IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

AMANDA G. LANG,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. CIV-16-565-BMJ
	)	
NANCY A. BERRYHILL,[1]	)	
Acting Commissioner of	)	
Social Security Administration,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Amanda G. Lang, brings this action pursuant to 42 U.S.C. § 405(g) for judicial review of the Social Security Administration's final decision finding she was not disabled under the Social Security Act. The parties have consented to the exercise of jurisdiction over this matter by a United States Magistrate Judge. *See* 28 U.S.C. § 636(c). The Commissioner has filed the Administrative Record (AR) [Doc. No. 12], and both parties have briefed their respective positions. For the reasons stated below, the Court reverses the Commissioner's decision and remands the matter for further proceedings.

I. Procedural Background

On April 16, 2013, Plaintiff protectively filed an application for disability insurance benefits (DIB). *See* AR 89. The Social Security Administration (SSA) denied the application initially and on reconsideration. AR 125, 149. Following a hearing, an Administrative Law Judge (ALJ) issued an unfavorable decision dated October 24, 2014. AR 86-100. The Appeals Council

[1] Pursuant to Fed. R. Civ. P. 25(d), Nancy A. Berryhill, Acting Commissioner of Social Security Administration, is hereby substituted as the proper Defendant in this action.

denied Plaintiff's request for review. AR 1-6. Thus, the decision of the ALJ became the final decision of the Commissioner. Plaintiff seeks judicial review of this final agency decision.

II. The ALJ's Decision

The ALJ followed the sequential evaluation process required by agency regulations. *See Fischer-Ross v. Barnhart*, 431 F.3d 729, 731 (10th Cir. 2005) (explaining five-step sequential evaluation process); *see also* 20 C.F.R. § 404.1520. The ALJ first determined Plaintiff had not engaged in substantial gainful activity since February 2, 2011, her alleged onset date. AR 91.

At step two, the ALJ determined Plaintiff suffers from the severe impairments of status post traumatic brain injury, a mood disorder, and a cognitive disorder. AR 91.[2] At step three, the ALJ found Plaintiff's impairments do not meet or medically equal any of the impairments listed at 20 C.F.R. Part 404, Subpart P, Appendix 1. AR 92-93.

The ALJ next determined Plaintiff's residual functional capacity (RFC), concluding:

> [Plaintiff] has the residual functional capacity to perform a full range of work at all exertional levels but with the following nonexertional limitations: She is limited to simple tasks; only superficial contact with supervisors and co-workers; and no interaction with the general public. She can adapt to a low stress work environment that does not involve high production standards or require rapid mental processing.

AR 93-96. The ALJ determined Plaintiff was unable to perform any past relevant work. AR 96. Relying on the testimony of a vocational expert (VE), the ALJ found there were other jobs that existed in significant numbers in the national economy that Plaintiff could perform— hand packer and laundry sorter. AR 96-97. The ALJ concluded, therefore, that Plaintiff was not disabled for purposes of the Social Security Act. AR 97.

[2] The ALJ also found Plaintiff had the non-severe impairments of migraine and slight ataxic gait. *Id.*

III. Issues Presented for Judicial Review

Plaintiff argues the ALJ failed to develop the record regarding Plaintiff's mental impairments. Pl.'s Br. [Doc. No. 16], 5-12.[3] She also argues the ALJ improperly ignored probative medical evidence contradicting his findings. *Id.* at 12-15.

IV. Standard of Review

Judicial review of the Commissioner's final decision is limited to determining whether the factual findings are supported by substantial evidence in the record as a whole and whether the correct legal standards were applied. *See Poppa v. Astrue*, 569 F.3d 1167, 1169 (10th Cir. 2009). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Doyal v. Barnhart*, 331 F.3d 758, 760 (10th Cir. 2003) (quotation omitted). A decision is not based on substantial evidence if it is overwhelmed by other evidence in the record or if there is a mere scintilla of evidence supporting it. *Branum v. Barnhart*, 385 F.3d 1268, 1270 (10th Cir. 2004). The court "meticulously examine[s] the record as a whole, including anything that may undercut or detract from the ALJ's findings in order to determine if the substantiality test has been met." *Wall v. Astrue*, 561 F.3d 1048, 1052 (10th Cir. 2009) (citations omitted). While the court considers whether the ALJ followed the applicable rules of law in weighing particular types of evidence in disability cases, the court does not reweigh the evidence or substitute its own judgment for that of the Commissioner. *Bowman v. Astrue*, 511 F.3d 1270, 1272 (10th Cir. 2008) (quotations and citations omitted).

