

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AARON RAPAPORT,

Plaintiff,

- against -

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

16 Civ. 2617 (VSB) (JCF)

REPORT AND
RECOMMENDATION

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TO THE HONORABLE VERNON S. BRODERICK, U.S.D.J.:

The plaintiff, Aaron Rapaport, brings this action under section 1631(c)(3) of the Social Security Act (the "Act"), 42 U.S.C. § 1383(c)(3), seeking review of a determination of the Commissioner of Social Security (the "Commissioner") denying his application for Supplemental Security Income ("SSI"). The parties have submitted cross-motions for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. For the reasons that follow, I recommend that the Commissioner's motion be granted and the plaintiff's motion be denied.

Background

A. Personal History

Mr. Rapaport was born on September 22, 1986. (R. at 62).¹

¹ "R." refers to the Administrative Record filed with the Commissioner's Answer.

He graduated from high school in 2004, completed college, and later received a master's degree in library science in 2011. (R. at 477). In 2011, he engaged in a short-term program to train as a reference librarian, which required him to stand, sit, kneel, crouch and reach at various times during the day. (R. at 162). From 2012 until 2013, he was employed part-time as a library assistant in New City, assisting in library selections and book data management. (R. at 121, 160). His job responsibilities as a library assistant required him to sit throughout the day and lift less than 10 pounds. (R. at 160-61). His job duties as a library trainee required him to stand, sit, kneel, crouch, and reach at various times during the day. (R. at 162). Mr. Rapaport left employment at the library in approximately 2013 and has not been employed since.

B. Medical, Educational, and Employment-Related Evaluations

1. Early Evaluations

Mr. Rapaport's claim to disability relates to developmental and psychiatric issues. He was born at 32 weeks gestation, at which time there was "no evidence of intracerebral bleeding" but there was the possibility of a maternal viral infection. (R. at 289). Mr. Rapaport received CT scans in 1986, shortly after he was born, and in 1989. (R. at 292, 290). Although his family

noted no physical problems (R. at 289), Dr. Michael Harned and Dr. Irvin Kricheff diagnosed Mr. Rapaport with severe hydrocephalus in 1991. (R. at 302).

In a letter that same year, Dr. Isabelle Rapin observed that Mr. Rapaport presented "semantic-language syndrome" and "mild motor clumsiness." (R. at 332). She stated that he appeared to suffer from Asperger's syndrome and noted that he was working with a psychologist. (R. at 332). Dr. Rapin added that Mr. Rapaport was "doing well and should continue to do well." (R. at 332).

In 1992, Dr. Diana Kurtzberg noted that Mr. Rapaport exhibited a mild hearing impairment. (R. at 312). He received speech therapy three times a week at school as well as occupational therapy and speech therapy at home. (R. at 303). At about the same time, Dr. Rapin noted that Mr. Rapaport had adequate reading comprehension and "spoke very clearly in long sentences." (R. at 333). She also noted that he did not display any "abnormal posture or movement," but did talk to himself at times. (R. at 333).

In 1993, Mr. Rapaport was initially classified as a student in need of special education services and received the classification of "emotional disability." (R. at 351-52). An Individualized Education Plan ("IEP") from 2000 noted that his

school district in New City recommended the following educational services: services in English, math, and social studies for one period each, five days a week; counseling once a week for one period; speech and language services two days a week for 30 minutes; and occupational therapy once a week for 30 minutes. (R. at 350). The IEP recommended that Mr. Rapaport participate in "regular class" for blocks/electives and foreign language class five days a week for one period; in physical education three days a week for one period; and in science five days a week for one period. (R. at 350). The IEP also noted that the school district recommended Mr. Rapaport receive modifications in testing procedures and be placed in a self-contained program with a pupil/staff ratio of 15 to 1. (R. at 350). The IEP also stated that Mr. Rapaport had "handwriting difficulties" yielding a "significant detrimental effect on his ability to convey meaning in the written form." (R. at 350). It stated that his family requested that he receive access to a laptop computer to assist him. (R. at 350). The IEP also noted the presence of a stutter. (R. at 351).

In terms of academic performance, in 1999, Mr. Rapaport scored in the 36th percentile in reading, in the 19th percentile in spelling, and in the 20th percentile in math. (R. at 351). In a 1999 IQ test, using the WISC-III testing instrument, Mr.

Rapaport received a verbal IQ of 107, a performance IQ of 77, and a full scale IQ of 91. (R. at 351). The IEP noted that Mr. Rapaport needed "to continue to develop his ability to express himself" and also needed to improve in "math calculation and reasoning." (R. at 351). It further stated that he did not present behavioral problems and that, after receiving encouragement, he "generally works quickly, quietly, and independently." (R. at 351).

