 12.05(C). Plaintiff contends that the evidence of record shows that he met the listing of Section 12.05(C), and thus should have been presumed disabled. (Pl. Mem., at 12–14; Pl. Reply Mem., at 1–5 .) Plaintiff further argues that, even if he did not meet the impairment listing, the ALJ also erred at the fifth step of his analysis because the evidence in the record was insufficient to justify a finding that Plaintiff was actually capable of performing sedentary work. (Pl. Mem., at 15–21; Pl. Reply Mem., at 6–9, 11–13.) For the reasons discussed below, this Court finds that the ALJ's conclusion at step three was supported by substantial evidence, and that the evidence in the record further supports the ALJ's finding that Plaintiff was capable of performing sedentary work.

### B. *Review of the ALJ's Decision*

***10** Given that the ALJ followed the five-step procedure set forth in the Social Security regulations, this Court's review is limited to determining whether, in the course of following that procedure, the ALJ correctly applied the relevant legal principles, and whether his decision was supported by substantial evidence.

#### 1. *Substantial Evidence Supports the ALJ's Decision at Step Three.*

As noted above, the third step in the disability assessment requires an ALJ to determine whether a claimant's

impairment meets or equals a listed impairment in Appendix 1 of the regulations. 20 C.F.R. §§ 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If, at this step, the ALJ finds that the claimant meets the listing requirement, he is presumed disabled. (*See id.*)

Plaintiff claims that, in this case, the ALJ failed to consider whether Plaintiff's impairment met or equaled the listed impairment of "mental retardation," as set forth in Section 12.05 of the regulatory listings. Section 12.05 provides the diagnostic description of mental retardation, and states:

> Mental retardation: Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22.
>
> The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.
>
> A. Mental incapacity evidenced by dependence upon others for personal needs (e.g. toileting, eating, dressing, or bathing) and inability to follow directions, such that the use of standardized measures of intellectual functioning is precluded;
>
> Or
>
> B. A valid verbal, performance, or full scale IQ of 59 or less;
>
> Or
>
> B. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function;
>
> Or
>
> D. A valid verbal, performance, or full scale IQ of 60 through 70, resulting in at least two of the following:
>
> 1. Marked restriction of activities of daily living; or
>
> 2. Marked difficulties in maintaining social functioning; or
>
> 3. Marked difficulties in maintaining concentration, persistence, or pace; or
>
> 4. Repeated episodes of decompensation, each of extended duration.

20 C.F.R. Pt. 404, Subpt. P, App.1, § 12.05. Plaintiff specifically argues that he met the criteria of Subsection C of this listed impairment. To establish disability under Subsection 12.05(C), Plaintiff would have had to first make a threshold showing—as would be necessary, regardless of which subsection of the listing may be implicated—that he had (a) "significantly subaverage general intellectual functioning," (b) "with deficits in adaptive functioning," (c) that manifested "before age 22." Then, under the particular requirements of Subsection C, he would have had to go on to show that he had (1) an IQ score between 60 and 70; and (2) a "physical or other mental impairment imposing an additional and significant work-related limitation of function." *Id.*

***11** The only Section 12.05(C) criterion that is at issue here is the requirement that Plaintiff have had "deficits in adaptive functioning," which, as noted above, is part of the threshold requirement that applies generally to all parts of Section 12.05. The parties do not appear to dispute that Plaintiff had "significantly subaverage general intellectual functioning," and, as Plaintiff's application for benefits, as well as his hearing before the ALJ, both preceded Plaintiff's 22nd birthday, it is obvious that, to the extent Plaintiff suffered from *any* disability at that time, the disability had manifest "before age 22 ." Further, there is little dispute that, based on the record, Plaintiff met the additional severity criteria of Subsection C. First, the IQ testing in the record placed him with both sub-test and aggregate scores of between 60 and 70 (R. at 187), and, second, even the ALJ appears to have accepted that Plaintiff's bone condition resulted in an additional and significant work-related limitation (*see* R. at 14 (finding Plaintiff limited to sedentary work) [7] ).

The parties do contest, though, whether the ALJ made the necessary finding as to Paintiff's "adaptive functioning," and Plaintiff essentially argues that, even if the ALJ made an adverse finding on this factual question, such a finding is not supported by substantial evidence in the record. In support of his arguments, Plaintiff first notes that, while the ALJ's "Findings of Fact and Conclusions of Law" include a statement that Plaintiff did not meet one of the listed impairments in 20 C.F.R. Pt. 404, Subpt. P, App. 1 (R. at 14), the ALJ never specifically mentioned Section 12.05 (or Subsection 12.05(C)) in his decision, nor did he,

at step three, provide an explicit analysis of the criteria of that listing (*see* R. at 14). (Pl. Mem., at 11.) As for the evidentiary record on the question of whether Plaintiff had "deficits in adaptive functioning," Plaintiff highlights the medical diagnoses of "mild mental retardation" contained in the record (*see* R. at 188, 194), as well as Plaintiff's educational records (R. at 75–117), his testimony that he lived with his grandmother, rather than with his children (R. at 27), and the records that show that, since leaving school in 2003, Plaintiff had never earned more than $300 in any year (R. at 73, 77). (Pl. Mem., at 12–13.) According to Plaintiff, these portions of the record all reveal that Plaintiff had deficits in day-to-day adaptive functioning. (*See id.*) To the extent the record evinces any conflict on the subject (as in the seeming inconsistency in Dr. Kamin's evaluation, noted *supra,* at 8–9), Plaintiff argues that this would merely show that remand would be necessary to clarify the resulting confusion. (Pl. Mem., at 15–18.)

Defendant, on the other hand, asserts that the ALJ made the necessary finding regarding Plaintiff's adaptive functioning, and argues that the ALJ's finding against Plaintiff on this issue was, in fact, supported by substantial evidence in the record and thus should not be disturbed. (Def. Mem., at 13–14.) In particular, Defendant contends that the references to Plaintiff's "adequate adaptive functioning" that appear in the medical reports of Drs. Hoffman and Kamin (*see* R. 188, 204–05) are sufficient evidence to support the denial of disability benefits (Def. Mem., at 103–14). On a more detailed level, Defendant points to several references in the reviewing physicians' reports that attest to Plaintiff's ability to cope with common life demands. (Def. Reply Mem., at 3.)

***12** Defendant, in this instance, has the better argument. First, although it is true that the ALJ never refered to Section 12.05 at step three of his analysis (or elsewhere in his decision), he did refer—at step two of his analysis—to Section 12.00 of the listings, an over-arching provision that, *inter alia,* requires evaluation of the same "adaptive functioning" criterion at issue here. (*See* R. at 13 (citing 20 CFR, Part 404, Subpart P, Appendix 1).) At step two, with reference to Section 12.00, the ALJ made an explicit finding that Plaintiff "show[ed] adequate adaptive functioning." (*Id.*) [8] In situations where the ALJ's analysis contains enough information to enable this Court to determine whether he made the requisite findings, his failure to invoke an applicable standard does not, in itself, require remand. *Cf. O'Connor v. Astrue,* 2009 U.S. Dist. LEXIS 94554, at *8–10 (W.D.N.Y. Oct. 9, 2009) (where ALJ did not employ the applicable medical improvement review standard, the court analyzed the ALJ's decision in its entirety to ascertain whether he determined that the plaintiff had experienced medical improvement (citing *Lewis v. Barnhart,* 201 F.Supp.2d 918, 932 (N.D.Ind.2002))). Here, although the ALJ never expressly stated whether he had considered Listing 12.05(C), his findings at step two nonetheless demonstrate the inapplicability of that listing.

As to whether the record contains substantial evidence to support the ALJ's finding that Plaintiff had adequate adaptive functioning, the Court notes that, while the Commissioner has not defined the term "deficits in adaptive functioning" *see Ali v. Astrue,* No. 09 Civ. 2123(JG), 2010 WL 889550, *5 (E.D.N.Y. Mar. 8, 2010), courts have analyzed adaptive functioning to mean "a claimant's effectiveness in areas such as social skills, communication, and daily living skills," *West v. Commissioner of Social Security Administration,* 240 Fed. Appx. 692, 698 (6th Cir.2007). At step two, not only did the ALJ find that Plaintiff showed "adequate adaptive functioning and socialization skills," but the ALJ specifically found that Plaintiff had no limitation in activities of daily living. (R. at 13.) He stated that Plaintiff "is able to cook, do laundry, and shop independently. He can travel with public transportation independently. He reads the newspaper and cares for his personal hygiene without any assistance." (*Id.*) The ALJ also found that Plaintiff had no limitations in social functioning or in concentration, persistence, or pace. (*Id.*) Finally, the ALJ found that Plaintiff had experienced no episodes of decompensation of extended duration. (*Id.*) These findings are supported by substantial evidence in the record, including the reports of Drs. Kamin (R. at 200, 206) and Hoffman (R. at 187–88), and Plaintiff's own testimony at the hearing (R. at 28, 35). [9]

Finally, the Court notes that, although, on his evaluation form, Dr. Kamin checked a box indicating that Plaintiff had "[s]ignificantly subaverage general intellectual functioning with deficits in adaptive functioning" (R. at 194), this doctor ultimately concluded, in his own words, that Plaintiff "can read the newspaper, can take the bus and subway independently, [is] able to do his [activities of daily living], cook, clean, shop independently[,] ... has friends, pla[ys] video games, [and] shows adequate adaptive function and socialization skills ..." (R. at 206).

Thus, Dr. Kamin found that Plaintiff's impairments did "not meet or equal [the] listing level." (*Id.*) While the way in which Dr. Kamin filled out the form may have led to some minor confusion, his ultimate, detailed findings regarding Plaintiff's adaptive functioning could not be more clear. In any event, as discussed above, this Court must uphold the Commissioner's decision upon a finding of substantial evidence, even where contrary evidence exists. (*See supra,* at 14.)

***13** Overall, this Court finds that the ALJ fulfilled his duty to develop the administrative record and that substantial evidence supports the ALJ's finding that Plaintiff did not have "deficits in adaptive functioning." This, in turn, supports the ALJ's conclusion, at step three, that Plaintiff had not demonstrated that he met or equaled a listed impairment. Accordingly, I recommend that the Court uphold the ALJ's finding at step three.

**2. *Substantial Evidence Also Supports the ALJ's Determination, at Step Five, That Plaintiff Could Perform Sedentary Work.***

Plaintiff's second argument is that, even if Plaintiff did not meet the listing requirements of 12.05(C), the ALJ nonetheless erred in concluding that Plaintiff was capable of performing sedentary work because Defendant did not meet its burden of proof on this point, at step five of the five-step analysis. (*See* Pl. Mem., at 183.) Under the procedure set out in the Commissioner's regulations, once it has been determined that a claimant cannot perform his or her past relevant employment, the burden shifts to the Commissioner to demonstrate that the claimant is capable of performing any other work. *See* 20 C.F.R. § 404.1520; *see also Mimms,* 750 F.2d at 185 ("[O]nce the claimant has established a prima facie case [of disability] by proving that his impairment prevents his return to his prior employment, it then becomes incumbent upon the [Commissioner] to show that there exists alternative substantial gainful work in the national economy which the claimant could perform, considering his physical capability, age, education, experience and training.") (citations omitted). In determining whether the Commissioner has met this burden of proof, the ALJ, under appropriate circumstances, may rely on the Medical–Vocational Guidelines contained in Appendix 2 of 20 C.F.R. Part 404, Subpart P, commonly referred to as the "grid." *See Zorilla v. Chater,* 915 F.Supp. 662, 667 (S.D.N.Y.1996).

The grid "takes into account the claimant's residual functional capacity in conjunction with the claimant's age, education and work experience. Based on these factors, the grid indicates whether the claimant can engage in any other substantial gainful work which exists in the national economy." *Id.* As a general matter, the result listed in the grid is "dispositive on the issue of disability." *Id.* (citation omitted). If, however, a claimant's nonexertional impairments "significantly" limit the range of work permitted by a claimant's exertional limitations, then application of the grid "will not accurately determine disability status because [it] fail[s] to take into account claimant's nonexertional impairments." *Bapp v. Bowen,* 802 F.2d 601, 605 (2nd Cir.1986) (internal citation and quotations omitted). "[W]here the claimant's work capacity is significantly diminished beyond that caused by his exertional impairment[,] the application of the grid[ ] is inappropriate." (*Id.* at 605–06.) "Significantly diminish[ed]" means "the additional loss of work capacity beyond a negligible one or ... one that so narrows a claimant's possible range of work as to deprive him of a meaningful employment opportunity." (*Id.* at 606.) While the grid is not dispositive in cases where the claimant has nonexertional limits, it may still serve as a framework to guide the ALJ's decision. 20 C.F.R. § 404.1569a(d); *see also Paulino v. Astrue,* 08 Civ. 02813(CM)(AJP), 2010 U.S. Dist. LEXIS 77070, *29, 85–88 (S.D.N.Y. July 30, 2010) (using grid as framework and finding that substantial evidence supported the ALJ's finding of no disability at step five, in spite of ALJ's finding at step two that claimant had the "severe impairments [of] lumbar spine disorder, right ankle derangement, mental retardation, and depression").

***14** When evaluating a claimant with nonexertional limitations, the ALJ must also consider whether the range of work that a claimant could perform is so "significantly diminished" as to require the introduction of vocational testimony. *Bapp,* 802 F.2d at 606. In other words, if an ALJ determines that nonexertional limitations significantly diminish a claimant's ability to perform the full range of work suggested by the grid, then the ALJ should require the Commissioner to present either the testimony of a vocational expert or other similar evidence regarding the existence of jobs in the national economy for an individual with the claimant's limitations. *Bapp,* 802 F.2d at 603. "[T]he mere existence of a nonexertional impairment does not automatically require the production of a vocational expert nor preclude

reliance on the guidelines." *Id.* Rather, "application of the grid guidelines and the necessity for expert testimony must be determined on a case by case basis." *Id.,* at 605.

