UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FOSTER,

Plaintiff,

16-cv-05541 (JGK)

- v.-

MEMORANDUM OPINION AND ORDER

BERRYHILL, Acting Commissioner of Social Security,

Defendant.

JOHN G. KOELTL, District Judge:

The plaintiff, Diane Foster, brings this action pursuant to 42 U.S.C. § 405(g) seeking review of a final decision by the Commissioner of Social Security ("Commissioner") denying the plaintiff's claim for Disability Insurance Benefits ("DIB") under the Social Security Act ("SSA").

Foster filed her DIB application on July 5, 2013, alleging disability that began on March 29, 2013. A hearing determining her eligibility for benefits was held before an Administrative Law Judge ("ALJ") on October 14, 2014. The ALJ denied the application on March 4, 2015. On May 23, 2016, the Appeals Council denied the plaintiff's claim for review, making the ALJ's decision the final decision of the Commissioner. The plaintiff then brought this action appealing that decision. The parties have filed cross-motions for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The plaintiff seeks reversal of the decision of the Commissioner and remand to

the administrative agency for the calculation of benefits or, in the alternative, remand for a new hearing. The Commissioner seeks to have this case dismissed.

I.

The administrative record contains the following facts relevant to this motion.

The plaintiff, born November 1, 1957, has a high school education and vocational training in the field of court administration. Tr. 14, 150. Foster has been employed as a sanitation enforcement agent and a court clerk, and was last employed as a court assistant by the New York State Unified Court System, a position she held from 2012 to 2013. Tr. 14, 44-49, 184. She lives with her husband. Her daily activities include light cooking, cleaning and shopping, and watching television and reading. Tr. 221.

Foster suffers from cervical myelopathy and degenerative disc disease. On December 6, 2010, Foster underwent cervical fusion surgery to treat these ailments. Tr. 235.

On January 16, 2012, Foster was seen by her neurologist, Dr. Rina Caprarella. Foster complained about neck pain, severe headaches, and difficulty speaking and swallowing. Dr. Caprarella noted that Foster’s job as a court assistant required “multiple repetitive activities of the neck.” Dr. Caprarella also noted that Foster had briefly received physical therapy

until “financial limitations” forced her to discontinue that treatment. Tr. 237.

An electromyography and nerve conduction study performed on January 19, 2012, revealed that Foster had cervical radiculopathy and mild bilateral carpal tunnel syndrome that had “worsened in degree” since 2010. Tr. 267-68.

On August 9, 2012, Dr. Caprarella observed that Foster had continued “swallowing difficulties,” “significant muscular spasm over the bilateral trapezius and cervical paraspinal muscles” and a “tremendously limited range of motion.” Tr. 240. Dr. Caprarella expressed concern that a change in Foster’s work responsibilities that required Foster to lift heavy files multiple times a day could endanger Foster’s neck safety. Tr. 240. Dr. Caprarella noted that such activities would likely “result in further degenerative changes and the need for further surgery.” Tr. 240.

Dr. Caprarella reiterated these concerns at a follow-up appointment on November 30, 2012, and advised Foster to seek additional treatments, including physical therapy. Tr. 241.

On February 20, 2013, Dr. Caprarella again reiterated her concerns, observing that the plaintiff was experiencing muscle spasms and pain in additional areas. Dr. Caprarella advised Foster to consider applying for DIB if Foster could not access other modalities of care, such as physical therapy and

myofascial release therapy, and if her work-related responsibilities continued to limit her ability to take care of herself. Tr. 242.

On March 4, 2013, Foster underwent an MRI of the lumbar spine that revealed multilevel degenerative changes in the lower thoracic and lower lumbar spine. Tr. 258-59.

In accordance with Dr. Caprarella's medical advice, the plaintiff requested that her employer assign her to a position with less physically demanding work responsibilities, which was denied. Tr. 45. As a result, on March 29, 2013, the plaintiff retired from her position as a court assistant. Tr. 12.