V. Analysis

Plaintiff asserts the ALJ inadequately developed the record with regard to her mental impairments. Specifically, Plaintiff contends the ALJ had a duty to obtain a neuropsychological

[3] Page references to briefs are to the CM/ECF page number.

evaluation[4] because "the record contained sufficient evidence 'to suggest a reasonable possibility' that she suffered continuing effects from her previous traumatic brain injury." Pl.'s Br. 8.

A. Summary of Relevant Portions of the Record

In 1997, Plaintiff was involved in a motor vehicle accident in which she suffered a traumatic brain injury and was in a coma for over two months. AR 318, 385. Later in 1997, when Plaintiff was seventeen years old, she underwent a neuropsychological evaluation with Mitchel A. Woltersdorf, Ph.D. AR 385-388. Dr. Woltersdorf's evaluation indicates that Plaintiff had a performance scale IQ score of 62 and was "on the mildly retarded range of visual spatial abilities." AR 386. Plaintiff had another neuropsychological evaluation with Dr. Woltersdorf in March 1998, where she received a performance scale IQ score of 65, and the report further stated:

> [Plaintiff] is functioning in the low average range of verbal abilities and the retarded range of visual-spatial abilities. Her poorest scores were in visual-perceptual problem-solving (severely retarded and not changed from previous exam) and processing speed (now in the borderline retarded range, up from the previous severely retarded range).
>
> Processing speed is likely to improve slightly but the others are permanent deficits.

AR 390.[5]

Plaintiff underwent a consultative psychological evaluation in 2013 with Suzan B. Simmons, Ph.D. AR 318-324. At the end of Dr. Simmons' report, she stated: "Review of [Plaintiff's] neuropsychological evaluation post [traumatic brain injury] and comparison with a

[4] *See* 20 C.F.R., pt. 404, subpt. P, App. 1, § 12.00(C)(5).

[5] As Defendant notes, the ALJ cited to portions of Dr. Woltersdorf's neuropsychological evaluations. *See* AR 94. The ALJ did not, however, reference the IQ scores.

new neuropsychological evaluation would be helpful in identifying progress or deterioration in cognitive functioning since her injury." AR 321.

Prior to the hearing, Plaintiff's counsel sought further development of the record by way of "neuropsychiatric evaluation to determine the nature and extent of her Traumatic Brain Injury." AR 306. At the hearing, Plaintiff's counsel repeated his request that the ALJ send Plaintiff for a neuropsychological evaluation "to better define the cognitive deficits that she has as a result of her traumatic brain injury." AR 123. She contends the ALJ's failure to grant the request is reversible error.

B. The ALJ Failed to Develop the Record

Although "the burden to prove disability in a social security case is on the claimant," the "hearing is nonadversarial . . . and the ALJ bears responsibility for ensuring that an adequate record is developed during the disability hearing consistent with the issues raised." *Branum,* 385 F.3d at 1271 (quotation omitted). "The ALJ's duty to further develop the record is triggered by conflicts, inconsistencies or inconclusive findings in the medical record requiring further investigation." *Maestas v. Colvin*, 618 F. App'x 358, 361 (10th Cir. 2015) (*citing Hawkins v. Chater*, 113 F.3d 1162, 1166-67 (10th Cir. 1997)); *see also* 20 C.F.R. § 404.1519a ("We may purchase a consultative examination to try to resolve an inconsistency in the evidence, or when the evidence as a whole is insufficient to allow us to make a determination or decision on your claim.").[6]