Here, Plaintiff argues that the ALJ already found that Plaintiff's mild mental retardation and asthma, both nonexertional limitations, were "severe impairments." (Pl. Reply Mem., at 11.) Yet the ALJ's actual finding, to which Plaintiff cites, was that "[t]he claimant has the following severe impairment: The claimant has multiple osteochondromatosis and mild mental retardation. Asthma (20 CFR 416.921 *et seq.*)." (R. at 13.) Thus, the ALJ found only that Plaintiff's bone condition, *in combination* with his mild mental retardation and asthma, created a severe impairment; [10] indeed, the ALJ expressly found that Plaintiff's mild mental retardation, by itself, did not cause more than "minimal limitation in [Plaintiff's] ability to perform basic mental work activities and [was] therefore *nonsevere."* (R. at 13 (emphasis added).) As for Plaintiff's asthma, the ALJ noted that Plaintiff smoked up to a pack of cigarettes a day and smoked marijuana at least three times a week and, at times, every day (R. at 17, 18)—evidence that suggested that Plaintiff's asthma was also not severe. In the end, the ALJ apparently accepted Dr. Akresh's conclusion that there were "mild limitations in [Plaintiff's] ability to be exposed to allergens secondary to his asthma." (R. at 18.) Overall, the ALJ's decision shows that he determined that Plaintiff's nonexertional limitations were only "mild" or "minimal," and, as described above (*see supra* at 3–9), the record contains substantial evidence to support this determination.

As the Court has no basis to set aside the ALJ's supported findings that Plaintiff's nonexertional limitations were "minor" or "minimal," there is also no basis for the Court to conclude that these limitations "significantly diminished" Plaintiff's ability to perform the full range of work suggested by the grid. *See Bapp,* 802 F.2d at 606. Given the ALJ's findings that Plaintiff's mild mental retardation did not "cause more than minimal limitation in [Plaintiff's] ability to perform basic mental work activities" (R. at 13), and that Plaintiff's asthma created only "mild limitations" (R. at 18), it was appropriate for the ALJ to rely on the grids. Further, for the same reason, testimony from a vocational expert was not necessary. In accordance with the grid, substantial evidence supports a finding of "no disability" at step five.

## *CONCLUSION*

***15** For the forgoing reasons, I respectfully recommend granting Defendant's motion for judgment on the pleadings (Dkt.10) and denying Plaintiffs cross-motion (Dkt.12).

Pursuant to 28 U.S.c. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from service of this Report to file written objections. See also Fed.R.Civ.P. 6. Such objections, and any responses to objections, shaH be filed with the Clerk of Court, with courtesy copies delivered to the chambers of the Honorable Barbara S. Jones, United States Courthouse, 500 Pearl Street, Room 1920, New York, N.Y. 10007, and to the chambers of the undersigned, United States Courthouse, 500 Pearl Street, Room 525, New York, N.Y. 10007. Any requests for an extension oftime for filing objections should be directed to Judge Jones. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS WILL RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. *See Thomas v. Arn,* 474 U.S. 140, 155 (1985); *IUE AFL–CIO Pension Fund v. Herrmann,* 9 F.3d 1049, 1054 (2d CiT.1993); *Frank v. Johnson,* 968 F.2d 298,300 (2d Cir.1992); *Wesolek v. Canadair Ltd.,* 838 F.2d 55,58 (2d CiT.1988); *McCarthy v. Manson,* 714 F .2d 234,237–38 (2d Cir.1983).

**All Citations**

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Footnotes

1 The background facts set forth herein are taken from the administrative record (referred to herein as "R."), which includes, *inter alia,* Plaintiff's medical records and the transcript of the November 18, 2008 hearing held before the ALJ, at which Plaintiff testified.

2 Plaintiff initially filed his claim on September 4, 2007, alleging disability beginning on June 15, 2005.

3 This condition is characterized by a presence of multiple benign tumors "consisting of projecting adult bone capped by cartilage projecting from the lateral contours of endocondral bones." (*See* Memorandum of Law in Support of the Commissioner's Motion for Judgment on the Pleadings, dated May 6, 2010 ("Def.Mem.") (Dkt.11) at 4 n. 2. (citing *Dorland's Illustrated Medical Dictionary* 1333 (30th ed.2003)).) "Endocondral bones" are bones, like the long bones of the arms and legs, that develop in, and replace, cartilage. *See http://www.medterms.com/script/main/art. asp? articlekey=10372.*

4 The Medical Research Council ("MRC") recommends the use of a 0–5 scale for measuring muscle strength; a grade of 5/5 means that the muscle contracts normally against full resistance. *See http:// www.medicalcriteria.c om/site/index.php? option=com.content & view =article & id=238#neuromrc & catid=64#neurology & Itemid=80 & lang=en.*

5 Section 12.05 in the appendix of 20 C.F.R. Pt. 404, subpart P, provides a diagnostic description and four sets of criteria for mental retardation. If a claimant's impairment satisfies the diagnostic description in the introductory paragraph and any one of the four sets of criteria, an impairment will meet the listing. 20 C.F.R. Pt. 404, Subpt. P, App. 1; *see also infra,* at 19–20.

6 The second heading under the ALJ's "Findings of Fact and Conclusions of Law" specifically states that "[t]he claimant has the following severe impairment: The claimant has multiple osteochondromatosis and mild mental retardation. Asthma (20 CFR 416 .921 *et seq.*)." (*Id.*)

7 The ALJ's statement, at step two of his analysis, that "[t]he claimant *has the following severe impairment:* The claimant has multiple osteochondromatosis and mild mental retardation. Asthma" (R. at 13 (emphasis added)), also likely means that the ALJ considered the osteochondromatosis to be a "significant impairment," within the meaning of Section 12.05(C). *See Baneky v. Apfel,* 997 F.Supp. 543, 547 (S.D.N.Y.1998) ("[T]he correct legal standard for determining whether an "additional" impairment is "significant" within the meaning of Section 12.05(C) is whether the "additional" impairment is "severe" within the meaning of 20 C.F.R. Section 404.1520(c).")

8 In this regard, the ALJ stated that he had considered the "four broad functional areas set out in the disability regulations for evaluating mental disorders [ ] in section 12.00C of the Listing of Impairments (20 CFR, Part 404, Subpart P, Appendix 1)" (R. 13.), which include activities of daily living, social functioning, concentration, persistence or pace, and episodes of decompensation. 20 CFR, Part 404, Subpart P, Appendix 1, 12.00(1)(C).

9 Defendant specifically points to the reports of Drs. Hoffman and Kamin, who each found that Plaintiff demonstrated "adequate adaptive functioning and socialization skills." (Def. Reply Mem., at 3 (citing R. at 188, 206).) In addition, Defendant emphasizes that "[t]he physicians who evaluated [P]laintiff properly relied on [P]laintiff's ability to: (1) take public transportation independently, (2) go to the library, (3) go grocery shopping, (4) take care of personal care activities, (5) shop for clothes, (6) do household chores, (7) handle money, and (8) get along with others." (Pl. Reply Mem., at 3–4 (citing R. at 27–28, 35, 147–53).)

10 *See* the ALJ's statements of the "Applicable Law": "At step two, the undersigned must determine whether the claimant has a medically determinable impairment that is "severe" *or a combination of impairments that is "severe."* (R. at 12 (emphasis added).)

2006 WL 399458
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United States District Court,
S.D. New York.

Julian VENTURA, Plaintiff,
v.
Jo Anne BARNHART, Commissioner
of Social Security Defendant.

No. 04 Civ. 9018(NRB).
|
Feb. 21, 2006.

**Attorneys and Law Firms**

Julian Ventura, New York, NY, for Plaintiff pro se.

John E. Gura, United States Attorney's Office, New York, NY, for Defendants.

MEMORANDUM AND ORDER

BUCHWALD, J.

***1** Plaintiff Julian Ventura ("plaintiff") brings this action pursuant to Section 1631(c)(3) of the Social Security Act ("the Act"), 42 U.S.C. § 1383(c)(3), challenging a final decision of the Commissioner of Social Security ("defendant" or the "Commissioner") denying his application for disability insurance benefits. Defendant has moved for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c). For the reasons set forth below, defendant's motion is granted.

*BACKGROUND*

On November 12, 2002, plaintiff filed an application for Supplemental Security Income ("SSI") disability insurance benefits in which he alleged to have been disabled since May 1, 2000. Tr. 52-54. [1] This application was denied on December 24, 2002, Tr. 37-38, 40-43, after which plaintiff requested a hearing before an administrative law judge ("ALJ"). Tr. 44-45. The hearing was held on April 22, 2004 before ALJ Mark S. Sochaczewsky. Tr. 22-36. On June 10, 2004, the ALJ issued a decision concluding that plaintiff was not disabled. Tr. 10-21. Specifically, the ALJ found that while plaintiff had medically determinable impairments that cause "some degree of work related functional limitations", Tr. 18, he retained the residual functional capacity ("RFC") [2] to perform the requirements of his past relevant work under 20 C.F.R. § 416.945. Tr. 19-20. This decision became the final decision of the Commissioner when the Appeals Council denied review on August 12, 2004. Tr. 3-7. This action followed. [3]

*FACTS*

Plaintiff was born on March 15, 1958, in the Dominican Republic and was forty-six years old at the time of the April 2004 hearing. Tr. 17, 52. Plaintiff came to the United States in 1977 and currently lives in upper Manhattan. Tr. 25-26, 37. Plaintiff indicated that he was educated through the second or third grade and could not read or speak English. Tr. 26, 55.

Plaintiff's relevant past work experience consists of working at a fabric-cutting factory and a restaurant. Tr. 27-28. Plaintiff worked for four years as a floor-person at a fabric-cutting factory, where he passed on work from one person to another. Tr. 27-28. This position required plaintiff to walk or stand for most of the workday and carry objects weighing about ten pounds. Tr. 28, 57. Prior to this job, plaintiff worked as a cleaner at a restaurant, where he lifted no heavy objects. Tr. 28. [4]

A. Plaintiff's Impairments

Plaintiff suffers from hepatitis B, hypertension, and hypercholesterolemia. Tr. 20, 80. At the hearing, plaintiff testified that he experienced severe back and shoulder pain and abdominal swelling due to hepatitis. Tr. 29, 32. Plaintiff testified that he was not taking any medication for pain although previously he had taken pain medication for one month, which relieved his pain for four to five hours. Tr. 29-30. Plaintiff indicated that his hypertension was controlled by medication but that he did not take any medication for his hepatitis. Tr. 29, 104, 106.

***2** Plaintiff testified that he spent his days lying down or watching television and did not cook, clean, shop, or do any housework. Tr. 33. He further testified that he could lift five to ten pounds, walk two to three blocks, stand for

about a half-hour, and sit for twenty to thirty minutes. Tr. 34.

B. Medical Evidence

On January 5, 2001, plaintiff was admitted to Bronx Lebanon Hospital for one day of testing after blood tests revealed abnormal liver function tests ("LFT's"). Tr. 73-75. Plaintiff's reported medical history included hepatitis B and C. Tr. 73. A liver biopsy revealed increased iron deposits but the examining physician ruled out "hemochromatosis/ siderosis (primary or secondary iron overload) ." Tr. 75. The physician suggested "further evaluation (iron studies) and clinical correlation," Tr. 75, and gave a principal diagnosis of abnormal LFT's. Tr. 74.

On June 13, 2002, an abdominal sonogram detected a mildly inhomogeneous liver. Tr. 76-77. Plaintiff's other structures were "grossly within normal limits." Tr. 76.

In a report dated November 16, 2002, plaintiff's treating physician, Dr. Echevarria, gave a diagnosis of hypertension, hypercholesterolemia, and abnormal LFT's. Tr. 80. Dr. Echevarria observed that plaintiff was asymptomatic in his last visit in September 2002 and that he had no complaints prior to that visit. Tr. 81, 84. She further opined that plaintiff had no limitations in lifting, carrying, standing, walking, sitting, pushing, or pulling. Tr. 83.

On December 2, 2002, plaintiff was examined by Dr. Antonio De Leon, a consulting internal medicine physician. Tr. 87-90. Dr. De Leon's impression was hypertension and chest pains. Dr. De Leon noted that the plaintiff's abdomen was soft and non-tender, with no masses, organomegaly,[5] or external hernia. Tr. 87. Dr. De Leon observed that plaintiff's station and gait were normal, and that he had no difficulty transferring from a seated to standing position or getting on and off the examination table. *Id.* Plaintiff was able to tandem walk and to walk on the balls and heels of his feet. Tr. 88. Dr. De Leon also found that plaintiff's extremities exhibited no abnormalities. Tr. 87. Plaintiff's spine and joints had full range of motion without any evidence of deformities, swelling, warmth, or tenderness. Tr. 88. Plaintiff's heart tones were regular; no murmurs or gallops were detected. Tr. 87. A neurological examination revealed normal motor power, sensation, and reflexes. Tr. 88. The electrocardiogram ("EKG") was unremarkable. Tr. 88-90. He concluded that the plaintiff had no limitations in sitting, and only mild limitations in lifting, carrying, walking, and standing due to hypertension and chest pains. Tr. 88.

On December 16, 2002, Dr. David Daly, a state agency medical consultant, reviewed the medical evidence and concluded that the plaintiff did not have a severe impairment or any exertional limitations. Tr. 91. He also advised against purchasing an exercise stress test given the absence of objective evidence of coronary artery disease. *Id.*

***3** An abdominal MRI taken on January 21, 2003 showed that plaintiff's liver was normal in size, contour, and signal intensity. Tr. 98. In addition, the pancreas, adrenal glands, and spleen were normal. *Id.*

In a September 2, 2003 report,[6] Dr. Animita Saha assessed plaintiff's ability to perform work-related activities. Tr. 99-102. Dr. Saha opined that plaintiff's ability to lift and carry was limited to ten pounds. Tr. 99. In addition, plaintiff's ability to push, pull, reach and to perform gross manipulations was limited due to shoulder pain. Tr. 100-101. However, Dr. Saha concluded that plaintiff was not limited in his ability to stand, walk, or sit. Tr. 99-100. He further opined that plaintiff could climb, balance, kneel, and stoop occasionally but that he could not crouch or crawl. *Id.*

## *DISCUSSION*

Standard of Review

Under the Act, a person is entitled to Social Security disability benefits when he or she is unable "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 twelve months." 42 U.S.C. § 423(d)(1)(A), 1382c(a)(3)(A); *Melville v. Apfel,* 198 F.3d 45, 50 (2d Cir.1999). Such a "physical or mental impairment" must be supported by "medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. §§ 423(d)(3), 1382c(a)(3)(D). Determinations of severity are based on objective medical facts, diagnoses or medical opinions inferable from these facts, subjective complaints of pain or disability, and educational background, age, and work

experience. *Mongeur v. Heckler,* 722 F.2d 1033, 1037 (2d Cir.1983); *Fishburn v. Sullivan,* 802 F.Supp. 1018, 1023 (S.D.N.Y.1992).