Mr. Rapaport began attending the Birchwood School, a special education center, in second grade. (R. at 367). He continued at the Birchwood School until fifth grade. (R. at 367). He began attending a general education school in sixth grade and continued in that setting until 12th grade. (R. at 367).

2. Dr. David Koplon, Ph.D.

Dr. David Koplon, a clinical psychologist, examined Mr. Rapaport in September 2008. (R. at 367). The plaintiff reported a "long history of anxiety and depression," for which he had taken the medications BuSpar and Luvox. (R. at 370). Dr. Koplon stated that Mr. Rapaport felt these medications were effective. (R. at 370). Although the plaintiff held a valid driver's license, he felt his anxiety prevented him from driving a car. (R. at 367). In a WAIS-III IQ examination Dr. Koplon

administered, Mr. Rapaport received a verbal IQ score of 112, a performance IQ score of 81, and a full scale IQ score of 98. (R. at 368). On Woodcock-Johnson III Tests of Achievement, the plaintiff scored within the "average" range of achievement. (R. at 369).

3. Dr. Henry Judka, Psy.D.

In January 2013, Dr. Henry Judka, a treating psychologist, stated that Mr. Rapaport displayed Asperger's syndrome and adjustment disorder-acute anxiety disorder with elements of panic behaviors. (R. at 399). He noted that the plaintiff had been classified as "handicapped" in a school setting and had been placed in "special classes" and a "special school." (R. at 399). Dr. Judka noted that Mr. Rapaport received social skills training, counseling, and psychopharmacological interventions. (R. at 399). He stated that in his opinion, Mr. Rapaport could not sustain himself through work due to these conditions. (R. at 399).

4. Sidney Paul, L.C.S.W.

Sidney Paul, a social worker, stated in March 2013 that Mr. Rapaport suffered from Asperger's syndrome. (R. at 426). Mr. Paul noted that Mr. Rapaport "is very limited socially and in his ability to communicate." (R. at 426). He stated that the plaintiff participated in two group therapy sessions and

multiple psychotherapy sessions. (R. at 426). Mr. Rapaport began in August 2012; as of January 2013, he had attended 18 therapy sessions and one intake session. (R. at 426). Mr. Rapaport reported that the global economic downturn caused his "difficulty finding a job as a librarian." (R. at 426). Mr. Paul described Mr. Rapaport's insight as "poor." (R. at 426).

5. Dr. G. Kleinerman

Dr. G. Kleinerman completed a psychiatric review technique form in May 2013. (R. at 73). He found no limitations in understanding and memory. (R. at 69). Dr. Kleinerman did find, however, that Mr. Rapaport had limitations in concentration and persistence. (R. at 69). Among other things, Dr. Kleinerman stated that Mr. Rapaport could carry out very short and simple instructions. (R. at 69). He found that the plaintiff was "not significantly limited" in the following categories: the ability to carry out detailed instructions; the ability to maintain attention and concentration for extended periods; the ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; the ability to sustain an ordinary routine without special supervision; and the ability to work in coordination with or in proximity to others without being distracted by them. (R. at 69-70). Dr. Kleinerman found that Mr. Rapaport had limitations

in social interaction and adaptation. (R. at 69-70). He further found the plaintiff to be moderately limited in his ability to respond appropriately to changes in the work setting. (R. at 71).

6. Sylvia Farkas, L.C.S.W.

In July 2014, Sylvia Farkas, a social worker, provided a checklist-based assessment of Mr. Rapaport. She checked lines indicating that the plaintiff experienced restrictions in the following daily living activities: maintenance, shopping, paying bills, using public transportation, planning daily activities, and initiating and participating in activities independent of supervision and direction. (R. at 473). She checked lines noting that Mr. Rapaport demonstrated difficulties in maintaining social functioning in: communicating clearly and effectively, displaying awareness of other's feelings, exhibiting social maturity, responding without fear to strangers, establishing interpersonal relationships, holding a job, and interacting and actively participating in group activities. (R. at 473). She also checked lines indicating that Mr. Rapaport experienced difficulties in maintaining concentration, persistence, or pace in the following areas: independent functioning, concentration, and ability to complete tasks in a timely manner. (R. at 474). She checked lines

indicating that the deficiencies seriously interfered with Mr. Rapaport's ability to function "in these areas in an independent, appropriate, and/or effective manner." (R. at 474).