On June 21, 2013, Dr. Caprarella noted that Foster's ailments had persisted and that Foster was unable to access physical therapy. Tr. 243. The plaintiff filed a DIB application on July 5, 2013, alleging disability that began on March 29, 2013. Tr. 161.

On September 27, 2013, Dr. Gilbert Jenouri conducted a consultative examination in connection with Foster's DIB claim. Dr. Jenouri reported that Foster had mild restrictions on walking, standing, sitting for long periods of time, bending, stair climbing, lifting and carrying. Tr. 220-24.

On October 23, 2013, the Social Security Administration determined that Foster was not eligible for DIB. Tr. 85. On

November 18, 2013, the plaintiff filed a written request for a hearing. Tr. 93.

On April 25, 2014, Dr. Caprarella submitted a Medical Source Statement of Ability to Do Work-Related Activities (the "Medical Source Statement") to the Social Security Administration indicating that the plaintiff could only work 4 hours a day and would need 30 minute breaks between continuous periods of sitting, standing or walking. Dr. Caprarella also indicated that Foster could not stoop, reach overhead, or lift or carry objects up to and in excess of 10 pounds. Tr. 228-33.

A hearing to determine disability was held on October 14, 2014. The plaintiff testified to severe pain, headaches and other impairments related to her neck, including difficulty moving her neck in any direction, holding her neck in a still position, sitting and standing for long periods, "lifting things," swallowing, reading, raising her hands over her head, and opening doors. Tr. 51, 54, 59-60. The plaintiff also testified that she could not afford recommended treatments, such as MRIs, physical therapy and acupuncture. Tr. 52 (the plaintiff testifying that she earned $509 per month while her last MRI cost her $386). Instead, the plaintiff self-treated her ailments with "gentle stretching exercises" based on instructional videos that she viewed on the Internet. Tr. 52-53. The ALJ commiserated with the plaintiff, noting that her inability to afford

treatment was “sad.” Tr. 52. The plaintiff testified that her husband did most chores. Tr. 55.

In his decision on the plaintiff’s DIB application, the ALJ found that the plaintiff had the following severe impairments: degenerative disc disease of the cervical spine with myelopathy, status-post C5 corpectomy and multilevel discectomy and fusion at C4-C7, diabetes mellitus, and obesity. Tr. 13. These impairments did not satisfy or equate in severity with the listed impairments in 20 C.F.R. §§ 404.1520(d), 404.1525, and 404.1526. Tr. 13. The ALJ found that the plaintiff “can sit, stand or walk for 4 hours each during the course of an 8-hour workday; she can lift/carry 10 pounds occasionally and 5 pounds more frequently; she can change positions from sitting to standing or walking every 30 minutes while staying on task, she can occasionally climb stairs and ramps, and frequently use her hands for fine and gross manipulation.” Tr. 13. The ALJ found that the plaintiff had the residual functional capacity (“RFC”) to perform sedentary work as defined in 20 C.F.R. § 404.1567(a). Tr. 13.

The ALJ’s RFC determination was based in part on the ALJ’s finding that Dr. Caprarella’s medical opinion was only entitled limited weight because (according to the ALJ) Dr. Caprarella had found that the plaintiff could lift “0” pounds and no “weight at all,” which was contrary to the evidence. In view of the

allegedly mild objective findings, and the conservative treatment received post surgery, the ALJ discounted the plaintiff's testimony about her pain. Tr. 16-17.

The ALJ determined that, while the plaintiff could not perform her past work as a court assistant or sanitation inspector, the plaintiff could perform her past work as a court clerk as it is generally performed in the national economy. The ALJ reached that conclusion despite the testimony of a vocational expert ("VE") who opined that, while an individual in the plaintiff's condition (specifically, one with her RFC who was required to take additional breaks during the workday) "may" be able to perform the job duties of a court clerk, the individual "would not be able to maintain employment given that additional time that she would need to have away from her job duties. She would be unable to meet . . . employment." Tr. 65.