[6] Plaintiff cited 20 C.F.R. § 404.1519a, listing situations which "normally require a consultative examination." Pl.'s Br. 7. The "normally require" language is contained in a version of 20 C.F.R. § 404.1519a that was superseded in 2012—before the decision in this matter. Defendant highlights the new language of the regulation which discusses situations that "may" require a consultative examination. *See* Def.'s Br. [Doc. No. 21], 6. Nevertheless, courts have always analyzed the need for a consultative examination under a framework giving the ALJ discretion. *See Hawkins*, 113 F.3d at 1166 ("The [Commissioner] has broad latitude in ordering consultative examinations."). And despite the change in regulatory language, courts have found the absence of a consultative examination resulted in reversible error. *See Williams v. Berryhill*, -- Fed. App'x --, 2017 WL

Plaintiff last underwent a neuropsychological evaluation in 1998. As stated above, that evaluation revealed modest recovery in some areas from her 1997 evalutation, but Dr. Woltersdorf expected permanent deficits in others. AR 390. Plaintiff contends Dr. Simmons' statement in the more-recent psychological evaluation that obtaining a "new neuropsychological evaluation would be helpful in identifying progress or deterioration in cognitive functioning since [Plaintiff's] injury" should have prompted the ALJ to order a new consultative neuropsychological evaluation. Defendant, however, suggests that the consultative psychological evaluation with Dr. Simmons was sufficient to decide the case.[7] Def.'s Br. 6-7. Defendant's argument is not convincing because Dr. Simmons suggested her evaluation was insufficient with regard to evaluating Plaintiff's permanent cognitive function. AR 321.

This matter is similar to a case decided by the United States District Court for the Eastern District of Oklahoma, where a doctor performed a psychological evaluation of the claimant and recommended a neuropsychological evaluation to assess possible cognitive disorder and memory loss. *Schlosser v. Colvin*, No. CIV-15-059-JHP-KEW, 2016 WL 1239865, at *3 (E.D. Okla. Mar. 14, 2016), *report and recommendation adopted*, No. CIV-15-059-JHP-KEW, 2016 WL 1240736 (E.D. Okla. Mar. 29, 2016). Like here, the claimant's attorney requested the neuropsychological evaluation at the administrative hearing. *Id.* There, the ALJ denied the request for the evaluation

1032570, at *2 (10th Cir. Mar. 17, 2017) (reversing and requiring ALJ to order a consultative examination when "the existing evidence [was] not sufficient to make a determination of [the] claim"); *Kleiman v. Colvin*, No. 15-CV-00399-MEH, 2016 WL 1637578, at *12 (D. Colo. Apr. 26, 2016) (remanding and instructing the ALJ "to either further develop the record or elaborate on its decision to not address the potential need for [a test]" that would have allowed the ALJ to determine whether Plaintiff equaled or exceeded a listing).

[7] Defendant also contends Dr. Brad Liston, D.O., who performed a consultative physical examination, also assessed Plaintiff's neurological functioning. Dr. Liston did not, however, address Plaintiff's cognitive functioning. *See* AR 312.

based on a lack of evidence. The court, however, found that the doctor preforming the psychological evaluation's suggestion was "persuasive even though the ALJ gave his opinion limited weight." *Id.* Ultimately, the Court found:

> The record does not contain such testing and, given Claimant's limitations in other cognitive areas such as literacy, the testing should be done to clearly and appropriately ascertain the state of Claimant's mental abilities. On remand, the ALJ shall obtain a neuropsychological evaluation in order to insure a full picture of Claimant's mental status is ascertained.

Id. Here too, the consulting doctor performing the psychological evaluation suggested a neuropsychological evaluation for purposes of assessing the claimant's cognitive functioning. Therefore, it is similarly appropriate for the matter to be remanded so that the ALJ can obtain a neuropsychological evaluation.