Ms. Farkas' checklist also indicated her opinion that Mr. Rapaport exhibited the following repeated episodes of deterioration or decompensation, each of extended duration: withdrawal from situations, exacerbation of symptoms of illness, superficial or inappropriate interaction with peers, poor decision making, and inability to adapt to changing demands of context. (R. at 474). She checked lines indicating that the plaintiff's psychiatric impairment had lasted or could be expected to last for a continuous period of not less than 12 months. (R. at 474). Mr. Rapaport saw Ms. Farkas for counseling appointments from late 2013 until at least June 2014. (R. at 37).

7. Diana Benattar

Diana Benattar, a job development coordinator, reported in June 2014 that Mr. Rapaport was attempting to find work. (R. at 470). She stated that Mr. Rapaport related that he "interviews well but was not offered the jobs due to funding cuts and the overall state of the economy." (R. at 470). She also noted that the plaintiff "reported stress headaches which he stated

can at times be crippling." (R. at 470). Ms. Benattar described Mr. Rapaport's behavior as "fatalistic about the possibility of succeeding past the first interview" and stated that he refused to discuss the possibility of "revisiting medications." (R. at 470). Ms. Benattar opined that the plaintiff "is not ready to begin preparing or interviewing for a work experience." (R. at 471). She stated her organization's recommendation that Mr. Rapaport "needs to reduce his anxiety either with psychiatric intervention or psychotropic medication." (R. at 471).

8. Susan Levitzky, M.D.

In late 2014, Dr. Susan Levitzky stated that she had treated Mr. Rapaport since birth. (R. at 476). She wrote a letter on his behalf stating that Mr. Rapaport suffered from autism with "[i]nability to establish or maintain effective interpersonal relationships," "[a]ttention deficit disorder, inattentive type," and a speech impediment. (R. at 476). She also stated that Mr. Rapaport had been diagnosed with an anxiety disorder, obsessive-compulsive disorder "with frequent hand washing resulting in red, rough hands," and "[p]aranoid ideation." (R. at 476). Dr. Levitzky stated that Mr. Rapaport presented with hydrocephaly and hypoplastic vermis. (R. at 476).

9. Sheryl Statman, Ph.D.

Also in late 2014, Dr. Sheryl Statman submitted a neuropsychological evaluation. (R. at 477). She noted Mr. Rapaport's background information, behavioral observations, tests administered, general functioning, language based cognitive functions, perceptually based nonverbal cognitive functions, memory functions, executive functions, and emotional functioning. (R. at 477-81). The report concluded with a summary, diagnosis, list of recommendations, and test results for Mr. Rapaport. (R. at 481-86). Dr. Statman stated that Mr. Rapaport is in "dire need of residential habilitation services . . . to allow for more independence in activities of daily living." (R. at 482). She also stated that he "is an excellent candidate for some basic pre-vocational training, job coaching onsite, and placement in a position comm[ensurate] with his academic skills." (R. at 482). She recommended, among other things, that Mr. Rapaport receive psychiatric evaluation for medication; that he pursue part-time work in a "bookstore, library, museum, art center, etc.," which "would all be appropriate;" that his environment be modified to minimize stress; and that specific strategies be pursued related to his learning style and organizational, memory, and attention capacities. (R. at 482).

C. Procedural History

Mr. Rapaport filed his application for SSI benefits on November 30, 2012, on the basis of anxiety, depression, panic attacks, adjustment disorder, Asperger's syndrome, and related issues. (R. at 132). His application was denied initially on June 14, 2013. (R. at 12). Mr. Rapaport requested a hearing, which took place before Administrative Law Judge ("ALJ") Robert Gonzalez on June 26, 2014. (R. at 12). Mr. Rapaport was represented by Jack Vega, a non-attorney representative. (R. at 12).

At the hearing, Mr. Rapaport testified that he graduated from St. Thomas Aquinas College in 2008, receiving a bachelor's degree. (R. at 30). He later completed a graduate program, receiving a master's degree in library science. (R. at 30). He also said that he was considering completing a legal aide training program at Rockland Community College. (R. at 33). Regarding his employment history, Mr. Rapaport testified that he had worked at the New City Jewish Center. He also stated that he had completed two days of training at the West Nyack Library. (R. at 31). The plaintiff noted that his job at the New City Jewish Center ended due to the Center's financial difficulties. (R. at 50).

