UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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SEAN STEWART,

Plaintiff,

-against-

NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY,

Defendant.
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ORDER

16-CV-4940 (CS)(JCM)

Seibel, J.

Before the Court are Plaintiff's objections, (Doc. 27 ("Obj.")), to the Report and Recommendation of United States Magistrate Judge Judith McCarthy, (Doc. 26 ("R&R")), recommending that Plaintiff's motion for judgment on the pleadings be denied and Defendant's motion for judgment on the pleadings be granted.

A district court reviewing a report and recommendation "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C). The district court "may adopt those portions of the report to which no 'specific, written objection' is made, as long as the factual and legal bases supporting the findings and conclusions set forth in those sections are not clearly erroneous or contrary to law." *Adams v. N.Y. State Dep't of Educ.*, 855 F. Supp. 2d 205, 206 (S.D.N.Y. 2012) (quoting Fed. R. Civ. P. 72(b)) (citing *Thomas v. Arn*, 474 U.S. 140, 149 (1985)). "A party that objects to a report and recommendation must point out the specific portions of the report and recommendation to which they [*sic*] object." *J.P.T. Auto., Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 659 F. Supp. 2d 350, 352 (E.D.N.Y. 2009). If a party fails to object to a particular portion of a report and recommendation, further review thereof is generally precluded. *See Mario v. P & C Food Mkts.,*

Inc., 313 F.3d 758, 766 (2d Cir. 2002). The court must review *de novo* any portion of the report to which a specific objection is made. *See* 28 U.S.C. § 636(b)(1)(C); *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997). "[W]hen a party makes conclusory or general objections, or simply reiterates the original arguments" made below, a court will review the report only for clear error. *Alaimo v. Bd. of Educ.*, 650 F. Supp. 2d 289, 291 (S.D.N.Y. 2009). "Furthermore, [even] on *de novo* review, the Court generally does not consider arguments or evidence which could have been, but were not, presented to the Magistrate Judge." *United States v. Vega*, 386 F. Supp. 2d 161, 163 (W.D.N.Y. 2005).

The Court presumes the reader's familiarity with the record, the prior proceedings and the standards governing judicial review of decisions of the Commissioner of Social Security.

Plaintiff first argues that the Administrative Law Judge ("ALJ") impermissibly substituted her own opinion for that of a consulting physician. (Obj. at 2-4.) Specifically, he argues that while Dr. Ali recommended that Plaintiff "avoid smoke, dust or other respiratory irritants," (R. at 383),[1] the ALJ found that Plaintiff had the residual functional capacity ("RFC") to tolerate "no more than occasional exposure to *concentrated* respiratory irritants," (R. at 17) (emphasis added). In this regard, Plaintiff merely repeats the same arguments he made to the Magistrate Judge. (*See* Doc. 13 at 23.) In any event, as Magistrate Judge McCarthy found, the RFC determination is the Commissioner's decision under the applicable regulations, so it need not parrot the finding of any particular doctor. (R&R at 49.) Thus, the ALJ did not "interject her own words into a medical opinion." (Obj. At 2.) Rather, she simply reached an arguably

[1] "R." refers to the administrative record, (Doc. 11).

different conclusion[2] – one which was reasonable based on the record. The ALJ accurately noted Dr. Ali's recommendation regarding respiratory irritants, (R. at 20), but also noted that Plaintiff's pulmonary problems were fairly well controlled and had never resulted in hospitalization, (*id.* at 19). She also noted that Plaintiff's breathing issues resulted from twenty-five years of smoking, that his alleged asthma limitations were inconsistent with his continued smoking, and that his continued smoking indicated that his condition was not debilitating. (*Id.* at 19, 21, 22.) Given that Plaintiff obviously could withstand daily exposure to a known respiratory irritant – cigarette smoke – there was nothing arbitrary in the ALJ's finding that Plaintiff could function in an atmosphere that afforded "no more than occasional exposure to concentrated respiratory irritants." (*Id.* at 17.) That conclusion meets the deferential substantial evidence standard of review. (*See* R&R at 41-42; *see also Poupore v. Astrue*, 566 F.3d 303, 305 (2d Cir. 2009) ("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.") (internal quotation marks omitted); *Alston v. Sullivan*, 904 F.2d 122, 126 (2d Cir. 1990) ("Where there is