The scope of judicial review in this context is limited. The Commissioner's decision is deemed conclusive unless it is not supported by substantial evidence in the record or is based on an erroneous legal standard. 42 U.S.C. § 405(g); *see Rosa v. Callahan,* 168 F.3d 72, 77 (2d Cir.1999); *Balsamo v. Chater,* 142 F.3d 75, 79 (2d Cir.1998). Substantial evidence has been defined as "more than a mere scintilla." *Richardson v. Perales,* 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 229 (1938)); *Schaal v. Apfel,* 134 F .3d 496, 501 (2d Cir.1998). If substantial evidence supports the Commissioner's decision, then it must be upheld, even if substantial evidence also supports the contrary result. *See Alston v. Sullivan,* 904 F.2d 122, 126 (2d Cir.1990) ("Where there is substantial evidence to support either position, the determination is one to be made by the factfinder.").

To facilitate our review of the Commissioner's findings, we will briefly summarize the standard that applies to plaintiff's claim.

The Five-Step Analysis

The Second Circuit has established a five-step analysis to be followed by the Commissioner for determining whether a plaintiff is eligible for disability benefits under 20 C.F.R. § 404.920(a)(4). First, the Commissioner should consider whether the plaintiff is currently engaged in substantial gainful activity. If he is not, the Commissioner next should consider whether the plaintiff has a "severe impairment" which significantly limits his physical or mental ability to do basic work activities. If the plaintiff has such an impairment, the third step requires the Commissioner to determine whether the impairment is listed in 20 C.F.R. Pt. 404, Subpt. P, App. 1 of the regulations ("Appendix 1"). If the impairment is listed, disability is presumed, and the plaintiff is considered unable to perform substantial gainful activity. Otherwise, the Commissioner must proceed to the fourth step and determine whether the plaintiff retains the RFC to perform his past work. If he is unable to perform his past work, the final step requires the Commissioner to determine whether there is other work within the national economy which the plaintiff is qualified to perform. 20 C.F.R. § 416.920(a)(4); *DeChirico v. Callahan,* 134 F .3d 1177, 1179-80 (2d Cir.1998) (citing *Berry v. Schweiker,* 675 F.2d 464, 467 (2d Cir.1982).

***4** For each of the first four steps, the plaintiff bears the burden of proof; the Commissioner bears the burden of proof on only the last step. *DeChirico,* 134 F.3d at 1180 (citing *Berry,* 675 F.2d at 467); *see also Melville,* 198 F.3d at 51.

The ALJ's Findings

The ALJ denied plaintiff's claim at the fourth step of the above analysis. The ALJ determined that, while the plaintiff suffered from a severe impairment or combination of impairments, he retained the RFC to return to his past work. Accordingly, the ALJ ruled that plaintiff was not disabled within the meaning of the Act.

At step one, the ALJ found that plaintiff had not engaged in substantial gainful activity since November 12, 2002. Tr. 17, 20.

At step two, the ALJ examined whether plaintiff had an impairment or combination of impairments defined as "severe" under 20 C.F.R. § 416.920(c).[7] Tr. 18, 20. Based on medical evidence in the record, the ALJ determined that plaintiff's hepatitis, hypertension, and hypercholesterolemia qualified as severe within the meaning of the regulations. *Id.*

However, at step three, the ALJ found that plaintiff's impairments did not meet or medically equal one of the listed impairments in Appendix 1. Tr. 18, 20. As required by the five-step analysis framework, the ALJ proceeded to step four to determine whether plaintiff retained the RFC to perform the requirements of his past relevant work. After examining plaintiff's medical history in the record, the ALJ concluded that plaintiff's impairments, while causing some functional limitations, did not "prevent him from doing at least light work" as defined by 20 C.F.R. § 416.967(b).[8] Tr. 19-20. Specifically, the ALJ found that plaintiff had a "residual functional capacity to lift and carry objects weighing up to [twenty] pounds occasionally and [ten] pounds frequently, and sit, stand and/or walk for up to six hours each, with normal breaks, in an eight hour workday." Tr. 20. Moreover, the ALJ found that plaintiff's subjective allegations of his limitations were not credible to the extent alleged. Tr. 20. Lastly, the ALJ examined plaintiff's previous work, and determined that

his "past relevant work as a floorperson did not require the performance of work-related activities precluded by his residual functional capacity." *Id.* [9]

Accordingly, the ALJ concluded that plaintiff was not eligible for disability insurance benefits under the Act. Tr. 21.

Review of the ALJ's Findings

Based on our review of the record, we find substantial evidence to support the ALJ's determination that plaintiff was capable of light work and therefore, not disabled within the meaning of the Act.

Plaintiff's cumulative medical records demonstrate that his various conditions did not, even in combination, result in functional limitations so severe as to prevent him from performing his past work. Plaintiff's hypertension could only be characterized as mild [10] and was controlled by medication. [11] Tr. 29. In addition, although plaintiff alleged that he experienced abdominal swelling due to hepatitis, no laboratory or physical examinations corroborated his allegations. An abdominal sonogram in June 2002 detected a mildly inhomogeneous liver but it appears that no follow-up treatment was required. Tr. 76-77. An abdominal MRI taken 6 months later showed that plaintiff's liver was normal in size, contour, and signal intensity. Tr. 98. In addition, Dr. Echevarria, who had been treating plaintiff since July 2001, reported that plaintiff exhibited no symptoms during his last visit in September 2002 and that he had no complaints prior to that visit. Tr. 81, 84. Dr. De Leon also did not find any abnormalities in plaintiff's EKG or during his physical examination. Finally, plaintiff's claims of severe back and shoulder pain and migraine headaches were further unsubstantiated by medical evidence. In short, plaintiff failed to carry his burden of proving that his impairments were severe enough to constitute a disability under the Act.

A. Plaintiff's Residual Functional Capacity

***5** Substantial evidence supports the ALJ's finding that plaintiff retained the RFC to perform light work. Specifically, the ALJ concluded that plaintiff was able to "sit, stand and walk for up to six hours (with normal breaks) in an eight hour workday, and lift, carry, push and/or pull objects weighing up to 10 pounds frequently and 20 pounds occasionally." Tr. 18. This finding is supported by Dr. Echevarria's opinion that plaintiff had no work-related limitations, Tr. 83-84, as well as Dr. De Leon's conclusion that plaintiff had no limitations in sitting and only mild limitations in lifting, carrying, walking, and standing. Tr. 88. [12]

The ALJ did consider Dr. Saha's evaluation that plaintiff's lifting or carrying ability was limited to objects weighing less than ten pounds. Tr. 19, 99-100. However, the ALJ decided against assigning controlling weight to the opinion of Dr. Saha, a treating source, because it was not supported by any clinical findings or other medical evidence, and because it was inconsistent with the opinion of Dr. Echevarria, another treating source. Tr. 19. We find that the ALJ's decision in this regard was not erroneous. Regulations provide that, in evaluating medical source opinions about a claimant's impairment, the Commissioner gives controlling weight to opinions from treating sources only if they are well supported by medically acceptable clinical and laboratory diagnostic techniques and are not inconsistent with other substantial evidence of record. 20 C.F.R. § 416.927(d)(2); *Snell v. Apfel,* 177 F.3d 128, 133 (2d Cir.1999). The record confirms that Dr. Saha's assessment was not supported by clinical or laboratory diagnostic findings, Tr. 99-102, and was inconsistent with the opinions of two other medical sources and objective medical evidence. Therefore, the ALJ's treatment of Dr. Saha's assessment comported with the relevant regulations.

Moreover, Dr. Saha's opinion is not wholly inconsistent with the ALJ's conclusion that plaintiff could perform his past work because, according to plaintiff's testimony, his job involved mostly standing and moving objects weighing "about" ten pounds. Tr. 28. Although Dr. Saha found that plaintiff was limited in his ability to lift and carry, he opined that plaintiff had no limitations with respect to walking or standing. Tr. 99.

In assessing plaintiff's RFC, the ALJ also evaluated the credibility of plaintiff's subjective complaints of pain but found them to be generally unsupported by the evidence. Tr. 19. When evaluating subjective allegations of pain, the ALJ must assess whether medical evidence shows "the existence of a medical impairment ... which could reasonably be expected to produce the pain or other symptoms alleged." 42 U.S.C. § 423(d)(5)(A). If there is "conflicting evidence about a [plaintiff's] pain, the ALJ

  

must make credibility findings." *Snell,* 177 F.3d at 135. As a fact-finder, the ALJ can accept or reject testimony, but the ALJ's findings must be consistent with the evidence. *See Williams on Behalf of Williams v. Bowen,* 859 F.2d 255, 260-61 (2d Cir.1988). When the alleged symptoms suggests greater severity of impairment than the objective medical evidence alone, the ALJ considers all the evidence submitted, and considers "the extent to which there are any conflicts between [claimant's] statements and the rest of the evidence." 20 C.F.R. § 416.929(c)(4).

***6** In assessing the credibility of plaintiff's subjective pain, the ALJ noted that plaintiff had used pain medication in the past for one month, which relieved his symptoms for four to five hours, but had discontinued its use for no apparent reason. Tr. 19, 30. The ALJ also reviewed the medical evidence which failed to locate the cause of pain plaintiff alleged. Based on our review of the record, we find substantial evidence in support of the ALJ's credibility finding. Accordingly, the ALJ properly discounted plaintiff's subjective allegations of pain.

B. Past Relevant Work

Pursuant to the Social Security Act, plaintiff bears the burden of demonstrating that "his physical or mental impairment or impairments are of such severity that he is ... unable to do his previous work...." 42 U.S.C. 1382c(a)(3)(B); *See Parker v. Harris,* 626 F.2d 225, 230 (2d Cir.1980). At his hearing, plaintiff testified that his most recent job required that he walk or stand for most of the workday and carry objects weighing about ten pounds. [13] Tr. 27-28. However, plaintiff has produced virtually no evidence to support his contention that he was unable to perform his past work in the fabric-cutting factory. Instead, the medical evidence in the record strongly supports the contrary finding by the ALJ. Although plaintiff is undeniably hampered by his difficulty with the English language and his pro se status, his statement that he "can't work," Tr. 35, is simply not enough to refute the substantial evidence that supports the ALJ's determination. Based upon our review of the record, we find that plaintiff has failed to meet his burden, and moreover, that the ALJ's findings are supported by substantial evidence. [14]

## *CONCLUSION*

Because we find that substantial evidence in the record supports the Commissioner's determination that plaintiff is not disabled and because the Commissioner did not apply an erroneous legal standard, we hereby affirm the decision to deny plaintiff benefits. Defendant's motion for judgment on the pleadings is granted. The Clerk of the Court is respectfully requested to close this case.

SO ORDERED.

**All Citations**

Not Reported in F.Supp.2d, 2006 WL 399458

Footnotes

1 "Tr." refers to the administrative transcript filed with defendant's answer in accordance with 42 U.S.C. § 405(g).

2 The term "residual functional capacity" is defined as the most an individual can still do after considering the effects of physical and/or mental limitations on the individual's ability to perform work-related tasks. 20 C.F.R. § 416.945.

3 Plaintiff's complaint includes a new allegation that he suffered a stroke and underwent surgery in 2004. Compl. 1. The subject of this review is the ALJ's decision which found that plaintiff was not disabled from his application date of November 12, 2002 through the date of the ALJ's decision of June 10, 2004. An SSI claim remains in effect only through the date of the ALJ's decision. 20 C.F.R. § 416.330. Despite our affirmance of the Commissioner's decision, nothing prevents plaintiff from reapplying for benefits in the future, if he remains covered, on the ground that his medical condition has changed since the Commissioner's last determination. See 20 C.F.R. § 416.330(b).

4 There are several inconsistencies in the record with respect to plaintiff's background and work history. At the April 2004 hearing, plaintiff testified that he worked at the fabric-cutting factory for four years. Tr. 27-28. In his initial application for benefits, plaintiff stated he had worked at a textile factory from 1997 to 1999. Tr. 57. In addition, although his application indicates that plaintiff lifted 25-50 pounds in this position, Tr. 57, he testified that he only lifted ten pounds. Tr. 27-28. Finally, plaintiff stated on the application that he had completed the eighth grade, Tr. 62, but he testified that he had completed only the third grade. Tr. 26. These inconsistencies do not affect our conclusion that the ALJ's findings were based on substantial evidence.

  

5 Organomegaly is an enlargement of the internal organs. *Dorland's Illustrated Medical Dictionary,* 1190, 1831, 1832 (28th ed.1994).

6 Although the date on the record is actually listed as Sept. 2, 2004, Tr. 102, we note that this must be mistaken because the ALJ's decision, citing Dr. Saha's report, was issued on June 10, 2004. Tr. 10. Furthermore, the "Recent Medical Treatment" form submitted by plaintiff to the state agency indicates that Dr. Saha prescribed plaintiff three medications on Dec. 1, 2003.

7 An impairment is not severe if it does not significantly limit an individual's physical or mental ability to do basic work activities. 20 C.F.R. 416.920(c).

8 Light work requires lifting no more than twenty pounds at a time with frequent lifting and carrying of objects weighing up to ten pounds. Even though the weight lifted may be very little, a job is in the light category when it involves a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. 20 C.F.R. § 416.967(b).

9 Because the ALJ found plaintiff was capable of performing his past relevant work, he did not need to determine whether, based on plaintiff's age, education, work skills, and functional capacity, he could perform other types of work. However, the ALJ proceeded to the final step of the five-step evaluation and determined that plaintiff was a younger individual with a limited education. Tr. 19-20. These factors, in combination with plaintiff's RFC for light work, corresponded to Rule 202.16 of the medical-vocational guidelines at 20 C.F.R. Pt. 404, Subpt. P, App. 2, which directs a finding that an individual with this profile is not disabled. Tr. 20; 20 C.F.R. § 416.969.