Mr. Rapaport testified about his anxiety and history of

panic attacks, including difficulty working with a co-worker related to anxiety. (R. at 52-54). He stated that although he holds a driver's license, his anxiety had prevented him from driving. (R. at 57). He said that he spends a typical day at home, conducting research and resting. (R. at 58). Mr. Rapaport said that he had applied for jobs but without success. (R. at 58). He testified that in the past he had taken medication such as Luvox, BuSpar, and clonazepam (R. at 42), but that at the time of the hearing he had not been prescribed any medication. (R. at 58-59).

On September 15, 2014, ALJ Gonzalez issued a decision finding that Mr. Rapaport was not disabled within the meaning of the Social Security Act during the period beginning November 30, 2012. (R. at 12). The Appeals Council denied Mr. Rapaport's request for review on February 10, 2016, making the ALJ's determination the final decision of the Commissioner in his case. (R. at 1). The plaintiff filed the present action on April 7, 2016.

Analytical Framework

A. Determination of Disability

A claimant is disabled under the Social Security Act and therefore entitled to disability benefits if he can demonstrate, through medical evidence, that he 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); see also Roman v. Colvin, No. 15 Civ. 4800, 2016 WL 4990260, at *5 (S.D.N.Y. Aug. 2, 2016). The disability must be of "such severity that [the claimant] 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).

To determine whether a claimant is entitled to disability benefits, the Commissioner employs a five-step sequential analysis. 20 C.F.R. § 416.920(a)(4). First, the claimant must demonstrate that he is not currently engaging in substantial gainful activity. 20 C.F.R. § 416.920(a)(4)(i), (b). Second, the claimant must prove that he has a severe impairment that "significantly limits his physical or mental ability to do basic work activities." 20 C.F.R. § 416.920(a)(4)(ii), (c). Third, if the impairment is listed in what are known as "the Listings," 20 C.F.R. Part 404, Subpt. P, App. 1, or is the substantial equivalent of a listed impairment, the claimant is automatically considered disabled. 20 C.F.R. § 416.920(a)(4)(iii), (d).

Fourth, if the claimant is unable to make the requisite showing under step three, he must prove that he does not have the residual functional capacity ("RFC") to perform his past work. 20 C.F.R. § 416.920(a)(4)(iv), (e). Fifth, if the claimant satisfies his burden of proof on the first four steps, the burden shifts to the Commissioner to demonstrate that there is alternative substantial gainful employment in the national economy that the claimant can perform. 20 C.F.R. §§ 416.920(a)(4)(v), (g), 416.960(c); Longbardi v. Astrue, No. 07 Civ. 5952, 2009 WL 50140, at *23 (S.D.N.Y. Jan. 7, 2009) (citing Rosa v. Callahan, 168 F.3d 72, 77 (2d Cir. 1999), and Bapp v. Bowen, 802 F.2d 601, 604 (2d Cir. 1986)). In order to determine whether the claimant can perform other substantial gainful employment, the Commissioner must consider objective medical facts, diagnoses or medical opinions based on these facts, subjective evidence of pain or disability, and 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)).

B. Judicial Review

Under Rule 12(c) of the Federal Rules of Civil Procedure, a party is entitled to judgment on the pleadings if she establishes that no material facts are in dispute and that she

is entitled to judgment as a matter of law. See Burnette v. Carothers, 192 F.3d 52, 56 (2d Cir. 1999); Morcelo v. Barnhart, No. 01 Civ. 743, 2003 WL 470541, at *4 (S.D.N.Y. Jan. 21, 2003).

The Social Security Act provides that the Commissioner's findings "as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. § 405(g). A court reviewing the Commissioner's decision "may set aside a decision of the Commissioner if it is based on legal error or if it is not supported by substantial evidence." Geertgens v. Colvin, No. 13 Civ. 5733, 2014 WL 4809944, at *1 (S.D.N.Y. Sept. 24, 2014) (quoting Hahn v. Astrue, No. 08 Civ. 4261, 2009 WL 1490775, at *6 (S.D.N.Y. May 27, 2009)); see also Longbardi, 2009 WL 50140, at *21.

Judicial review, therefore, involves two levels of inquiry. First, the court must decide whether the Commissioner applied the correct legal standard. Tejada v. Apfel, 167 F.3d 770, 773 (2d Cir. 1999); Calvello v. Barnhart, No. 05 Civ. 4254, 2008 WL 4452359, at *8 (S.D.N.Y. April 29, 2008). Second, the court must decide whether the ALJ's decision was supported by substantial evidence. Tejada, 167 F.3d at 773 (2d Cir. 1999); Calvello, 2008 WL 4452359, at *8. "In determining whether substantial evidence exists, a reviewing court must consider 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.” Longbardi, 2009 WL 50140, at *21 (citing Brown, 174 F.3d at 62, and Williams v. Bowen, 859 F.2d 255, 256 (2d Cir. 1988)). Substantial evidence in this context is “more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Hahn, 2009 WL 1490775, at *6 (quoting Richardson v. Perales, 402 U.S. 389, 401 (1971)).