The ALJ concluded that the plaintiff had not been under a disability from March 29, 2013, to the date of the decision. Tr. 10-18. Accordingly, on March 4, 2015, the ALJ denied the plaintiff's application for DIB. Tr. 18. On May 23, 2016, the Appeals Council denied the plaintiff's claim for review, making the ALJ's decision the final decision of the Commissioner. Tr. 1. This appeal followed.

II.

A court may set aside a determination by the Commissioner only if it is based on legal error or is not supported by substantial evidence in the record. See 42 U.S.C. § 405(g); Berry v. Schweiker, 675 F.2d 464, 467 (2d Cir. 1982) (per curiam) (citations omitted). Substantial evidence is "more than a mere scintilla"; it is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Diaz v. Shalala, 59 F.3d 307, 312 (2d Cir. 1995); Moreira v. Colvin, No. 13-CV-4850 (JGK), 2014 WL 4634296, at *3 (S.D.N.Y. Sept. 15, 2014).

A claimant seeking DIB is considered disabled if the claimant 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 12 months." 42 U.S.C. § 423(d)(1)(A); see also Moreira, 2014 WL 4634296, at *4. Remand is particularly appropriate where an ALJ has failed to develop the record sufficiently and where a remand for further findings would help to assure the proper disposition of a claim. See Butts v. Barnhart, 388 F.3d 377, 386 (2d Cir. 2004); see also Bushansky

v. Comm'r of Soc. Sec., No. 13-CV-2574 (JGK), 2014 WL 4746092, at *4 (S.D.N.Y. Sept. 24, 2014).[1]

There is a five-step framework to evaluate disability claims set out in 20 C.F.R. § 404.1520(a). In essence, "if the Commissioner determines (1) that the claimant is not working, (2) that [s]he has a 'severe impairment,' (3) that the impairment is not one [listed in Appendix 1 of the regulations] that conclusively requires a determination of disability, and (4) that the claimant is not capable of continuing in [her] prior type of work, the Commissioner must find [her] disabled if there is not another type of work the claimant can do." Burgess v. Astrue, 537 F.3d 117, 120 (2d Cir. 2008) (citations omitted); see also, e.g., Selian v. Astrue, 708 F.3d 409, 417-18 (2d Cir. 2013); Bushansky, 2014 WL 4746092, at *4.

The claimant must first establish a disability under the Act (the framework's first four steps). See Burgess, 537 F.3d at 120. If the claimant satisfies those steps, the Commissioner must establish that, given the claimant's RFC, there is still work the claimant could perform in the national economy (the framework's fifth step). See id. If a claimant cannot perform

[1] The definition of disability in Supplemental Security Income ("SSI") and DIB cases is virtually identical, as is the standard for judicial review. Consequently, cases under 42 U.S.C. § 423 (DIB) are cited interchangeably with cases under 42 U.S.C. § 1382c(a)(3)(A) (SSI). See Hankerson v. Harris, 636 F.2d 893, 895 n.2 (2d Cir. 1980); see also Villanueva v. Barnhart, No. 03-CV-9021 (JGK), 2005 WL 22846, at *5 n.5 (S.D.N.Y. Jan. 3, 2005).

work in the national economy then the claimant is entitled to DIB. See id.; see also Burton-Mann v. Colvin, No. 15-CV-7392 (JGK), 2016 WL 4367973, at *3-4 (S.D.N.Y. Aug. 13, 2016).

III.

The ALJ determined that the plaintiff was not disabled because the plaintiff could perform her past relevant work as a court clerk as it is generally performed in the national economy. The plaintiff argues principally that the ALJ made three errors that warrant remand: First, the ALJ erred by giving limited weight to Dr. Caprarella's medical opinion; second, the VE's testimony does not support the ALJ's decision; and, third, the ALJ erred in his credibility assessment of the plaintiff because he ignored that the plaintiff cannot afford treatment.

A.