10 Mild (stage 1) hypertension is characterized by a systolic reading of 140-159 or a diastolic reading of 90-99. *The Merck Manual of Diagnosis and Therapy,* 1633 tbl.199-2 (17th ed.1999). Plaintiff's blood pressure readings of 110/90, Tr. 80, and 120/90, Tr. 87, therefore are indicative of only mild hypertension.

11 Dr. Echevarria prescribed plaintiff Norvasc, Toprol, and Lotensin to treat hypertension. Tr. 61, 81. Plaintiff testified that medications controlled his hypertension. Tr. 29.

12 Dr. De Leon's conclusion was itself substantiated by a normal neurological examination and his observations of plaintiff having no difficulty performing basic movements. Tr. 87-88.

13 As we noted earlier, *supra* n. 4, plaintiff's testimony directly contradicted his statement in his application that he lifted or carried objects weighing 25-50 pounds. Tr. 57. We see no reason why the ALJ was not entitled to rely on plaintiff's testimony.

14 Even if we were to reverse this portion of the ALJ's decision, we still would not reverse the Commissioner's decision to deny plaintiff benefits because the ALJ found that plaintiff was able to perform other jobs existing in significant numbers in the national economy. Tr. 19-20. The ALJ reached this conclusion by applying the medical-vocational guidelines listed at 20 C.F.R. Pt. 404, Subpt. P, App. 2. *Id.; see supra* n. 9. Reliance on medical-vocational guidelines has been affirmed by the Supreme Court. *Heckler v. Campbell,* 461 U.S. 458, 467 (1983).

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United States District Court,
N.D. New York.

Sandra A. WALTERS, Plaintiff,
v.
Michael J. ASTRUE, Commissioner
of Social Security, Defendant.

No. 11–CV–640 (VEB).
|
Feb. 15, 2013.

**Attorneys and Law Firms**

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Sixtina Fernandez, John M. Kelly, Social Security Administration, Office of Regional General Counsel, New York, NY, for Defendant.

## DECISION AND ORDER

VICTOR E. BIANCHINI, United States Magistrate Judge.

## I. INTRODUCTION

***1** In April of 2007, Plaintiff Sandra A. Walters applied for supplemental security income ("SSI") benefits and disability insurance benefits ("DIB") under the Social Security Act. Plaintiff alleges that she has been unable to work since April of 2005 due to physical impairments. The Commissioner of Social Security denied Plaintiff's applications.

Plaintiff, by and through her attorneys, Olinsky Law Group, Karen S. Southwick, Esq., of counsel, bring this action seeking judicial review of the Commissioner's decision pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). The parties, by and through their respective counsel, consented to the jurisdiction of a United States Magistrate Judge on February 10, 2012. (Docket No. 15).

## II. BACKGROUND

The relevant procedural history may be summarized as follows:

On April 24, 2007, and April 26, 2007, Plaintiff applied for SSI benefits and DIB, alleging that she had been unable to work since April 15, 2005. (T at84–85, 93, 106, 514). [1] The applications were denied initially and Plaintiff timely requested a hearing before an Administrative Law Judge ("ALJ"). A hearing was held in Syracuse, New York, on December 23, 2009, before ALJ Robert E. Gale. Plaintiff appeared with her attorney and testified. (T at 10).

On March 26, 2010, ALJ Gale issued a written decision finding that Plaintiff was not disabled within the meaning of the Social Security Act during the relevant time period and denying Plaintiff's claims for benefits. (T at 7–18). The ALJ's decision became the Commissioner's final decision on April 8, 2011, when the Appeals Council denied Plaintiff's request for review. (T at 1–4).

Plaintiff, by and through her attorneys, timely commenced this action by filing a Complaint on June 8, 2011. (Docket No. 1). The Commissioner interposed an Answer on November 30, 2011. (Docket No. 8). The parties, through their respective attorneys of record, consented to the jurisdiction of a United States Magistrate Judge on February 10, 2012. (Docket No. 16). Plaintiff filed a Brief on March 2, 2012. (Docket No. 16). The Commissioner filed a Brief on May 16, 2012. (Docket No. 20).

Plaintiff requests that this case be remanded for the calculation of benefits. The Commissioner agrees that a remand is warranted, but argues that the remand should be for the purpose of rehearing and reconsideration of certain issues (as opposed to the calculation of benefits).

Pursuant to General Order No. 18, issued by the Chief District Judge of the Northern District of New York on September 12, 2003, this Court will proceed as if both parties had accompanied their briefs with a motion for judgment on the pleadings. [2]

For the reasons set forth below, the Commissioner's motion is granted, Plaintiff's motion is denied, and this case is remanded for further administrative proceedings.

  

## III. DISCUSSION

### A. Legal Standard

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), 1383(c)(3); *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. *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."); *see Grey v. Heckler,* 721 F.2d 41, 46 (2d Cir.1983); *Marcus v. Califano,* 615 F.2d 23, 27 (2d Cir.1979).

***2** "Substantial evidence" is evidence that amounts to "more than a mere scintilla," and it 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, 28 L.Ed.2d 842 (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).

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).

The Commissioner has established a five-step sequential evaluation process to determine whether an individual is disabled as defined under the Social Security Act. *See* 20 C.F.R. §§ 416.920, 404.1520. The United States Supreme Court recognized the validity of this analysis in *Bowen v. Yuckert,* 482 U.S. 137, 140–142, 107 S.Ct. 2287, 96 L.Ed.2d 119 (1987), and it remains the proper approach for analyzing whether a claimant is disabled. [3]

While the claimant has the burden of proof as to the first four steps, the Commissioner has the burden of proof on the fifth and final step. *See Bowen,* 482 U.S. at 146 n. 5; *Ferraris v. Heckler,* 728 F.2d 582 (2d Cir.1984).

The final step of the inquiry is, in turn, divided into two parts. First, the Commissioner must assess the claimant's job qualifications by considering his or her physical ability, age, education, and work experience. Second, the Commissioner must determine whether jobs exist in the national economy that a person having the claimant's qualifications could perform. *See* 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. §§ 416.920(g); 404.1520(g); *Heckler v. Campbell,* 461 U.S. 458, 460, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983).

### B. Analysis

#### 1. Commissioner's Decision

The ALJ determined that Plaintiff met the insured status requirements of the Social Security Act through December 31, 2010, and had not engaged in substantial gainful activity since April 15, 2005, the alleged onset date. (T at 12).

The ALJ found that Plaintiff had the following impairments considered "severe" under the applicable Social Security Regulations (the "Regulations"): tarsal tunnel syndrome and lumbar radiculopathy. (T at 12). However, the ALJ determined that Plaintiff's medically determinable impairments did not meet or equal one of the impairments listed in Appendix I of the Regulations (the "Listings"). (T at 13).

***3** After reviewing the medical evidence, the ALJ concluded that Plaintiff retained the residual functional capacity to perform sedentary work as defined in 20 C.F.R. § 404.1567(a) and 416.967(a), except that she was limited to occasional bending. (T at 13–17). The ALJ found that Plaintiff could perform her past relevant work as a clerk, as that job did not require the performance of work-related duties precluded by Plaintiff's residual functional capacity. (T at 17).

Accordingly, the ALJ determined that Plaintiff had not been under a "disability," as that term is defined under the Act, from the alleged onset date (April 15, 2005) through the date of the ALJ's decision (March 26, 2010), and was therefore not entitled to benefits. (T at 18). As noted above, the ALJ's decision became the Commissioner's final decision on April 8, 2011, when the Appeals Council denied Plaintiff's request for review. (T at 1–4).

**2. Remand**

"Sentence four of Section 405(g) provides district courts with the authority to affirm, reverse, or modify a decision of the Commissioner 'with or without remanding the case for a rehearing.' " *Butts v. Barnhart,* 388 F.3d 377, 385 (2d Cir.2002) (quoting 42 U.S.C. § 405(g)). Remand is "appropriate where, due to inconsistencies in the medical evidence and/or significant gaps in the record, further findings would ... plainly help to assure the proper disposition of [a] claim." *Kirkland v. Astrue,* No. 06 CV 4861, 2008 WL 267429, at *8 (E.D.N.Y. Jan.29, 2008).

In the Second Circuit a remand for the sole purpose of calculating benefits is the appropriate remedy if "the record provides persuasive proof of disability and a remand for further evidentiary proceedings would serve no purpose." *Parker v. Harris,* 626 F.2d 225, 235 (2d Cir.1980); *see also Butts v. Barnhart,* 388 F.3d 377, 385–86 (2d Cir.2004) (remand for calculation of benefits warranted where there is "no apparent basis to conclude that a more complete record might support the Commissioner's decision....") (quoting *Rosa v. Callahan,* 168 F.3d 72, 83 (2d Cir.1999)); *Johnson v. Bowen,* 817 F.2d 983, 986 (2d Cir.1987) (remand for calculation of benefits appropriate where record "compel[s] but one conclusion under the ... substantial evidence standard.").

**a. ALJ's Failure to Provide Function–by–Function Assessment**

The Commissioner acknowledges that the ALJ's decision was deficient and concedes that a remand is necessary (Docket No. 20, at p. 2). In particular, as the Commissioner recognizes, the ALJ erred by failing to provide a function-by-function assessment of the Plaintiff's residual functional capacity ("RFC").

Pursuant to the Social Security Regulations, an ALJ's assessment of the claimant's RFC must include a function-by-function analysis of the claimant's functional limitations or restrictions and an assessment of the claimant's work-related abilities on a function-by-function basis. With regard to physical limitations, this means the ALJ must make a function by function assessment of the claimant's ability to sit, stand, walk, lift, carry, push, pull, reach, handle, stoop, or crouch. 20 C.F.R. § 404.1513(c)(1); §§ 404.1569a(a), 416.969a(a); *Martone v. Apfel,* 70 F.Supp.2d 145, 150 (N.D.N.Y.1999). Once the function-by-function analysis is completed, the RFC may be expressed in terms of exertional levels of work, *e.g.,* sedentary, light, medium, heavy, and very heavy. *Hogan v. Astrue,* 491 F.Supp.2d 347, 354 (W.D.N.Y.2007).

***4** The ALJ in this case did not provide a function-by-function analysis with regard to Plaintiff's physical RFC. Rather, he simply expressed the RFC in terms of an exertional level of work (*i.e.* sedentary work). (T at 13). The Second Circuit has not yet decided whether the failure to provide a function-by-function assessment of a claimant's RFC is *per se* grounds for a remand.

At least three circuit courts of appeal have concluded that a function-by-function analysis is desirable, but not an absolute requirement if the rationale for the ALJ's RFC assessment can be readily discerned. *See Bayliss v. Barnhart,* 427 F.3d 1211, 1217 (9th Cir.2005) ("Preparing a function-by-function analysis for medical conditions or impairments that the ALJ found neither credible nor supported by the record is unnecessary."); *Depover v. Barnhart,* 349 F.3d 563, 567 (8th Cir.2003) (an ALJ does not fail in his or her duty to assess a claimant's RFC on a function-by-function basis merely because the ALJ does not address all areas regardless of whether a limitation is found); *Delgado v. Comm'r of Soc. Sec.,* 30 F. App'x 542, 547 (6th Cir.2002). [4]

District courts in the Second Circuit have reached conflicting conclusions. *See, e.g., Wood v. Comm'r of Soc. Sec.,* No. 06–CV–157, 2009 WL 1362971, at *6 (N.D.N.Y. May 14, 2009) (collecting cases); *McMullen v. Astrue,* 05–CV–1484, 2008 WL 3884359, at *6 (N.D.N.Y. Aug.18, 2008); *Brown v. Barnhart,* No. 01–CV–2962, 2002 WL 603044, at *5–7 (E.D.N.Y.Apr.15, 2002) ("In sum, because the ALJ did not properly apply the legal standard in Social Security Ruling 96–8p for assessing residual functional capacity, I cannot properly conclude that his finding that the claimant retained the residual functional capacity to do her past work was supported

by substantial evidence."); *Matejka v. Barnhart,* 386 F.Supp.2d 198, 208 (W.D.N.Y.2005) ("The ALJ's decision did not address the plaintiff's ability to sit, stand, or walk ... Since the ALJ failed to make a function-by-function analysis of plaintiff's RFC, his determination that she had the RFC for sedentary work is not supported by substantial evidence."); *but see Casino–Ortiz v. Astrue,* 2007 WL 2745704, at *13 (S.D.N.Y. Sept.21, 2007) (sustaining ALJ's decision, notwithstanding failure to provide function-by-function analysis); *Novak v. Astrue,* No. 07 Civ. 8435, 2008 WL 2882638, at *3 & n. 47 (S.D.N.Y. July 25, 2008) ("The A.L.J. must avoid perfunctory determinations by considering all of the claimant's functional limitations, describing how the evidence supports her conclusions, and discussing the claimant's ability to maintain sustained work activity, but she need not provide a narrative discussion for each function."); *but see Martin v. Astrue,* No. 05–CV–72, 2008 WL 4186339, at *16 (N.D.N.Y. Sept. 9, 2008) (declining to remand, despite finding that the ALJ grouped the functions in his function-by-function analysis because "treating the activities separately would not have changed the result of the RFC determination").

***5** This Court has concluded that, in limited circumstances, the ALJ's failure to provide a function-by-function analysis might constitute harmless error,[5] provided the absence of the analysis does not frustrate meaningful review of the ALJ's overall RFC assessment *See Goodale v. Astrue,* No. 11–CV–821, 2012 WL 6519946, at *7 (N.D.N.Y. Dec. 13, 2012). However, with that said, this Court has also taken great care to emphasize that the function-by-function assessment is an important regulatory requirement (which, ultimately, is designed to ensure that careful consideration is given to any and all of the claimant's work-related limitations) that should not (and, indeed, may not) be lightly set aside or in any way treated casually. *See Desmond v. Astrue,* No. 11–CV–0818, 2012 WL 6648625, at *6 n. 8 (N.D.N.Y. Dec. 20, 2012).