Analysis

A. The ALJ’s Decision

ALJ Gonzalez analyzed Mr. Rapaport’s claim pursuant to the five-step sequential evaluation process and concluded that he was not disabled on or after November 30, 2012. (R. at 12). At step one, the ALJ determined that Mr. Rapaport had not engaged in substantial gainful activity since November 30, 2012, the application date. (R. at 14).

Next, at step two, the ALJ found that Mr. Rapaport had severe impairments consisting of anxiety disorder and Asperger’s syndrome. (R. at 14).

At step three, ALJ Gonzalez found that none of Mr. Rapaport’s mental impairments, alone or in combination, met or medically equaled the severity of one of the impairments in the Listings. (R. at 14). ALJ Gonzalez considered two potential

listings: anxiety and obsessive-compulsive disorders (12.06), and autism spectrum disorder (12.10). (R. at 14). At the time of the hearing, paragraph B of these listings required a claimant to present marked restriction in at least two of the following areas: activities of daily living, social functioning, and concentration, persistence, or pace. As an alternative, Paragraph C of these listings required the claimant to demonstrate either repeated episodes of decompensation, a residual disease process resulting in marginal adjustment, or a history of one or more years' inability to function outside of a highly supportive living arrangement. ALJ Gonzalez concluded that neither the "paragraph B" nor "paragraph C" criteria were met. Specifically, he found that Mr. Rapaport had mild restriction with respect to activities of daily living, moderate difficulties in social functioning, and moderate difficulties with respect to concentration, persistence, or pace. ALJ Gonzalez also found that the medical evidence did not indicate repeated episodes of decompensation, a residual disease process resulting in marginal adjustment, or a history of one or more years' inability to function outside of a highly supportive living arrangement. (R. at 14-15).

Proceeding to step four, ALJ Gonzalez found that Mr. Rapaport had the residual functional capacity to perform a full

range of work at all exertional levels. (R. at 15). The ALJ found that "the claimant is able to understand, remember, and carry out simple instructions; deal with changes in a routine work setting; and occasionally interact with supervisors, coworkers, and the public." (R. at 15). ALJ Gonzalez stated that while Mr. Rapaport's medically determinable impairments "could reasonably be expected to cause the alleged symptoms," the plaintiff's statements concerning the intensity, persistence, and limiting effects of these symptoms were not entirely credible. (R. at 16). ALJ Gonzalez granted little weight to the opinion of Mr. Rapaport's treating psychologist, Dr. Henry Judka, that the plaintiff was "incapable of self-sustaining employment due to his developmental and psychological disorders" because "it is contradictory to the claimant's success in college and his successful work as a part-time librarian." (R. at 16-17). The ALJ also gave little weight to the opinion of Sidney Paul, who stated that Mr. Rapaport "cannot focus and make rational decisions" because, according to ALJ Gonzalez, it "is contrary to the claimant's activities of daily living." (R. at 17). By contrast, the ALJ gave substantial weight to the opinion of Dr. G. Kleinerman, who stated that Mr. Rapaport presented mild limitations in activities of daily living, mild limitations in concentration, persistence, and

pace, and moderate limitations in social functioning because this opinion was "well supported by the claimant's activities of daily living." (R. at 17).

At the final step in his analysis, ALJ Gonzalez found that Mr. Rapaport was not disabled because "jobs exist in significant numbers in the national economy that the claimant can perform." (R. at 18). ALJ Gonzalez based this decision on section 204.00 in the Medical-Vocational Guidelines ("the Grids"). (R. at 19).

B. Claims of Legal Error

1. Failure to Call a Vocational Expert

Mr. Rapaport asserts, first, that ALJ Gonzalez's failure to call a vocational expert constitutes an error of law. The plaintiff cites Social Security Ruling ("SSR") 85-15 (S.S.A. 1985), a policy statement describing decisions regarding nonexertional limitations. (Plaintiff's Memorandum of Law ("Pl. Memo.") at 13). Mr. Rapaport asserts that when a claimant presents "significant" nonexertional limitations, an ALJ may not rely on the Grids in making a decision. (Pl. Memo. at 13-15).