The ALJ erred when he accorded only limited weight to the opinion of the plaintiff's treating physician, Dr. Caprarella.

The opinion of a claimant's treating source is evidence that an ALJ must consider when determining whether the claimant is disabled. See 20 C.F.R. § 404.1527(c)(2); see also Shaw v. Chater, 221 F.3d 126, 131-34 (2d Cir. 2000) (discussing the "treating physician rule"). Great weight is traditionally accorded to the medical opinions of the claimant's treating physician. Id. at 131; see also Contreras v. Astrue, No. 11-CV-1179 (JGK), 2012 WL 2399543, at *2 (S.D.N.Y. June 26, 2012).

A treating source's opinion is due controlling weight only if it is well-supported by medically acceptable clinical and laboratory techniques and not inconsistent with substantial evidence of record. 20 C.F.R. § 404.1527(c)(2). If the opinion is not controlling, the Commissioner will give good reasons for the weight it is assigned. See Avila v. Astrue, 933 F. Supp. 2d 640, 653-54 (S.D.N.Y. Mar. 28, 2013); see also Shaw, 221 F.3d at 134. "In many cases a treating source's medical opinion will be entitled to the greatest weight and should be adopted, even if it does not meet the test for controlling weight." Dyson v. Astrue, No. 2:09-CV-3846 (WHY), 2010 WL 2640143, at *5 (E.D. Pa. June 30, 2010) (quoting Social Security Ruling ("SRR") 96-2p, 1996 WL 374188, at *4 (July 2, 1996)); see also Burton-Mann, 2015 WL 4367973, at *5.

The ALJ gave Dr. Caprarella's opinion limited weight because the ALJ found that Dr. Caprarella's opinion that the plaintiff could lift nothing ("0" pounds) was inconsistent with the evidence, which showed that the plaintiff could lift something (for example, when shopping and cleaning) and could handle files and papers. Tr. 17.

The ALJ did not fairly interpret Dr. Caprarella's opinion. Dr. Caprarella did not indicate that the plaintiff was incapable of lifting "any weight at all" or "0" pounds. Tr. 17. Dr. Caprarella indicated that the plaintiff could never lift "[u]p

to 10 lbs," Tr. 228, which does not speak to whether the plaintiff can lift "0" pounds or anywhere in between "0" and "10" pounds. Misreading Dr. Caprarella's opinion was not a basis to fail to give Dr. Caprarella's opinion controlling weight and indeed it was not a "good reason" for the limited weight that the ALJ gave to Dr. Caprarella's opinion. See Avila, 933 F. Supp. 2d at 653-55; see also Shaw, 221 F.3d at 134.

To the extent that the ALJ found that there was a gap in Dr. Caprarella's report regarding how much the plaintiff could lift, the ALJ had "an affirmative duty to seek out more information from the treating physician and to develop the administrative record accordingly." Hartnett v. Apfel, 21 F. Supp. 2d 217, 221 (E.D.N.Y. Oct. 23, 1998); see also Scott v. Astrue, No. 09-CV-3999 (KAM), 2010 WL 2736879, at *15 (E.D.N.Y. July 9, 2010); Sepa v. Colvin, No. 15-CV-7209 (JGK), 2016 WL 7442658, at *6 (S.D.N.Y. Dec. 27, 2016).

Accordingly, the ALJ erred by giving Dr. Caprarella's opinion limited weight because of purported inconsistencies with the record without first attempting to resolve the inconsistencies in order to fill the gaps. See Bushansky, 2014 WL 4746092, at *6; see also Burton-Mann, 2016 WL 4367973, at *6.

B.

Additionally, a reasonable interpretation of the VE's testimony does not support the ALJ's determination that the plaintiff can perform her past relevant work as a court clerk.

An ALJ is not required to seek the opinion of a VE at step four. See 20 C.F.R. § 404.1560(b)(2). Nevertheless, the ALJ sought such an opinion pursuant to § 404.1560(b)(2). Tr. 18.