In the present case, the ALJ's failure to provide a function-by-function assessment frustrates meaningful review and requires a remand. Social Security Ruling 96–9p provides, in pertinent part, as follows:

> The ability to perform the full range of sedentary work requires the ability to lift no more than 10 pounds at a time and occasionally to lift or carry articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one that involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. "Occasionally" means occurring from very little up to onethird of the time, and would generally total no more than about 2 hours of an 8–hour workday. Sitting would generally total about 6 hours of an 8–hour workday. Unskilled sedentary work also involves other activities, classified as "nonexertional," such as capacities for seeing, manipulation, and understanding, remembering, and carrying out simple instructions.

Dr. Carrie Jones, Plaintiff's treating physician, opined that Plaintiff was "appropriate for a sedentary position and occasional 10 pounds lifting restriction." (T at 379, 417). However, Dr. Jones did not feel that Plaintiff could return to her "prior position." (T at 379).

Dr. John Cambareri, Plaintiff's treating orthopedic surgeon, indicated that Plaintiff could perform "light duty work" and was "temporarily disabled from her job." (T at 239). Dr. Martin Schaeffer, a treating physician, opined that Plaintiff was limited to "no weights greater than 10–pounds and no repetitious type bending or lifting ...." (T at 476).

The ALJ afforded "great weight" to these opinions.[6] (T at 17). However, the ALJ appears not to have realized that the treating providers did not expressly indicate whether, for example, Plaintiff could sit for prolonged periods or engage in the occasional walking or standing necessary to perform sedentary work. Although Dr. Jones and Dr. Cambareri used generic descriptions related to Plaintiff's RFC ("sedentary" and "light duty" respectively), it is not clear how they defined those terms and there is no indication as to whether the doctors' definitions are co-extensive with the definitions found in the Social Security Regulations.

  

***6** This is precisely the sort of gap the function-by-function requirement is designed to avoid. In other words, by requiring the ALJ to carefully consider each of the various functional limitations, the function-by-function requirement works to prevent the ALJ from making assumptions, reaching conclusions not supported by the evidence, or otherwise failing to recognize gaps in the medical record.

Dr. Myra Shayevitz, the consultative examiner, opined that "sitting in a prolonged manner is uncomfortable" for Plaintiff and "there may be limitations which are significant in any prolonged sitting, standing, or walking." (T at 440). The ALJ discounted this assessment as inconsistent with the treating physicians' opinions. (T at 17). However, for the reasons outlined above, the treating physicians did not actually provide functional assessments concerning prolonged sitting, standing, or walking. The general references to "sedentary" or "light duty" work were not sufficient grounds upon which to discount other evidence, including the opinion of a consultative examiner, indicating limitations inconsistent with the requirements of sedentary work. Before discounting Dr. Shayevitz's opinion, [7] the ALJ should have re-contacted the treating physicians and requested clarification of their opinions concerning Plaintiff's functional limitations. After further development of the record in this regard, the ALJ should be sure to perform the function-by-function assessment required under the Regulations.

**b. Past Relevant Work**

In addition, as the Commissioner acknowledges, the ALJ's past relevant work analysis was flawed. "[I]n the fourth stage of the SSI inquiry, the claimant has the burden to show an inability to return to her previous specific job and an inability to perform her past relevant work generally." *Jasinski v. Barnhart,* 341 F.3d 182, 185 (2d Cir.2003) (citing SSR 82–62). A claimant is not disabled if she can perform her past relevant work, either as she actually performed it, or as it is generally performed in the national economy. *See* SSR 82–61; *Jock v. Harris,* 651 F.2d 133, 135 (2d Cir.1981) (noting that "the claimant has the burden to show an inability to return to her previous specific job and an inability to perform her past relevant work generally").

"Determination of the claimant's ability to perform past relevant work requires a careful appraisal of (1) the individual's statements as to which past work requirements can no longer be met and the reason(s) for his or her inability to meet those requirements; (2) medical evidence establishing how the impairment limits ability to meet the physical and mental requirements of the work; and (3) in some cases, supplementary or corroborative information from other sources such as employers, the *Dictionary of Occupational Titles,* etc., on the requirements of the work as generally performed in the economy." *Speruggia v. Astrue,* No. 05–CV–3532, 2008 WL 818004, at *12–*13 (E.D.N.Y. Mar.26, 2008).

***7** In this case, the ALJ found that Plaintiff was capable of performing her past relevant work as a clerk. (T at 17). The ALJ's finding is supported by two sentences of text. In the first sentence offered in support of his find, the ALJ referenced the *Dictionary of Occupational Titles* ("DOT") and noted that the DOT identifies clerk positions at the sedentary level that begin with a specific vocational preparation ("SVP") score of 2. [8] In the second sentence, the ALJ summarily stated that a comparison of Plaintiff's RFC and "the physical and mental demands of this work" indicate that Plaintiff is able to perform the work as it is generally performed. (T at 17).

However, the DOT lists numerous different types of "clerk" with differing exertional and non-exertional demands (e.g. shipping and receiving clerk, stock clerk, administrative clerk, file clerk, production clerk, sales clerk, data entry clerk, railroad-maintenance clerk). The ALJ did not identify which of the clerk positions he considered and which of the positions had physical and mental demands consistent with Plaintiff's RFC. Moreover, Plaintiff provided a description of the work requirements of her past relevant work as a clerk (T at 118), but the ALJ's conclusory, two-sentence decision does not indicate whether he considered the exertional and nonexertional demands of Plaintiff's work as actually performed.

The ALJ's analysis at step four clearly did not satisfy the applicable standard, which requires "a careful appraisal of (1) the individual's statements as to which past work requirements can no longer be met and the reason(s) for his or her inability to meet those requirements; (2) medical evidence establishing how the impairment limits ability to meet the physical and mental requirements

  

of the work; and (3) in some cases, supplementary or corroborative information from other sources such as employers, the Dictionary of Occupational Titles, etc., on the requirements of the work as generally performed in the economy." SSR 82–62. A remand for reconsideration and clarification on this point is therefore necessary.

**c. Remand for Rehearing and Further Development of the Record**

For the foregoing reasons, this Court has no hesitancy in granting the Commissioner's motion requesting remand. This Court finds that a remand for rehearing is appropriate, as opposed to a remand solely for the purpose of calculating benefits.

As noted above, courts should remand for development of the evidence (as opposed to solely for calculation and payment of benefits), "[w] here there are gaps in the administrative record or the ALJ has applied an improper legal standard." *Rosa v. Callahan* 168 F.3d 72, 82–83 (2d Cir.1999) (quotation omitted); *see also Williams v. Apfel,* 204 F.3d 48, 50 (2d Cir.1999) (holding "a remand for further proceedings is the appropriate remedy when an erroneous step four determination has precluded any analysis under step five").

***8** This Court finds that a remand for calculation of benefits, which is appropriate only where the record "compel[s] but one conclusion under the ... substantial evidence standard," *Johnson v. Bowen,* 817 F.2d 983, 986 (2d Cir.1987), is not warranted here. Itis possible that, upon further development of the record and reconsideration, the ALJ may conclude that Plaintiff is not disabled. Two of her treating physicians found her capable of performing some work (described in one instance as "sedentary" and in another as "light duty"). It may be the case that the treating physicians' definitions of those terms and assessments of Plaintiff's limitations do support a finding that Plaintiff was not disabled within the meaning of the Social Security Act during the relevant time period. As such, a remand for reconsideration (as opposed to calculation of benefits) is the appropriate remedy. *See Rodriguez v. Astrue,* No. 11–Civ–7720, 2012 WL 4477244, at *42 (S.D.N.Y. Sep't 28, 2012) ("Depending on the nature of any additional evidence procured by the ALJ to fill gaps in the record and his supplemental findings, it is certainly possible that he may defensibly conclude that plaintiff is not disabled. Hence we recommended that the court order remand for reconsideration rather than calculation of benefits.").

## III. CONCLUSION

For the foregoing reasons, this case is remanded to the Commissioner for further administrative proceedings pursuant to sentence four of Section 405(g).

## IV. ORDERS

It is hereby ORDERED that the Commissioner's motion for judgment on the pleadings, which requests a remand for rehearing and reconsideration, is GRANTED; and it is further

ORDERED, that Plaintiff's motion for judgment on the pleadings is DENIED to the extent it requests a remand solely for the calculation of benefits; and it is further;

ORDERED, that this case is remanded to the Commissioner of Social Security for further proceedings consistent with this Decision and Order; and it is further

ORDERED, that the Clerk of the Court shall enter judgment accordingly.

SO ORDERED.

**All Citations**

Not Reported in F.Supp.2d, 2013 WL 598331, 187 Soc.Sec.Rep.Serv. 184

Footnotes

1 Citations to "T" refer to the Administrative Transcript. (Docket No. 9).

2 General Order No. 18 provides, in pertinent part, that "[t]he Magistrate Judge will treat the proceeding as if both parties had accompanied their briefs with a motion for judgment on the pleadings ."

3 This five-step process is detailed 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 has 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.

*Berry v. Schweiker,* 675 F.2d 464, 467 (2d Cir.1982) (per curiam); *see also Rosa v. Callahan,* 168 F.3d 72, 77 (2d Cir.1999); 20 C.F.R. §§ 416.920, 404.1520.

4 The Third Circuit and Seventh Circuit have reached similar conclusions, albeit in unpublished decisions. *See Bencivengo v. Comm'r of Soc. Sec.,* 251 F.3d 153 (3d Cir.2000)) ("Although SSR 96–8p requires a 'function-by-function evaluation' to determine a claimant's RFC, case law does not require the ALJ to discuss those capacities for which no limitation is alleged."); *Zatz v. Astrue,* 346 F. App'x 107, 111 (7th Cir.2009) ("[A]n ALJ need not provide superfluous analysis of irrelevant limitations or relevant limitations about which there is no conflicting medical evidence.").

5 Several courts have recognized the general applicability of the harmless error rule to the review of disability denial claims. *See, e.g., Duvergel v. Apfel,* No. 99 Civ. 4614, 2000 WL 328593, at *11 (S.D.N.Y.Mar.29, 2002); *Walzer v. Chater,* 93 Civ. 6240, 1995 WL 791963 at *9 (S.D.N.Y.Sept.26, 1995).

6 Under the "treating physician's rule," the ALJ must give controlling weight to the treating physician's opinion when the opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] record." 20 C.F.R. § 404.1527(d)(2); *Halloran v. Barnhart,* 362 F.3d 28, 31–32 (2d Cir.2004); *Shaw v. Chater,* 221 F.3d 126, 134 (2d Cir.2000).

> Even if a treating physician's opinion is deemed not to be deserving of controlling weight, an ALJ may nonetheless give it "extra weight" under certain circumstances. In this regard, the ALJ should consider the following factors when determining the proper weight to afford the treating physician's opinion if it is not entitled to controlling weight: (1) length of the treatment relationship and the frequency of examination, (2) nature and extent of the treatment relationship, (3) supportability of opinion, (4) consistency, (5) specialization of the treating physician, and (6) other factors that are brought to the attention of the court. C.F.R. § 404.1527(d)(1)-(6); *see also de Roman,* 2003 WL 21511160, at *9; Shaw, 221 F.3d at 134; *Clark v. Comm'r of Soc. Sec.,* 143 F.3d 115, 118 (2d Cir.1998); *Schaal v. Apfel,* 134 F.3d 496, 503 (2d Cir.1998).

7 It is well settled that an ALJ is entitled to rely upon the opinions of both examining and non-examining State agency medical consultants, since such consultants are deemed to be qualified experts in the field of social security disability. *See* 20 C.F.R. §§ 404.1512(b)(6), 404.1513(c), 404.1527(f)(2), 416.912(b) (6), 416.913(c), and 416.927(f)(2); *see also Leach ex. Rel. Murray v. Barnhart,* No. 02 Civ. 3561, 2004 WL 99935, at 9 (S.D.N.Y.Jan.22, 2004) ("State agency physicians are qualified as experts in the evaluation of medical issues in disability claims. As such, their opinions may constitute substantial evidence if they are consistent with the record as a whole.").

8 SVP "is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job—worker situation. An SVP of 2 means anything beyond a short demonstration, up to and including one month." *Reynolds v. Comm'r of Social Security,* No. 11–CV–778, 2012 2050410, at *5 n. 2 (N.D.N.Y. June 6, 2012).

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Sandra J. Warthan, Plaintiff,
v.
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**DECISION and ORDER**

GLENN T. SUDDABY, Chief United States District Judge

***1** Currently before the Court, in this Social Security action filed by Sandra J. Warthan ("Plaintiff") against the Commissioner of Social Security ("Defendant" or "the Commissioner") pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are the parties' cross-motions for judgment on the pleadings. (Dkt. Nos. 11, 15.) For the reasons set forth below, Plaintiff's motion is denied and Defendant's motion is granted.

## I. RELEVANT BACKGROUND

### A. Factual Background

Plaintiff was born in 1970. The highest level of education that she achieved was completing the sixth grade in school. Plaintiff's employment history consists of working as a factory-line assembler, stock clerk, and cashier. Generally, Plaintiff's alleged disability consists of post-traumatic stress disorder ("PTSD"), depression, anxiety, mild arthritis, stomach tremors, fibromyalgia, degenerative disc disease, and joint problems. Plaintiff's alleged disability onset date is May 31, 2005.

### B. Procedural History

On August 25, 2010, Plaintiff applied for Supplemental Security Income and Social Security Disability Insurance. (Tr. 291-294.) Plaintiff's application was initially denied on December 20, 2010, after which she timely requested a hearing before an Administrative Law Judge ("the ALJ"). (Tr. 136-141, 144.) On December 15, 2011, Plaintiff appeared before the ALJ, Marie Greener. (Tr. 80-109.) On February 27, 2012, the ALJ issued a written decision finding Plaintiff not disabled under the Social Security Act. (Tr. 112-131.) Thereafter, Plaintiff filed a request for review, and, on July 23, 2013, the Appeals Council remanded the case. (Tr. 132-35.) Specifically, the Appeals Council instructed the ALJ to reexamine the following five issues: (1) the severity of Plaintiff's fibromyalgia; (2) the vocational evidence regarding the extent to which Plaintiff's limitations erode the occupational base for light work; (3) the issue of disability; (4) Plaintiff's subjective complaints; and (5) Plaintiff's maximum residual functional capacity. (*Id.*)

On July 9, 2014, Plaintiff appeared before the ALJ for a second hearing. (Tr. 45-79.) On September 18, 2014, the ALJ issued a written decision that was once again unfavorable to Plaintiff. (Tr. 17-44.) On December 7, 2015, the Appeals Council denied Plaintiff's request for review, rendering the ALJ's decision the final decision of the Commissioner. (Tr. 1-6.) Thereafter, Plaintiff timely sought judicial review in this Court.