However, this argument misstates the essence of SSR 85-15. As Mr. Rapaport himself notes, the policy statement does not mandate use of a vocational expert; it only states one will be necessary in many cases. Zabala v. Astrue, 595 F.3d 402, 410 (2d Cir. 2010) (citing Bapp v. Bowen, 802 F.2d 601, 603 (2d Cir.

1986)) ("However, the 'mere existence of a nonexertional impairment does not automatically . . . preclude reliance on the guidelines.'") Specifically, an ALJ is required to call upon a vocational expert only if a claimant's "nonexertional limitations . . . significantly limit the range of work permitted by his exertional limitations." Lewis v. Colvin, 548 F. App'x 675, 678 (2d Cir. 2013) (alteration in original) (quoting Zabala, 595 F.3d at 410).

In the present case, ALJ Gonzalez found that Mr. Rapaport's nonexertional limitations, including the ability to "understand, remember, and carry out simple instructions" and "occasionally interact with supervisors, coworkers, and the public" (R. at 15) did not preclude him from performing basic work activities. (R. at 18). The evidence as a whole suggests that economic conditions, not physical or mental limitations, caused the termination of the plaintiff's employment. (R. at 481, 470, 32, 50). Moreover, the ALJ observed that Mr. Rapaport's nonexertional limitations "have little or no effect on the occupational base of unskilled work at all exertional levels." (R. at 19). It was not error, therefore, for ALJ Gonzalez to rely on the Grids rather than solicit the testimony of a vocational expert. See, e.g., Roma v. Astrue, 468 F. App'x 16, 21 (quoting Bapp, 802 F.2d at 603); Woodmancy v. Colvin, 577 F.

App'x 72, 75-76 (2d Cir. 2014).

2. Treating Physician Rule

Next, Mr. Rapaport asserts that ALJ Gonzalez "made an unsupported medical/vocational conclusion that is beyond the purview of his expertise or adjudicative power." (Pl. Memo. at 15). In support of this proposition, the plaintiff claims that the ALJ "improperly disregarded" the opinions of Dr. Judka and Dr. Koplun, both treating psychologists, and Mr. Paul, a treating social worker source. (Pl. Memo. at 16).

The "treating physician rule" states that a treating physician's opinion "is deemed controlling only if it is well-supported by clinical evidence." Schaal v. Apfel, 134 F.3d 496, 504 (2d Cir. 1998). Stated differently, an ALJ need not afford great or controlling weight to a treating source when substantial evidence does not support this weight. See, e.g., Halloran v. Barnhart, 362 F.3d 28, 32-33 (2d Cir. 2004).

In the present case, the ALJ applied the treating physician rule correctly. ALJ Gonzalez did not "disregard" opinions of the treating sources. Instead, he properly assessed each of these medical opinions in light of the medical record as a whole. (R. at 16-17). ALJ Gonzalez gave good reasons for not granting great or controlling weight to the opinions of Dr. Judka, Dr. Koplun, or Mr. Paul. He did so by describing the

inconsistency of these opinions with Mr. Rapaport's educational success in college, vocational success as a librarian, and ability to complete activities of daily living. (R. at 16-17). See, e.g., Klodzinski v. Astrue, 274 F. App'x 72, 73 (2d Cir. 2008).

In fact, at least two of these sources -- Dr. Koplon and Mr. Paul -- provided direct support for the conclusion that Mr. Rapaport is not disabled. First, Dr. Koplon stated that Mr. Rapaport "should be successful in the field of Library Science research which may focus on his cognitive and scholastic strengths and minimize close personal relationships." (R. at 371). Second, Mr. Paul stated that Mr. Rapaport "can and does care for himself." (R. at 437). Mr. Paul also checked a box indicating that he "cannot provide a medical opinion regarding this individual's ability to do work-related activities." (R. at 439).

3. Reliance on Consulting Physician

Mr. Rapaport next argues that ALJ Gonzalez committed legal error by relying on the opinion of Dr. Kleinerman, a non-examining physician. (Pl. Memo at 18-19). As the Second Circuit has stated, "The general rule is that 'the written reports of medical advisors who have not personally examined the claimant "deserve little weight'" " Vargas v. Sullivan,

898 F.2d 293, 295 (2d Cir. 1990) (quoting Allison v. Heckler, 711 F.2d 145, 147 (10th Cir. 1983)). Here, the ALJ did not rely only on Dr. Kleinerman's opinion. Rather, he relied on Mr. Rapaport's successful work history, college record, IQ scores, and other factors. The ALJ thus did not err in relying in part on the opinion of a consulting physician. See, e.g., Fessler v. Astrue, No. 09 Civ. 6905, 2011 WL 346553 at *9 (S.D.N.Y. Jan. 10, 2011) ("Not only may the reports of consultative or non-examining physicians constitute substantial evidence as to disability, but they may override the opinions of treating physicians in appropriate circumstances."); Casino-Ortiz v. Astrue, No. 06 Civ. 155, 2007 WL 2745704 at *9 (S.D.N.Y. Sept. 21, 2011).