"An ALJ may rely on a vocational expert's testimony regarding a hypothetical as long as there is substantial record evidence to support the assumption[s] upon which the vocational expert based his opinion, and accurately reflect the limitations and capabilities of the claimant involved." McIntyre v. Colvin, 758 F.3d 146, 151 (2d Cir. 2014) (citations and internal quotation marks omitted); see also Sanchez v. Barnhart, 329 F. Supp. 2d 445, 449 (S.D.N.Y. Aug. 6, 2004) ("The ALJ must pose hypothetical questions to the vocational expert which reflect the full extent of the claimant's capabilities and impairments to provide a sound basis for the VE's testimony.").

During the hearing, the ALJ posed a hypothetical to the VE asking whether an individual with the plaintiff's RFC, who required additional work breaks after prolonged periods of sitting or standing, would be able to perform the job of a court clerk. Tr. 65. The ALJ's determination that the plaintiff could perform her past relevant work seems to have rested on the

first-part of the VE's answer, that such an individual "may" be able to perform the job duties of a court clerk. Tr. 65. The ALJ ignored the second-part of the VE's answer, the categorical statement that, given the additional time away from her job duties, the plaintiff "would not be able to maintain employment." Tr. 65. Contrary to the ALJ's determination, the VE's opinion was thus that Foster "may" be able to perform some of the job duties of a court clerk, but that she "would not be able" to maintain her employment.

The Commissioner argues that the VE's answer was not critical to the ALJ's determination because the hypothetical involved an individual with the plaintiff's RFC who *also* required additional breaks. The Commissioner contends that the ALJ based his determination on his assessment of the plaintiff's RFC only, meaning that the ALJ found that the plaintiff did not require additional breaks. The Commissioner contends that the ALJ relied on the VE's answers to other hypotheticals that indicated that the plaintiff could work in the national economy.

The Commissioner's argument is speculative. The ALJ's decision does not justify that conclusion. The final hypothetical posed by the ALJ incorporated the need for additional breaks. Tr. 65. That hypothetical was based on substantial evidence and accurately reflected the limitations and capabilities of the plaintiff. The hypothetical was

consistent with the medical opinion of Dr. Caprarella and the plaintiff's testimony. Tr. 62, 229. "Although an ALJ may reject a VE's testimony regarding a claimant's limitations," see Hatcher v. Comm'r of Soc. Sec., No. 15-CV-3282 (SJF), 2017 WL 1323747, at *12 (E.D.N.Y. Mar. 22, 2017) (citing Perez v. Barnhart, 440 F. Supp. 2d 229, 234 (W.D.N.Y. July 20, 2006)), the ALJ did not do so here. Tr. 17-18.[2]

As the court in Ball v. Astrue, 755 F. Supp. 2d 452, (W.D.N.Y. Dec. 2, 2010), explained in an analogous case:

> Where, as here, the VE's testimony is essential to a finding of disability, failure to address the VE's determination requires remand, and the ALJ, at a minimum, must articulate the reasons for his decision not to follow the VE's determination that Plaintiff would not be able to perform any work in the national economy if she needed to take unscheduled rest breaks. While it may be that the ALJ presented the final hypothetical to the VE despite the ALJ's disbelief that Plaintiff, in fact, required such unscheduled rest breaks, the ALJ's failure to explain as much requires remand.

Id. 466-67; see also Karle v. Colvin, 12-Civ-3933 (JGK)(AJP), 2013 WL 4779037, at *3 (S.D.N.Y. Sept. 6, 2013) ("At the very least . . . the ALJ was required to provide an explanation for his decision to ignore the medical evidence and the testimony of the VE."); Hatcher, 2017 WL 1323747, at *12.

[2] In light of the disposition of this Memorandum Opinion and Order, it is unnecessary to reach the plaintiff's other contentions related to the credibility of the VE and the adequacy of the hypotheticals posed to the VE.

c.