### C. The ALJ's Decision

Generally, in her decision, the ALJ made the following six findings of fact and conclusions of law. (Tr. 17-34.) First, the ALJ found that Plaintiff had not engaged in substantial gainful activity since May 31, 2005, her alleged onset date. (Tr. 23.) Second, the ALJ found that Plaintiff had the following three severe impairments: (1) an affective disorder (variously characterized), (2) an anxiety disorder (variously characterized), and (3) cervical spine degenerative changes. (Tr. 23-26.) Third, the ALJ found that Plaintiff's impairments do not meet or medically equal one of the listed impairments located in 20 C.F.R. Part 404, Subpart P, Appendix, 1. (Tr.

26-28.) In so doing, the ALJ considered the listings in Sections 12.04 and 12.06 (the "Listings") and the criteria in Paragraphs B and C. (*Id.*) Fourth, the ALJ found that Plaintiff had the residual functional capacity ("RFC") to perform unskilled light work in a low-stress environment and that she should be limited to routine daily tasks, which do not significantly change in pace or location on a daily basis, and that do not require fast-paced work and more than short interactions with supervisors, co-workers, and no more than occasional interaction with the public. (Tr. 28.) Fifth, the ALJ found that Plaintiff is unable to perform any past relevant work. (Tr. 36.) Sixth, and finally, the ALJ determined that there are jobs that exist in significant numbers in the national economy that Plaintiff can perform, considering her age, education, work experience, and RFC. (Tr. 36-38.)

## II. THE PARTIES' BRIEFINGS

### A. Plaintiff's Arguments

***2** Generally, Plaintiff makes the following five arguments in support of her motion for judgment on the pleadings.

First, Plaintiff argues that the ALJ failed to properly assess the severity of her symptoms of fibromyalgia. (Dkt. No. 11, at 15-17 [Pl.'s Mem. of Law].)[1] Specifically, Plaintiff argues that the ALJ failed to find that her widespread physical pain constituted a severe impairment because (a) the medical evidence of record clearly shows that she complained of such pain since 2006, (b) she treated with Dr. Andrew Hillburger, M.D., a neurlogist, and at North Country Neurology, P.C., for her fibromyalgia for several years, (c) it was noted multiple times that fibromyalgia was believed to be the source of her pain, and (d) none of her many care providers have questioned her diagnosis of fibromyalgia. (*Id.* at 16.) Plaintiff further argues that, although she was referred to a rheumatologist, she could not afford to see a specialist, which prevented her from receiving an "official" diagnosis. (*Id.*) Nevertheless, Plaintiff argues that her well-documented symptoms demonstrate that her fibromyalgia is more than a *de minimis* claim and, by failing to recognize the full extent of her symptoms, the ALJ failed to adequately consider her limitations. (*Id.* at 17.)

Second, Plaintiff argues that the ALJ failed to properly assess her subjective complaints of pain and disabling symptoms by failing to consider the seven statutory factors under 20 C.F.R. §§ 404.1529(c)(3) and 416.929(c)(3). (*Id.* at 17-18.) Specifically, Plaintiff argues that the ALJ (a) noted that Plaintiff had a Global Assessment Functioning ("GAF") score of 65 but neglected to discuss much-lower scores at which she was consistently assessed, (b) found that Plaintiff's representations that she has "pain all over" were not supported by record evidence even though she treated with multiple doctors and was referred to a specialist for such pain, (c) improperly construed Plaintiff's "poor earnings record" and work history as an unwillingness to work even though Plaintiff testified that she made multiple attempts to return to work, and (d) misconstrued Plaintiff's testimony that she cares for a significant other who is physically disabled to mean that, not only are Plaintiff's activities of daily living not compromised, but she is also able to care for another's daily needs. (*Id.* at 18-19.) Plaintiff further argues that her credibility is supported by her longitudinal medical record, which demonstrates her persistent and long-term attempts to obtain relief from her symptoms. (*Id.* at 19.)

Third, Plaintiff argues that the ALJ's RFC assessment is not supported by substantial evidence because the ALJ failed to (a) assess Plaintiff's function-by-function abilities, and (b) properly represent the evidence regarding the nature and extent of Plaintiff's limitations. (*Id.* at 19-22.) Specifically, Plaintiff argues that the ALJ incorrectly found that her GAF score of 50 was inconsistent with the "marked" limitations assessed by her treating providers. (*Id.* at 21.) Furthermore, Plaintiff argues that, although the ALJ consistently noted in her decision that she was described as "pleasant and affable," the record demonstrates that she had several issues dealing with her treating providers, including, among other things, feeling overwhelmed and losing her temper. (*Id.*)

***3** Fourth, Plaintiff argues that the ALJ failed to properly analyze and review the medical evidence of record in determining her mental RFC assessment at each of the five steps outlined in 20 C.F.R. § 404.1520a. (*Id.* at 22.) Specifically, at the first step (§ 404.1520a[b][1] ), Plaintiff argues that the ALJ failed to specify or evaluate any of the medical evidence that supports the presence of her mental impairments, even though the ALJ still found them to be "severe." (*Id.* at 22-23.) At the second step (§ 404.1520a[c][2] ), Plaintiff argues that the ALJ failed to rate the degree of her functional

limitation and otherwise skipped this step. (*Id.* at 23.) At the third step (§ 404.1520a[c][3] ), commonly known as the "special technique," Plaintiff argues that the ALJ made findings that are not consistent with the opinions of her treating physicians, which indicated that she had marked limitations in all relevant areas, and that the ALJ cited inaccurate facts and relied on her own opinion to support her findings. (*Id.*) At the fourth step (§ 404.1520a[d] [2] ), Plaintiff argues that, had the ALJ properly considered the medical evidence instead of misconstruing the record and relying on her own opinion, she would have made findings consistent with those made by Plaintiff's treating physicians. (*Id.* at 24.) At the fifth step, Plaintiff argues that the ALJ's mental RFC assessment is contrary to the medical evidence of record because there is insufficient evidence to support the ALJ's finding that Plaintiff's sole mental limitation is the need for low stress work. (*Id.* at 24-25.)

Fifth, and finally, Plaintiff argues that the ALJ failed to properly follow the treating physician rule when she gave "little weight" to the medical source statements made by nurse Ann Bates, NPP, Dr. Steven Fogelman, M.D., and Dr. Maritza Santana, M.D., regarding Plaintiff's mental limitations. (*Id.* at 25-26.) As an initial matter, Plaintiff argues that these medical source statements were consistent with several other medical opinions of record. (*Id.*) Nevertheless, even if the opinions are inconsistent, Plaintiff argues that the ALJ failed to consider the opinions in light of the eight regulatory factors under 20 C.F.R. § 416.927(c) in order to determine how much weight they should have been accorded. (*Id.* at 26-27.)

**B. Defendant's Arguments**

Generally, Defendant makes the following five arguments in opposition to Plaintiff's motion for judgment on the pleadings and in support of her own such motion.

First, Defendant argues that the ALJ properly evaluated the severity of Plaintiff's symptoms of fibromyalgia. (Dkt. No. 15, at 8 [Def.'s Mem. of Law].) Specifically, Defendant argues that the ALJ's evaluation is supported by the opinions of consultative physician Roberto Rivera, M.D., who found no trigger points related to pain after examining Plaintiff in November of 2010. (*Id.* at 9.) Similarly, Defendant argues that Dr. Hillburger's "guess" that Plaintiff "probably does have fibromyalgia although most of her laboratories are normal" does not constitute a formal diagnosis of fibromyalgia, especially when Dr. Hillburger did not find any trigger points during three examinations between July 2007 and April 8, 2008. (*Id.*) Furthermore, Defendant argues that, although consultative physician Dr. Elke Lorenson, M.D., found two trigger points during a physical examination of Plaintiff in September of 2013, this is well short of the requirement under SSR 12-2p that a claimant have at least 11 trigger points before he/she is considered to have fibromyalgia. (*Id.*)

Second, Defendant argues that the record evidence supports the ALJ's determination that Plaintiff's subjective complaints were not entirely credible for the following three reasons: (1) despite Plaintiff's allegations of pain, there was no indication that she was taking pain medication; (2) although Plaintiff complained of headaches occurring six to nine times per month, she admitted that her headaches lasted for only forty-five minutes; and (3) Plaintiff's complaints were inconsistent with her activities and lifestyle including being able to make the bed, wash dishes, cook, do laundry, walk the dog, read books, engage in woodcrafting, watch television, take care of her pets, manage her money, use public transportation, and drive to familiar places. (*Id.* at 11.)

Third, Defendant argues that the ALJ's RFC assessment is supported by substantial evidence because (a) the ALJ's finding that Plaintiff retained the physical ability to perform work at all exertional levels was supported by the opinions of Dr. Lorenson and Dr. Rivera, who both made many normal physical findings, and (b) the ALJ's RFC assessment with respect to Plaintiff's mental abilities is supported by the opinions of consultative psychologist, Dr. Dennis Noia, Ph.D., who made many normal mental status findings, and state agency psychiatric consultant, Dr. Zenaida Mata, M.D., who found that Plaintiff retained the ability to perform unskilled work with limited exposure to the general public on a sustained basis. (*Id.* at 12-13.)

***4** Fourth, Defendant argues that the ALJ properly evaluated Plaintiff's mental impairments and correctly concluded that she did not meet the Listing requirements of Sections 12.04 and 12.06. (*Id.* at 14.) More specifically, Defendant argues that the ALJ properly applied the special technique to determine the severity of Plaintiff's mental impairments and that her findings were supported by Dr. Malta's opinion who likewise found that Plaintiff

did not have any marked limitations in the areas identified under Paragraph B. (*Id.* at 14-15.)

Fifth, and finally, Defendant argues that the ALJ properly evaluated the medical opinions of record. Specifically, Defendant argues that the ALJ discussed the opinions of nurse Bates and Dr. Fogelman, who opined that Plaintiff had marked limitations in all areas of mental functioning except for interacting with the public, which they rated a mild limitation. (*Id.* at 16.) However, Defendant argues that it was appropriate for the ALJ to assign little weight to their opinions because (a) the ALJ expressed doubt regarding whether there was an actual treatment relationship between Plaintiff and Dr. Fogelman (given that the treatment notes indicated that, except for one occasion, Plaintiff saw only nurse Bates), (b) their assessment was not consistent with the clinical evidence of record that consistently described Plaintiff as pleasant and affable, and (c) their assessment was also inconsistent with the many benign mental status findings reported by Dr. Jeanne Shapiro, Ph.D., and Dr. Noia. (*Id.* at 16-17.) In addition, Defendant argues that the ALJ discussed the opinion of Dr. Santana who found that Plaintiff had marked limitations in her ability to interact appropriately with others. (*Id.* at 17.) Once again, however, the ALJ appropriately gave little weight to this opinion because it was based on only one evaluation of Plaintiff on December 12, 2011, and Dr. Santana reported many benign mental findings such as noting that Plaintiff was alert, fully oriented, pleasant, cooperative, verbally spontaneous, had good eye contact, fair concentration, and good insight and judgment. (*Id.*)

## 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. 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 be reversed only if the correct legal standards were not applied, or the determination 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."); *accord, 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 (1971). Where evidence is deemed susceptible to more than one rational interpretation, the Commissioner's conclusion must be upheld. *Rutherford v. Schweiker*, 685 F.2d 60, 62 (2d Cir. 1982).

***5** "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. *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), *accord, McIntyre v. Colvin,* 758 F.3d 146, 150 (2d Cir. 2014). "If at any step a finding of disability or non-disability can be made, the SSA will not review the claim further." *Barnhart v. Thompson,* 540 U.S. 20, 24 (2003).

## IV. ANALYSIS

For the ease of analysis, Plaintiff's arguments will be reorganized and consolidated below.

### A. Whether the ALJ Erred at Step Two by Failing to Find that Plaintiff's Fibromyalgia Is a Severe Impairment

After carefully considering the matter, the Court answers this question in the negative for the reasons stated by Defendant in her memorandum of law. (Dkt. No. 15, at 8-9 [Def.'s Mem. of Law].) To those reasons, the Court adds the following analysis.

The claimant bears the burden of presenting evidence establishing severity at step two of the disability analysis. *Briggs v. Astrue*, 09-CV-1422, 2011 WL 2669476, at *3 (N.D.N.Y. Mar. 4, 2011) (Bianchini, M.J.), adopted, 2011 WL 2669463 (N.D.N.Y. July 7, 2011) (Scullin, J.). A severe impairment is one that significantly limits the plaintiff's physical and/or mental ability to do basic work activities. 20 C.F.R. § 404.1520(c); *see also* 20 C.F.R. § 404.1521(a) (noting that an impairment is not severe at step two if it does not significantly limit a claimant's ability to do basic work activities).

***6** The Regulations define "basic work activities" as the "abilities and aptitudes necessary to do most jobs," examples of which include the following: (1) physical functions such as walking, standing, lifting, pushing, pulling, reaching, carrying, or handling; (2) capacities for seeing, hearing, and speaking; (3) understanding, carrying out, and remembering simple instructions; (4) using judgment; (5) responding appropriately to supervision, co-workers and usual work situations; and (6) dealing with changes in a routine work setting. 20 C.F.R. § 404. 1521(b). "Severity" is determined by the limitations imposed by an impairment, and not merely its by diagnosis. The mere presence or diagnosis of a disease or impairment is not, by itself, sufficient to deem a condition severe. *Hamilton v. Astrue*, 12-CV-6291, 2013 WL 5474210, at *10 (W.D.N.Y. Sept. 30, 2013).