4. Failure to Consider Non-Medical Opinions

Mr. Rapaport also argues that ALJ Gonzalez committed legal error by failing to give "any weight" to the report of Ms. Benattar, the job assessor. (Pl. Memo. at 21). In particular, the plaintiff contends that the ALJ neglected to consider all of the "Factors for Considering Opinion Evidence" set forth in a Social Security Ruling, SSR 06-03p, 2006 WL 2329939, at *4-5 (S.S.A. 2006).

There is no doubt that ALJ Gonzalez considered some of the listed factors explicitly. For example, the ruling identifies

one relevant consideration as “[h]ow consistent the opinion is with other evidence.” SSR 06-03p, 2006 WL 2329939, at *4. The ALJ found that Ms. Benattar’s opinion was not supported by Mr. Rapaport’s testimony: the plaintiff stated that he had appropriate skills, had previously worked, and was prevented from working by a tight job market.

Other factors not mentioned by the ALJ do not favor Mr. Rapaport. For instance, the ruling suggests consideration of “[h]ow long the source has known and how frequently the source has seen the individual.” SSR 06-03p, 2006 WL 2329939, at *4. Yet, the plaintiff had only been in contact with Ms. Benattar’s agency for approximately three months when she wrote her report, and she had seen him personally only two or three times. (Tr. At 470-71).

Accordingly, it was not error for ALJ Gonzalez to discount Ms. Benattar’s opinion.

C. Substantial Evidence

1. Residual Functional Capacity

Mr. Rapaport next argues that substantial evidence does not support ALJ Gonzalez’s residual functional capacity determination. (Pl. Memo. at 15-16). For the reasons discussed above, this argument is not persuasive. While the evidentiary record does contain evidence of impairment, it does not require

the conclusion that Mr. Rapaport's symptoms would preclude successful employment. Mr. Rapaport himself provided numerous examples of being able to perform key activities of daily living and of being able to perform work tasks. During the hearing, he stated, for instance, that his "computer skills" and "typing skills" were "good" and stated that his "researching skills" were "very, very good." (R. at 42). The plaintiff indicated that he had been able to apply for jobs. (R. at 58). He testified that he was told that he "did a very good job" while working at a library. (R. at 51). Neither Mr. Rapaport nor any medical source provided any indication of a physical disability that would prevent him from performing work. The medical evidence as a whole supports the ALJ's residual functional capacity determination. See Smith v. Commissioner of Social Security, 595 F. Supp. 2d 236, 238 (W.D.N.Y. 2009) (residual functional capacity for claimant with Asperger's syndrome did not direct finding of disability); see also Mideczky v. Colvin, No. 15 CV 531, 2016 WL 4402031, at *6-7 (N.D.N.Y. Aug. 18, 2016); Delucia v. Colvin, No. 15 CV 6029 2016 WL 898836, at *18-19 (W.D.N.Y. March 9, 2016).

2. New Evidence

Mr. Rapaport also argues that the Appeals Council improperly ignored the newly submitted opinions of Ms. Farkas,

Dr. Levitzky, and Dr. Statman when it upheld the ALJ's determination. (Pl. Memo. at 21-23). Mr. Rapaport also argues that an October 9, 2014 opinion from Ms. Benattar was submitted to the Appeals Council and ignored. (Pl. Complaint ("Compl.") at 7).

At the time of the hearing and appeal, 20 C.F.R. 416.1476(b)(1) provided that: "[I]n reviewing decisions based on an application for benefits, the Appeals Council will consider the evidence in the administrative law judge hearing record as well as any new and material evidence submitted to it" see, e.g., Bhuiyan v. Astrue, Civ. No. 2:12-362, 2013 WL 663711, at *3 (D.N.J. Feb. 22, 2013). Because nothing in the opinions of Ms. Farkas, Dr. Levitzky, or Dr. Statman constitutes "new and material" evidence, it was proper for the Appeals Council not to consider them. First, Ms. Farkas' evidence consists largely of a checklist related to alleged functional limitations, such as difficulties with maintenance, shopping, paying bills, and using public transportation. (R. at 473-74). The substantial evidence does not support the limitations alleged on the checklist. In addition, courts have found this type of conclusory evidence problematic. See, e.g., Sabater v. Colvin, No. 12 Civ. 4594, 2016 WL 1047080, at *5 n.6 (S.D.N.Y. March 10, 2016), citing Mason v. Shalala, 994 F. 2d 1058, 1067 (3d Cir.