The plaintiff also contends that, in finding that the plaintiff was not "entirely credible" because the plaintiff's medical record was "void of actual treatment," Tr. 15, the ALJ did not adequately explain away the plaintiff's rationale for the void, namely, that the plaintiff could not afford treatment.

Social Security Ruling ("SSR") 16-3p allows an ALJ to consider an individual's failure to follow prescribed treatment in determining that an individual's alleged symptoms are inconsistent with the overall evidence of record. SSR 16-3p, 2016 WL 1020935, at *14170 (Mar. 16, 2016). However, SSR 16-3p dictates that an ALJ must consider the individual's reasons for not seeking treatment. SSR 16-3p identifies the inability to "afford treatment" and the lack of "access to free or low-cost medical services" as an example of a reason why an individual may not have sought treatment. Id.

The Court of Appeals for the Second Circuit has observed that "[i]t would fly in the face of the plain purposes of the Social Security Act to deny claimant benefits because [s]he is too poor to obtain additional treatment . . . ." Shaw, 221 F.3d at 133; see also Bernadel v. Comm'r of Soc. Sec., No. 14-CV-5170 (PKC), 2015 WL 5719725, at *14 (E.D.N.Y. Sept. 29, 2015) (collecting cases for the proposition that "[c]ourts in this Circuit have observed that a claimant's credibility regarding

her impairments should not be discounted for failure to obtain treatment she could not afford").

During the hearing, the plaintiff explained that she could not afford physical therapy, an explanation the ALJ credited at the hearing. Tr. 52-53. Dr. Caprarella likewise stated that the plaintiff was unable to receive recommended treatments due to financial limitations and the absence of available physical therapy. Tr. 237, 241-43. While the ALJ acknowledged Foster's "insurance constraints" in his decision, the ALJ never addressed why those insurance constraints did not explain the "void of actual treatment." Tr. 15-16. Instead, "the ALJ erred in drawing a negative inference from [the plaintiff's] lack of treatment, which appears to be directly attributable to her indigence." Bernadel, 2015 WL 5719725, at *14; see also, e.g., Dhanraj v. Barnhart, No. 04-Civ-5537 (MBM), 2006 WL 1148105, at *7, *9 (S.D.N.Y. May 1, 2006); Blizzard v. Barnhart, No. 03-Civ-10301 (GWG), 2005 WL 946728, at *16 (S.D.N.Y. Apr. 25, 2005). The plaintiff's credibility should therefore be reexamined on remand.

IV.

The errors discussed above warrant remand. Remand is appropriate where, as here, "further findings or a clearer explanation for the decision" would help to assure the proper disposition of the plaintiff's claim. Villanueva v. Barnhart,

No. 03-CV-9021 (JGK), 2005 WL 22846, at *13 (S.D.N.Y. Jan. 3, 2005) (citation omitted).

The plaintiff argues that the remand should be solely for the calculation of benefits. However, because "a more complete record might support the Commissioner's decision," remand solely for the calculation of benefits is inappropriate in this case. Rosa v. Callahan, 168 F.3d 72, 83 (2d Cir. 1999); see also Sepa, 2016 WL 7442658, at *7.

Accordingly, the Commissioner's determination is **vacated** and the case is **remanded** for reconsideration of Foster's eligibility for DIB.

CONCLUSION

The Court has considered all of the arguments of the parties. To the extent not specifically addressed above, the remaining arguments are either moot or without merit.

For the reasons explained above, the plaintiff's motion for judgment on the pleadings is **granted**, and the defendant's cross-motion is **denied**. The Commissioner's decision is **vacated** and the case is **remanded** to the Commissioner pursuant to sentence four of 42 U.S.C. § 405(g) for further administrative proceedings consistent with this opinion. The Clerk is directed to enter judgment and to close this case. The Clerk is also directed to close all open motions.

SO ORDERED.

Dated: New York, New York
July 21, 2017

_____/s/_____
John G. Koeltl
United States District Judge