[2] Plaintiff relies on *Forrest v. Colvin*, No. 15-CV-1573, 2016 WL 3528191, at *13 (S.D.N.Y. June 22, 2016), but that decision – which is in any event not binding – is distinguishable. In *Forrest*, the ALJ used a particular doctor's opinion as support for the proposition that Plaintiff had to avoid "concentrated exposure," but the doctor had not used that adjective. *See id.* Here the ALJ did not cite to Dr. Ali's recommendation, let alone a misreading thereof, as the (or even a) basis for her conclusion. (*See* R. at 17, 19.) Further, in *Forrest* the defendant argued that the plaintiff's smoking showed that the plaintiff obviously could tolerate exposure to some irritants, an argument the Court rejected because the ALJ had not made it. *See id.*; *see also Petersen v. Astrue*, 2 F. Supp. 3d 223, 234 (N.D.N.Y. 2012) ("[T]his Court may not create post-hoc rationalizations to explain the Commissioner's treatment of evidence when that treatment is not apparent from the Commissioner's decision itself.") (internal quotation marks omitted) (citing *Melville v. Apfel*, 198 F.3d 45, 52 (2d Cir. 1999) ("Nor may [the Court] properly affirm an administrative action on grounds different from those considered by the agency.")). Here, in contrast, the ALJ noted that Plaintiff's pulmonary problems resulted from his smoking, (R. at 19), and that his "limitations due to asthma are not consistent with [his] ongoing smoking," (*id.* at 21).

substantial evidence to support either position, the determination is one to be made by the factfinder.").)

Plaintiff further objects that the Magistrate Judge erred in concluding that the ALJ did not misapply the treating physician rule. Again his arguments merely reiterate those made below. (Doc. 13 at 11-19.) In any event, I agree with Magistrate Judge McCarthy that the ALJ gave the required "good reasons," *Snell v. Apfel*, 177 F.3d 128, 133 (2d Cir.1999); 20 C.F.R. § 404.1527(c)(2), for not affording controlling weight to the opinions of Dr. Bhanusali and Dr. Nadir – that their opinions were contradicted by other evidence of record[3] – and that the record reflects that the ALJ was correct in so concluding. (*See* R&R at 44-47.) Further, Plaintiff's argument that the ALJ gave great weight to the opinion of Dr. Helprin simply because Dr. Helprin had done an in-person examination of Plaintiff, (Obj. at 6), is not borne out by the record. The ALJ noted that fact, (R. at 15), and it was worth noting, given that consulting doctors sometimes do not do in-person exams and rather only review records. But the ALJ's reason for giving great weight to Dr. Helprin's opinion was that that opinion was consistent not only with the doctor's own evaluative findings but also with the ongoing treatment notes from Plaintiff's treating clinician – which is a "good reason[]" *Snell*, 177 F.3d at 133, for assigning that weight to that opinion. The ALJ need not "slavish[ly] recit[e] . . . each and every factor where the ALJ's reasoning and adherence to the regulation are clear," *Atwater v. Astrue*, 512 F. App'x 67, 70 (2d Cir. 2013) (summary order), and need only provide "good reasons" when not affording controlling weight to a treating physician's opinion, *Selian v. Astrue*, 708 F.3d 409, 419 (2d Cir. 2013). The decision here meets that standard.

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[3] The ALJ also noted that Dr. Nasir's opinion appeared to be based wholly on Plaintiff's subjective complaints. (R. at 21; *see id.* at 463-65.)

Thus, for the reasons stated above, Plaintiff's objections are overruled. I have reviewed the portions of the R&R as to which no objection has been raised, and find no error, clear or otherwise. Thus, the R&R is adopted as the decision of the Court. Plaintiff's motion for judgment on the pleadings is DENIED, and Defendant's is GRANTED. The Clerk of Court is respectfully directed to terminate the pending motions, (Docs. 12, 22), and close the case.

SO ORDERED.

Dated: July 14, 2017
White Plains, New York

Cathy Seibel

CATHY SEIBEL, U.S.D.J.