1993) ("Form reports in which a physician's obligation is only to check a box or fill in a blank are weak evidence at best."). Furthermore, pursuant to SSR 06-03p, Ms. Farkas does not qualify as an "acceptable medical source[]," and her opinion is therefore not entitled to deference.

The evidence from Dr. Levitzky consists of a letter dated from November 29, 2014. The diagnoses, which include autism, anxiety disorder, and hydrocephaly, already appear in other evidence. (R. at 476). And, while Dr. Levitzky writes that "[o]nly a professional with a background in autism and extensive mental health training would be appropriate to determine the level of disability for this man (R. at 476)," the determination of disability is reserved to the Commissioner. See, e.g., Pichardo v. Commissioner of Social Security, No. 14 Civ. 7213, 2015 WL 6674822, at *10 (S.D.N.Y. 2015).

Dr. Statman's report also does not provide new evidence requiring Appeals Council review. While comprehensive, the report duplicates evidence already in the record concerning Mr. Rapaport's neuropsychological functioning. (R. at 477-86). The report exhaustively details Mr. Rapaport's background information, verbal and language skills, cognitive functions, memory functions, and the like, but it does not conclude that the plaintiff exhibits "marked" symptoms or a residual

functional capacity directing a finding of disability. Dr. Statman describes "mildly impaired" cognitive functioning (R. at 478, 482); "expressive verbal skills" that are "well within normal limits" (R. at 479); a "mildly impaired" ability to "process orally presented quantitative information" (R. at 479); and a "mildly impaired" ability to "discriminate essential from non-essential details" (R. at 480). The few times Dr. Statman identifies potentially greater deficits, such as "significant limitations in all areas of memory" (R. at 480) and "significant attention deficits" (R. at 480), this information is consistent with other reports. As Dr. Statman himself notes, "[Mr. Rapaport's] current cognitive skills are slightly lower than previous evaluations; however, the overall profile remains consistent." (R. at 482).

In fact, Dr. Statman suggests that the plaintiff is not disabled, stating, "Mr. Rapaport is an excellent candidate for some basic pre-vocational training, job coaching onsite, and placement in a position comm[ensurate] with his academic skills." (R. at 482; Pl. Memo at 22).

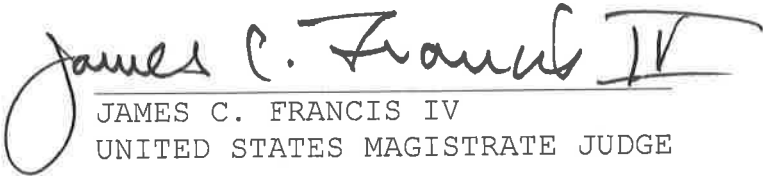
With regards to Ms. Benattar's October 9, 2014 report, the plaintiff has not provided any evidence to suggest that the Appeals Council received and failed to consider this opinion. The doctrine of administrative regularity "provides that, in the

absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties." Otero v. Commissioner of Social Security, No. 12 CV 1434, 2013 WL 1934074, at *5 (E.D.N.Y. May 8, 2013), citing Miley v. Principi, 366 F.3d 1343, 1347 (Fed. Cir. 2004). Therefore, the plaintiff has not rebutted this presumption of administrative regularity.

Conclusion

For the foregoing reasons, I recommend that the Commissioner's motion for judgment on the pleadings (Docket no. 17) be granted, the plaintiff's motion (Docket no. 14) be denied, and the complaint be dismissed. Pursuant to 28 U.S.C. § 636(b)(1) and Rules 72, 6(a), and 6(d) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with the Clerk of the Court, with extra copies delivered to the chambers of the Honorable Vernon S. Broderick, Room 415, 40 Foley Square, New York, New York 10007 and to the chambers of the undersigned, Room 1960, 500 Pearl Street, New York, New York 10007. Failure to file timely objections will preclude appellate review.

Respectfully submitted,


JAMES C. FRANCIS IV
UNITED STATES MAGISTRATE JUDGE

Dated: New York, New York
April 5, 2017

Copies transmitted this date to:

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