An ALJ should make a finding of " 'not severe' ... if the medical evidence establishes only a 'slight abnormality' which would have 'no more than a minimal effect on an individual's ability to work.' " *Rosario v. Apfel*, 97-CV-5759, 1999 WL 294727, at *5 (E.D.N.Y. Mar. 19, 1999). Although an impairment may not be severe by itself, the ALJ must also consider "the possibility of several such impairments combining to produce a severe impairment...." SSR 85-28, 1985 WL 56856, at *3. The Second Circuit has held that the step two analysis "may do no more than screen out *de minimis* claims." *Dixon v. Shalala*, 54 F.3d 1019, 1030 (2d Cir. 1995). If the disability claim rises above a *de minimis* level, then the ALJ must

  

undertake the remaining analysis of the claim at step three through step five. *Dixon*, 54 F.3d at 1030.

Often, when there are multiple impairments and the ALJ finds some but not all of them severe, an error in the severity analysis at step two may be harmless because the ALJ continued with the sequential analysis and did not deny the claim based on the lack of a severe impairment alone. *Tryon v. Astrue*, 10-CV-0537, 2012 WL 398952, at *3 (N.D.N.Y. Feb. 7, 2012) (D'Agostino, J.). This is particularly true because the regulations provide that combined effects of all impairments must be considered, regardless of whether any impairment, if considered separately, would be of sufficient severity. 20 C.F.R. §§ 404.1523, 416.923; *Dixon*, 54 F.3d at 1031.

As an initial matter, the Court agrees with Defendant that Plaintiff failed to proffer sufficient evidence demonstrating that her fibromyalgia is a medically determinable impairment. Under SSR 12-2p, fibromyalgia is considered a medically determinable impairment if there is a physician diagnosis of fibromyalgia and he provides evidence meeting either the 1990 American College of Rheumatology Criteria for Classification of Fibromyalgia or the 2010 American College of Rheumatology Preliminary Diagnostic Criteria. SSR 12-2p, 2012 WL 3104869, at *2 (July 25, 2012). These two diagnostic regimes establish two different sets of specific medical findings necessary for a fibromyalgia diagnosis, either of which is sufficient to establish the impairment. [2] *Id.*, at *2-3.

***7** Granted, a "mere diagnosis of fibromyalgia without a finding as to the severity of symptoms and limitations does not mandate a finding of disability." *Rivers v. Astrue*, 280 Fed.Appx. 20, 22 (2d Cir. 2008); *see also* SSR 12-2p, 2012 WL 3017612, at *2 ("We cannot rely upon the physician's diagnosis alone."). Nor can a physician's diagnosis be "inconsistent with the other evidence in the person's case record." SSR 12-2p, 2012 WL 3017612, at *2. However, "denying a fibromyalgia-claimant's claim of disability based in part on a *perceived* lack of *objective* evidence is reversible error." *Campbell v. Colvin*, 13-CV-0451, 2015 WL 73763, at *6 (N.D.N.Y. Jan. 6, 2015) (Sharpe, C.J.) (emphasis added). This is because "a growing number of courts, including our own, have recognized that fibromyalgia is a disabling impairment and that there are no objective tests which can conclusively confirm the disease." *Green-Younger v. Barnhart*, 335 F.3d 99, 108 (2d Cir. 2003) (internal quotation marks omitted). Indeed, "[fibromyalgia's] cause or causes are unknown, there is no cure and, of greatest importance to disability law, its symptoms are entirely subjective. There are no laboratory tests for the presence or severity of fibromyalgia." *Cabibi v. Colvin*, 50 F. Supp. 3d 213, 233 (E.D.N.Y. 2014) (internal quotation marks omitted).

In the present case, the ALJ found that Plaintiff was never formally diagnosed with fibromyalgia because Dr. Hillburger "guessed" that Plaintiff "probably did have fibromyalgia" based upon her complaints of having pain "throughout her body" even though her "laboratories are normal[,]" and he did not find any positive trigger points over the course of three examinations. (Tr. 23, 404-05.) Similarly, the ALJ noted that Plaintiff's other "primary care providers do not appear to have examined the claimant to confirm the presence of 11/18 ... trigger points." (Tr. 23.) The ALJ further noted that Dr. Lorenson found two positive trigger points; however, this is well short of the eleven trigger points required for a formal diagnosis (under the 1990 American College of Rheumatology Criteria for Classification of Fibromyalgia). (*Id.*)

Despite the lack of objective evidence to support Plaintiff's claim of fibromyalgia, the ALJ also considered Plaintiff's subjective complaints of pain, which she found to be not entirely credible. [3] The ALJ found that, although Plaintiff complained of disabling pain and discomfort, she was still able to engage in many activities of daily living, such as cooking and cleaning two to three times a week (depending on pain), shopping once a week, showering five to six times a week, read, watch television, do woodcrafting, and care for a significant other who is disabled. (Tr. 30, 95.) *See Poupore v. Astrue,* 566 F.3d 303, 307 (2d Cir. 2009) (finding that the plaintiff's activities, including childcare, watching television, reading, using the computer, and occasional vacuuming, washing dishes, and driving, supported the ALJ's determination that the plaintiff's alleged symptoms were not disabling); *Rivera v. Harris,* 623 F.2d 212, 216 (2d Cir. 1980) (finding that the plaintiff's report that she could "cook, sew, wash and shop, so long as she did these chores slowly and takes an afternoon rest" supported the ALJ's determination that the plaintiff's alleged symptoms were not disabling.); *but see Brosnahan v. Barnhart*, 336 F.3d 671, 677 (8th Cir. 2003) ("[I]n the context of a fibromyalgia case, ... the ability to engage in activities such as cooking, cleaning,

and hobbies, does not constitute substantial evidence of the ability to engage in substantial gainful activity."). The ALJ also found that there is "no indication that the claimant was taking pain medication currently, despite her allegations of constant, daily disabling pain." (Tr. 30.)

***8** Based upon the foregoing, the ALJ properly determined that Plaintiff failed to satisfy her burden that she received a formal diagnosis of fibromyalgia that was supported by objective tests and/or that her subjective complaints of pain constitute a severe impairment under the regulations. In any event, even if the Court were to find that the ALJ erred in determining that Plaintiff's fibromyalgia was not severe, she considered the limiting effects of all of Plaintiff's impairments later in her RFC analysis. (Tr. 28-30.) *See Reices-Colon v. Astrue*, 523 Fed.Appx. 796, 798 (2d Cir. 2013) (finding alleged step-two error harmless because ALJ considered impairments during subsequent steps); *Snyder v. Colvin*, 13-CV-0585, 2014 WL 3107962, at *5 (N.D.N.Y. July 8, 2014) (Sharpe, C.J.) ("[W]hen an administrative law judge identifies some severe impairments at Step 2, and then proceeds through sequential evaluation on the basis of combined effects of all impairments, including those erroneously found to be non severe, an error in failing to identify all severe impairments at Step 2 is harmless.").

**B. Whether the ALJ's Assessment of Plaintiff's Mental Impairments Is Supported by Substantial Evidence**

After carefully considering the matter, the Court answers this question in the affirmative for the reasons stated by Defendant in her memorandum of law. (Dkt. No. 15, at 14-15 [Def.'s Mem. of Law].) To those reasons, the Court adds the following analysis.

In addition to the typical five-step analysis outlined in 20 C.F.R. § 404.1520, the ALJ must apply a "special technique" at the second and third steps to evaluate alleged mental impairments. *See Kohler v. Astrue*, 546 F.3d 260, 265 (2d Cir. 2008). The Second Circuit has explained as follows:

> This technique requires the reviewing authority to determine [at step two] first whether the claimant has a "medically determinable mental impairment." 20 C.F.R. § 404.1520a(b)(1). If the claimant is found to have such an impairment, [at step three] the reviewing authority must "rate the degree of functional limitation resulting from the impairment(s) in accordance with paragraph (c)," *Id.* § 404.1520a(b)(2), which specifies four broad functional areas: (1) activities of daily living; (2) social functioning; (3) concentration, persistence, or pace; and (4) episodes of decompensation. *Id.* § 404.1520a(c)(3). According to the regulations, if the degree of limitation in each of the first three areas is rated "mild" or better, and no episodes of decompensation are identified, then the reviewing authority generally will conclude that the claimant's mental impairment is not 'severe' and will deny benefits. *Id.* § 404.1520a(d)(1). If the claimant's mental impairment is severe, the reviewing authority will first compare the relevant medical findings and the functional limitation ratings to the criteria of listed mental disorders in order to determine whether the impairment meets or is equivalent in severity to any listed mental disorder. *Id.* § 404.1520a(d)(2). If so, the claimant will be found to be disabled. If not, the reviewing authority will then assess the claimant's residual functional capacity [in step four]. *Id.* § 404.1520a(d)(3).

*Kohler*, 546 F.3d at 265-66.

Moreover, the regulations "require the ALJ's written decision to reflect application of the technique, and explicitly provide that the decision '*must* include a specific finding as to the degree of limitation in each of the functional areas described in paragraph (c) of this section.' " *Id.* at 266 (quoting 20 C.F.R. § 404.1520a[e][2] ). "If the ALJ fails to provide specific findings regarding the degree of limitation in each of the four functional areas, then the reviewing court will be unable to determine whether 'there is substantial evidence for the ALJ's conclusion that [the Plaintiff's] impairment, while severe, was not as severe as any listed disabling condition,' and the case should be remanded." *Fait v. Astrue,* 10-CV-5407, 2012 WL 2449939, at *5 (E.D.N.Y. June 27, 2012) (alteration in original) (quoting *Kohler,* 546 F.3d at 267-88).

***9** Here, the ALJ made specific findings as to the degree of limitation in each of the functional areas and gave an explanation for each of her conclusions. (Tr. 27.) Because the ALJ did not find that Plaintiff's mental impairments cause at least two "marked" limitations, or one "marked" limitation and repeated episodes of decompensation, she found that the Paragraph B criteria was not satisfied. (Tr. 28.) Similarly, the ALJ found that the Paragraph C criteria was not met. (*Id.*)

As discussed above in Part II.A. of this Decision and Order, Plaintiff argues that the ALJ's findings are inconsistent with the opinions of several medical sources, including the opinions of nurse Bates, Dr. Fogelman, and Dr. Santana, who opined that Plaintiff had marked limitations in almost all functional areas. However, the Court finds that the ALJ's decision to accord these assessments little weight was supported by substantial evidence. Specifically, with respect to the joint opinion of nurse Bates and Dr. Fogelman, the ALJ noted that there was no evidence that Dr. Fogelman ever examined Plaintiff or reviewed her progress notes. (Tr. 32.) Indeed, at the most recent administrative hearing, the ALJ noted that she did not see any evidence in the record indicating that Dr. Fogelman personally met with Plaintiff. (Tr. 49, 59.) In response, Plaintiff stated that "I've never heard that name before" and her attorney clarified that Dr. Fogelman was nurse Bates' supervising physician and that Dr. Fogelman had countersigned her records. (Tr. 49.) Accordingly, the ALJ properly found that the joint opinion was not entitled to any additional weight. 20 C.F.R. 416.927(c); 20 C.F.R. 404.1527(c).

In any event, the ALJ properly found that the joint opinion was not fully consistent with the clinical evidence of record because (a) although Plaintiff presented as depressed and anxious, she also presented as happy and in a "good" mood, (b) even when Plaintiff was found to be angry or depressed, nurse Bates consistently described her as "pleasant and affable" and she was able to fully participate in her treatment, (c) the consultative psychiatric examinations performed by Drs. Noia and Shapiro documented that Plaintiff presented with good social skills, logical and coherent thinking, and with intact attention/concentration and recent/remote memory skills, (d) Plaintiff consistently received a GAF score of 50, which is on the borderline between serious and moderate symptoms or serious and moderate limitations,[4] and (e) the joint opinion does not discuss Plaintiff's ability to perform a wide range of activities of daily living. (Tr. 32.)

With regard to Dr. Santana's opinion, Dr. Santana opined that Plaintiff had marked limitations in her abilities to interact appropriately with others and manage work stress. (Tr. 586.) It was proper for the ALJ to accord this opinion little weight because (a) Dr. Santana's assessment was based on only one evaluation of Plaintiff without any evidence of a follow-up evaluation, (b) Dr. Santana initially checked the boxes for moderate limitations but then changed them to marked without any explanation, and (c) Dr. Santana's opinion that Plaintiff is markedly limited in interacting with others is not supported by her notes from her examination of Plaintiff nor by the record as a whole. (Tr. 32-33.) *See Fiducia v. Comm'r of Soc. Sec.*, 13-CV-0285, 2015 WL 4078192, at *4 (N.D.N.Y. July 2, 2015) (Mordue, J.) (finding that a marked limitation in interacting with others does not establish that the plaintiff is disabled, particularly where the ALJ limited the plaintiff to occasional interaction with the public and coworker).

***10** Finally, the Court finds that the ALJ properly gave little weight to the assessment from Carthage Area Behavioral Health Center, which noted several marked and extreme limitations, for the reasons discussed by the ALJ. (Tr. 31.) Although Plaintiff argues that the ALJ's determination is inconsistent with the opinions of Drs. Noia and Shapiro, Plaintiff fails to specify what parts of their opinions are inconsistent. Nevertheless, the Court has reviewed their respective treatment notes and finds that Dr. Noia's opinion is not inconsistent with the ALJ's determination (Tr. 704) and finds that the ALJ properly gave Dr. Shapiro's opinion little weight (Tr. 33). Accordingly, for the foregoing reasons, the Court finds that the ALJ's assessment of Plaintiff's mental impairments is supported by substantial evidence.

### C. Whether the ALJ Violated the Treating Physician Rule

After carefully considering the matter, the Court answers this question in the negative for the reasons stated by Defendant in her memorandum of law. (Dkt. No. 15, at 15-18 [Def.'s Mem. of Law].) To those reasons, the Court adds the following analysis.

The opinion of a treating source will be given controlling weight if it "is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record." 20 C.F.R. §§ 416.927(c)(2), 404.1527(c)(2); *Greek v. Colvin*, 802 F.3d 370, 375 (2d Cir. 2015).