Further bolstering Plaintiff's argument is the fact that an updated neuropsychological evaluation may be relevant to the ALJ's step-three findings. Plaintiff contends a further evaluation was necessary to determine if Plaintiff met the criteria of Listing 12.05(C). 20 C.F.R., pt. 404, subpt. P, App. 1, § 12.05.[8] Listing 12.05 contains a "capsule definition" or "diagnostic description" of intellectual disability:

> Intellectual disability 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.

[8] Plaintiff also argued that an evaluation would assist in determining whether Plaintiff met the criteria of Listing 12.02(A)(7). The Court finds this argument unpersuasive because the ALJ found Plaintiff met neither the paragraph B nor paragraph C criteria of Listing 12.02. AR 92-93. A claimant must meet either the paragraph B or paragraph C criteria (along with the criteria of Paragraph A) in order to establish disability pursuant to Listing 12.02. 20 C.F.R., pt. 404, subpt. P, App. 1, § 12.00(A). Thus, it is irrelevant whether Plaintiff could establish Paragraph A. On remand, however, the ALJ should consider the neuropsychological evaluation in considering Listing 12.02.

20 C.F.R., pt. 404, subpt. P, App. 1, § 12.05. The Listing also contains four sets of criteria describing listing-level severity. *Id*., § 12.05(A)-(D). A claimant bears the burden of satisfying both the capsule definition and one of the four severity prongs to establish that she meets the listing. *Lax v. Astrue*, 489 F.3d 1080, 1085 (10th Cir. 2007). Plaintiff contends a neuropsychological evaluation will show Plaintiff satisfies the requirements in paragraph 12.05(C): "[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." *Id*.

The ALJ did not address Listing 12.05 in the decision despite the fact that Dr. Woltersdorf's neuropsychological evaluations from 1997 and 1998 included performance-scale IQ scores of 65 or lower for Plaintiff. AR 386, 390. These scores, along with Plaintiff's mood disorder, seemingly satisfy the severity prong in paragraph 12.05(C). While it is possible that the ALJ did not consider Listing 12.05 because he did not believe Plaintiff satisfied the capsule definition or because he did not consider the IQ scores to be valid, the Court cannot be certain because the ALJ did not discuss the listing or explain why he did not grant Plaintiff's request for a neuropsychological evaluation.[9]

On remand the ALJ should obtain a neuropsychological evalaution and consider its findings—in conjunction with Listing 12.05, any other relevant listing, and at all other appropriate steps in the decision.

[9] Defendant argues "the ALJ noted significant activity inconsistent with the low score in the years after Plaintiff's injury, including Plaintiff's successful past skilled and semi-skilled work, and primary and independent child care." Def.'s Br. 9-10. Plaintiff's past work, however, was not referenced in relation to the analysis of the listings, but instead only with regard to Plaintiff's inability to perform her past work. *See* AR 96. Although Defendant cites *Keyes-Zachary v. Astrue*, 695 F.3d 1156, 1172 (10th Cir. 2012) in support of this proposition, in that case the individual's full scale IQ score was 84—in borderline mental retardation range—and there was no indication that the claimant had a score that could meet the severity criteria of one of the paragraphs in Listing 12.05. *Id.* at 1172-73.

C. The Court Does Not Reach the Merits of Plaintiff's Second Point of Error

Plaintiff's other contention of error is that the ALJ erred by ignoring probative medical evidence which contradicted his findings. Because the ALJ must further develop the record on remand, the Court does not reach the merits of Plaintiff's remaining claim as it "may be affected by the ALJ's treatment of the case on remand." *Watkins v. Barnhart*, 350 F.3d 1297, 1299 (10th Cir. 2003). The ALJ, however, is reminded that the decision "must discuss the uncontroverted evidence he chooses not to rely upon, as well as significantly probative evidence he rejects." *Clifton v. Chater*, 79 F.3d 1007, 1010 (10th Cir. 1996).

VI. Conclusion

For the reasons set forth, the Court reverses the decision of the Commissioner and remands the matter for further proceedings consistent with this Memorandum Opinion and Order.

ENTERED this 26th day of July, 2017.

BERNARD M. JONES
UNITED STATES MAGISTRATE JUDGE