The following factors must be considered by the ALJ when deciding how much weight the opinion should receive, even if the treating source is not given controlling weight: "(i) the frequency of examination and the length, nature, and extent of the treatment relationship; (ii) the evidence in support of the opinion; (iii) the opinion's consistency with the record as a whole; and (iv) whether

the opinion is from a specialist." 20 C.F.R. §§ 416.927(c)(2)(i)-(iv), 404.1527(c)(1)-(5). "Although the ALJ is required to explicitly consider all of the factors, the ALJ is not required to explicitly 'address or recite' each factor in his decision." *Reyes v. Colvin*, 13-CV-4683, 2015 WL 337483, at *16 (S.D.N.Y. Jan. 26, 2015); *see also Marquez v. Colvin*, 12-CV-6819, 2013 WL 5568718, at *12 (S.D.N.Y. Oct. 9, 2013) ("Although the ALJ did not explicitly recite the factors, his decision nonetheless adequately considered each factor."). "If it is unclear whether the ALJ explicitly considered all of the factors, the court may search the record to assure that the treating physician rule has not been traversed, but only when the ALJ gives good enough reasons to allow the court to engage in such an inquiry." *Reyes*, 2015 WL 337483, at *16 (citing *Halloran v. Barnhart*, 362 F.3d 28, 32 [2d Cir. 2004]). Finally, the ALJ is also required to set forth his reasons for the weight he assigns to the treating physician's opinion. *Id.*; *see also* SSR 96-2p, 1996 WL 374188 (July 2, 1996); *Shaw v. Chater*, 221 F.3d 126, 134 (2d Cir. 2000) (quoting *Clark v. Comm'r of Soc. Sec.*, 143 F.3d 115, 118 [2d Cir. 1998]). "Failure to provide 'good reasons' for not crediting the opinion of a claimant's treating physician is a ground for remand." *Reyes*, 2015 WL 337483, at *14.

Here, the ALJ's reasoning in her decision, along with the facts in the record, reasonably allow the Court to conclude that she considered the treating physician rule even though she did not explicitly recite each factor. (Tr. 26, 31-36.) Furthermore, the Court finds that the ALJ gave proper weight to the opinions of nurse Bates, Dr. Fogelman, and Dr. Santana, for the reasons discussed above in Part IV.B. of this Decision and Order and for the reasons stated by Defendant in her memorandum of law. (Dkt. No. 15, at 16-18 [Def.'s Mem. of Law].) *See also Schlichting v. Astrue*, 11 F. Supp. 3d 190, 204 (N.D.N.Y. 2012) (Suddaby, J.) ("[C]onflicts in evidence ... are for the Commissioner to resolve.... Where, as here, the Commissioner's decision 'rests on adequate findings supported by evidence having rational probative force, [the Court] will not substitute [its] judgment for that of the Commissioner.' ") (quoting *White v. Comm'r*, 06-CV-0564, 2008 WL 3884355, at *11 [N.D.N.Y. Aug. 18, 2008] [Kahn, J.] ). Accordingly, the Court finds that the ALJ did not traverse the treating physician rule.

**D. Whether the ALJ's RFC Assessment Is Supported by Substantial Evidence**

***11** After carefully considering the matter, the Court answers this question in the affirmative for the reasons stated by Defendant in her memorandum of law (Dkt. No. 15, at 12-14 [Def.'s Mem. of Law] ) as well as for the reasons discussed above in Parts IV.B. and IV.C. of this Decision and Order. To those reasons, the Court adds the following point regarding Plaintiff's alleged physical impairments and the ALJ's determination that she can perform light work.

RFC is defined as

> what an individual can still do despite his or her limitations ... Ordinarily, RFC is the individual's maximum remaining ability to do sustained work activities in an ordinary work setting on a regular and continuing basis, and the RFC assessment must include a discussion of the individual's abilities on that basis. A regular and continuing basis means 8 hours a day, for 5 days a week, or an equivalent work schedule.

*Melville v. Apfel*, 198 F.3d 45, 52 (2d Cir. 1999) (quoting SSR 96-8p, 1996 WL 374184, at *2). "In assessing a claimant's RFC, the ALJ must consider all of the relevant medical and other evidence in the case record to assess the claimant's ability to meet the physical, mental, sensory and other requirements of work." *Domm v. Colvin*, 12-CV-6640, 2013 WL 4647643, at *8 (W.D.N.Y. Aug. 29, 2013) (citing 20 C.F.R. § 404.1545[a][3]-[4] ). The ALJ must consider all of the relevant evidence, including medical opinions and facts, physical and mental abilities, non-severe impairments, and the plaintiff's subjective evidence of symptoms. 20 C.F.R. § 404.1545(b)-(e). The ALJ must consider RFC assessments made by acceptable medical sources and may consider opinions from other non-medical sources to show how a claimant's impairments may affect his ability to work. 20 C.F.R. § 404.1513(c)(d). Finally, an ALJ's RFC assessment "must be set forth with sufficient specificity to enable [the Court] to decide whether the determination is supported by substantial evidence." *Ferraris v. Heckler*, 728 F.2d 582, 587 (2d Cir. 1984)

Here, Plaintiff argues that the ALJ failed to assess Plaintiff's function-by-function abilities, resulting in an

  

RFC assessment that is not supported by substantial evidence. However, the Second Circuit has stated that an explicit function-by-function analysis is unnecessary "[w]here an ALJ's analysis at Step Four regarding a claimant's functional limitations and restrictions affords an adequate basis for meaningful judicial review, applies the proper legal standards, and is supported by substantial evidence such that additional analysis would be unnecessary or superfluous[.]" *Cichocki v. Astrue*, 729 F.3d 172, 177 (2d Cir. 2013).

The ALJ's RFC assessment in the present case limited Plaintiff to unskilled light work. (Tr. 28.) Light work requires the ability to sit for six hours, stand or walk for six hours, lift up to 20 pounds at a time, and frequently lift or carry up to ten pounds during an eight-hour workday. 20 C.F.R. §§ 404.1567(b), 416.967(b); SSR 83-10, 1983 WL 31251 (1983). In making this assessment, the ALJ gave "considerable weight" to the opinion of consultative examiner, Dr. Elke Lorenson, who opined that Plaintiff "can lift and carry up to 20 pounds frequently, sit for 8 hours at a time for a total of 8 hours in an 8 hour workday, stand for 8 hours at a time for a total of 8 hours in an 8 hour workday, walk for 8 hours at a time for a total of 8 hours in an 8 hour workday, can occasionally reach, and frequently push/pull with the upper extremities, can continuously handle, finger and feel with the upper extremities, occasionally engage in postural activities such as stair climbing and should avoid working with unprotected heights." (Tr. 36.) The ALJ noted that she did not give any weight to Dr. Lorenson's opinion that Plaintiff should be limited to occasional reaching for the reasons explained in her decision. (*Id.*) The ALJ also gave "some weight" to Dr. Rivera's opinion that Plaintiff has no limitations in sitting, standing, walking and lifting. (Tr. 35.) Finally, the ALJ discussed her reasoning for not giving equal or greater weight to the opinions of other treating sources regarding Plaintiff's impairments. (Tr. 31-35.)

***12** The Court finds that the ALJ's analysis affords an adequate basis for meaningful judicial review, applies the proper legal standards, and is supported by substantial evidence such that a function-by-function analysis would be unnecessary or superfluous. *See Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005) ("Preparing a function-by-function analysis for medical conditions or impairments that the ALJ found neither credible nor supported by the record is unnecessary.") Furthermore, the Court notes that it was proper for the ALJ to rely on the opinions of consultative examiners, such as Drs. Lorenson and Rivera, which constitute substantial evidence. *See Suarez v. Colvin*, 102 F. Supp. 3d 552, 577 (S.D.N.Y. 2015) ("It is well-settled that a consulting physician's opinion can constitute substantial evidence supporting an ALJ's conclusions.... Moreover, an ALJ may give greater weight to a consultative examiner's opinion than a treating physician's opinion if the consultative examiner's conclusions are more consistent with the underlying medical evidence.") (collecting cases).

**E. Whether the ALJ Failed to Properly Assess Plaintiff's Subjective Complaints of Pain and Disabling Symptoms**

After carefully considering the matter, the Court answers this question in the negative for the reasons stated by Defendant in her memorandum of law. (Dkt. No. 15, at 9-11 [Def.'s Mem. of Law].) To those reasons, the Court adds the following analysis.

A plaintiff's allegation of pain is "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) (Mordue, C.J., adopting Report-Recommendation of Bianchini, M.J.) (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.* (citing §§ 404.1529[c][3][i]-[vii], 416.929[c][3][i]-[vii] ). Further, "[i]t is the role of the Commissioner, not the reviewing court, 'to resolve evidentiary conflicts and to appraise the credibility of witnesses,' including with respect to the severity of a claimant's symptoms." *Cichocki v. Astrue*, 534 Fed.Appx. 71, 75 (2d Cir. 2013) (quoting *Carroll v. Sec'y of Health & Human Servs.*, 705 F.2d 638, 642 [2d Cir. 1983]).

Here, the ALJ found that Plaintiff's medically determinable impairments could reasonably be expected to cause the alleged symptoms, but that Plaintiff's statements regarding the intensity, persistence and limiting effects of these symptoms are not entirely credible. (Tr. 29.) Throughout her decision, the ALJ articulated the inconsistencies that she considered in assessing the allegations of Plaintiff's symptoms, and in determining that Plaintiff is not as limited as alleged. Specifically, the ALJ considered (a) inconsistencies in Plaintiff's statements regarding her alleged symptoms and limitations, (b) the measures that Plaintiff took to relieve her symptoms, (c) inconsistencies in Plaintiff's reports regarding her symptoms and activities of daily living, and (d) medical opinion evidence that was inconsistent with Plaintiff's allegations of disabling symptoms. (Tr. 29-30.) For example, the ALJ noted that there was no evidence that Plaintiff was taking pain medication, "despite her allegations of constant, daily disabling pain." (Tr. 30.) Indeed, Plaintiff testified at the first administrative hearing that she does not currently take pain medication but will use ibuprofen as needed. (Tr. 90.) Although Plaintiff argues that she uses a transcutaneous electrical nerve ("TENS") unit [5] to help with her pain, she testified that the TENS unit was her fiance's and, therefore, it was not actually prescribed to her. (Tr. 91.)

***13** Plaintiff correctly argues that a longitudinal medical record demonstrating persistent, long-term attempts to obtain relief from symptoms will strongly indicate credibility regarding her alleged symptoms. *See Somogy v. Comm'r of Soc. Sec.*, 366 Fed.Appx. 56, 64 (11th Cir. 2010) ("Somogy's complaints of disabling pain are bolstered by evidence that she made numerous visits to her doctors over the course of several years, underwent numerous diagnostic tests, and was prescribed numerous medications."). However, on balance, the ALJ properly exercised her discretion in finding Plaintiff's subjective complaints to be not entirely credible in light of the numerous inconsistencies between her complaints and the objective evidence as well as the other record evidence. (Tr. 29-30.) *See also Carroll v. Sec'y of Health and Human Servs.*, 705 F.2d 638, 642 (2d Cir. 1982) ("The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive."). Similarly, Plaintiff's argument that the ALJ failed to explicitly evaluate her complaints in light of the seven statutory factors noted above is also unpersuasive. "Because the ALJ thoroughly explained his credibility determination and the record evidence permits us to glean the rationale of the ALJ's decision, the ALJ's failure to discuss those factors not relevant to his credibility determination does not require remand." *Cichocki*, 534 Fed.Appx. at 76. Here, the ALJ complied with the Regulations and articulated the inconsistencies that she considered in discrediting Plaintiff's allegations of disabling impairments.

**ACCORDINGLY**, it is

**ORDERED** that Plaintiff's motion for judgment on the pleadings (Dkt. No. 11) is **DENIED**; and it is further

**ORDERED** that Defendant's motion for judgment on the pleadings (Dkt. No. 15) is **GRANTED**; and it is further

**ORDERED** that Defendant's decision denying disability benefits is **AFFIRMED**; and it is further

**ORDERED** that Plaintiff's Complaint (Dkt. No. 1) is **DISMISSED**.

**All Citations**

Slip Copy, 2017 WL 79975

Footnotes

1 Page citations refer to the page numbers used on CM/ECF rather than the actual page numbers contained in the parties' respective motion papers.

2 The first set of criteria requires (1) a "history of widespread pain–that is, pain in all quadrants of the body (the right and left sides of the body, both above and below the waist) and axial skeletal pain (the cervical spine, anterior chest, thoracic spine, or low back)–that has persisted ... for at least 3 months" and (2) "[a]t least 11 positive tender points on physical examination ... found bilaterally (on the left and right sides of the body) and both above and below the waist" and (3) "[e]vidence that other disorders that could cause the symptoms or signs were excluded." SSR 12-2p, 2012 WL 3104869, at *2-3.

The second set of criteria requires "all three of the following criteria," including (1) "[a] history of widespread pain," (2) "[r]epeated manifestations of six or more [fibromyalgia] symptoms, signs, or co-occurring conditions, especially manifestations of fatigue, cognitive or memory problems ("fibro fog"), waking unrefreshed, depression, anxiety disorder, or irritable bowel syndrome," and (3) "[e]vidence that other disorders that could cause these repeated manifestations of symptoms, signs, or co-occurring conditions were excluded." *Id.* at *3.

3 For the reasons discussed below in Part IV.E. of this Decision and Order, the Court finds that the ALJ's credibility determination was proper.

4 "GAF is a scale that indicates a clinician's overall opinion of an individual's psychological, social, and occupational functioning." *Marvin v. Colvin*, 12-CV-1779, 2014 WL 1293509, at *2 (N.D.N.Y. Marc. 31, 2014) (Sharpe, C.J.). "GAF scores of forty-one to fifty indicate that the individual has serious symptoms (e.g., suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., few friends, conflicts with peers or co-workers)." *Marvin*, 2014 WL 1293509, at *2 (internal quotation marks omitted).

5 "A TENS Unit sends an electrical current through the skin for pain control. The unit is usually connected to the skin using two or more electrodes. A typical battery-operated TENS unit is able to modulate pulse width, frequency and intensity." *Stephenson v. Colvin*, 14-CV-8132, 2016 WL 153091, at *4 n.18 (S.D.N.Y. Jan. 12, 2016).