IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAWN PERRY,

Plaintiff,

v.

NANCY A. BERRYHILL,[1] Acting Commissioner of Social Security

Defendant.

CIVIL ACTION
NO. 15-4225

PAPPERT, J. **July 19, 2017**

MEMORANDUM

Dawn Perry, pursuant to 42 U.S.C. § 405(g), seeks judicial review of a decision by the Commissioner of Social Security denying her claim for Disability Insurance Benefits under Title II of the Social Security Act, 42 U.S.C. § 401, *et seq*. Perry contends the decision was erroneous because the Administrative Law Judge failed to adequately address her obesity, rejected medical opinion evidence without explanation, failed to adequately explain his credibility determination and based his decision on vocational expert testimony elicited by an improper hypothetical question. The ALJ's decision was upheld by the Appeals Council, and Magistrate Judge Lynne Sitarski subsequently recommended that Perry's request for review be denied. For the reasons below, the Court overrules Perry's objections to Magistrate Judge Sitarski's Report and Recommendation and grants judgment in favor of the Commissioner.

[1] Nancy A. Berryhill became the Acting Commissioner of Social Security on January 23, 2017. Pursuant to Federal Rule of Civil Procedure 25(d), Ms. Berryhill should be substituted for the former Acting Commissioner, Carolyn Colvin, as the defendant in this action. *See* FED. R. CIV. P. 25(d).

I.

Perry filed for Disability Insurance Benefits on June 15, 2012, claiming disability, effective May 20, 2011, due to osteoarthritis in both knees. (R. 51, 118, ECF No. 4.)[2] Her claim was initially denied on August 15, 2012. (R. 63–66.) On August 22, 2012, Perry requested a hearing before an Administrative Law Judge ("ALJ"), (R. 67), which was held on November 15, 2013, (R. 26–46). Perry, represented by counsel, testified at the hearing, as did an impartial vocational expert. (*Id.*) On March 18, 2014, the ALJ denied Perry's claim. (R. 10–25.) Perry filed a request for review with the Appeals Council on May 4, 2014. (R. 7–9.) The Council denied Perry's request on May 29, 2015, rendering the ALJ's decision the final decision of the Commissioner. (R. 1–3.) Perry filed this action on July 31, 2015, seeking judicial review of the ALJ's decision. (ECF Nos. 1 & 8.) On February 24, 2017, the magistrate judge issued a report recommending that Perry's request for review be denied. (ECF No. 14.) Perry filed her objections to the magistrate judge's recommendation on March 13, 2017. (ECF No. 15).

II.

The Court has reviewed the administrative record in its entirety and summarizes here the evidence relevant to Perry's request for review.

A.

Perry, born on February 21, 1964, was forty-seven years old on May 20, 2011, the alleged onset date of her disability. (R. 20.) She received a high school equivalency certificate and worked as a medical assistant from 1996 to 2011. (R. 20, 110.) In May

[2] The record, consisting of 512 numbered pages, was uploaded to ECF in piecemeal fashion. *See* (ECF Nos. 4-2–4-11). The Court will cite to the record page numbers rather than the specific ECF document identifiers.

2011, Perry complained of pain, instability, stiffness, weakness and locking in her left thigh, knee and calf. (R. 17, 200.) She treated with orthopedic surgeon Andrew Frankel, M.D. on May 10 and May 13, 2011. (R. 17, 183–84, 188–93, 200–08.) Upon examination, Dr. Frankel found moderate swelling and effusion with marked tenderness in the left knee. (R. 17, 203.) He noted a history of a meniscus tear and an ACL repair to the right knee. (R. 202.) X-rays showed severe degenerative joint disease (DJD) in the right knee, no significant DJD in the left knee and mild DJD in the patellofemoral joints of both knees. (R. 203.) An MRI of the left knee showed a complex medical meniscus tear, moderate joint effusion and moderate degenerative changes of the medial femoral condyle. (R. 17, 200.) Dr. Frankel diagnosed left knee joint effusion, medial meniscus tear and DJD in the patellofemoral joint. (R. 200.) He performed a left knee arthroscopy with a partial medial meniscectomy on May 23, 2011. (R. 17, 181–82.) In a series of post-operative visits, Perry complained of uncontrolled pain. (R. 194–98.) Dr. Frankel reported nearly normalized range of motion and improved strength. (*Id.*) On July 24, 2012, Dr. Frankel wrote that he was unable to complete a Medical Source Statement delineating Perry's functional capacity, stating: "Unable to assess. Have not seen patient since 7/14/2011 when she left practice to see another surgeon." (R. 156–57.)

B.

On September 20, 2011, orthopedic surgeon Jonathan P. Garino replaced both of Perry's knees at Paoli Hospital. (R. 28–29, 210–13, 407–08.)[3] On September 25, 2011,

[3] Though the Paoli Hospital medical records from the September 20 surgery were inadvertently omitted from the record, the record contains Paoli Hospital records from Perry's subsequent treatment on September 25, November 30, December 19, 2011 and March 20, 2012, and the September 20 bilateral knee replacement procedure is reflected in those records. (R. 209–58.)

Perry went to the Paoli Hospital emergency room complaining of pain and swelling in both knees. (R. 209–23.) She described the pain as "dull" and of moderate severity but constant. (R. 210.) She was diagnosed with post-operative pain and swelling of both legs and discharged with instructions to elevate her legs above chest level. (R. 212, 216.) She was cleared to walk and bear weight as tolerated. (R. 212.)

Dr. Garino referred Perry to Elizabeth Todd for physical therapy, which Perry attended semi-regularly from October 2011 to June 2012 to address mild edema, pain, decreased range of motion and decreased strength. (R. 361–97.) On October 17, 2011, Todd noted: "Pain is 3/10 at rest mostly in the left lower extremity but can increase to 6/10." (R. 394.) On October 24, 2011, Perry told Todd that her knees continued to feel really stiff and that she was "wiped-out from her weekend." (R. 391.) On October 27, 2011, Todd noted that Perry had fallen the day before and landed on both knees but denied any increase in pain, swelling or bruising. (*Id.*) On October 31, 2011, Perry reported that "she was very active over the weekend and noted increased swelling and stiffness" in her knees. (R. 392.) Todd noted that she added a weight machine into Perry's curriculum, which Perry performed successfully. Todd wrote: "Patient continues to demonstrate good range of motion and is demonstrating improved strength bilaterally." (*Id.*) On November 3, 2011, Perry stated that her legs felt "normal." (R. 389.) Todd noted that Perry "continue[d] to demonstrate slight Trendelenburg gain with ambulation but overall is improving well, able to reciprocally ascend and descend stairs." (*Id.*)

C.

In November 2011, while on vacation at Disney World in Florida, Perry went to the emergency room complaining of swelling in her left leg. (R. 386, 388, 435.) An MRI was negative for Deep Vein Thrombosis. (R. 386, 435.) Upon returning home, she saw Dr. Garino, who told her that "she was doing too much activity." (R. 386, 390.) One week later, Perry fell over her dog, landed on her knees and heard her "right knee pop." (R. 224, 275–76, 386, 390.) Dr. Garino examined her, diagnosed her with a dislocated right knee and directed her to the Paoli Hospital ER for "sedation and manipulation." (R. 224–31, 235, 275, 386, 390.) The procedure successfully popped her knee back into place and she was discharged on November 30, 2011 in "stable condition with weight bearing as tolerated." (R. 235.)

On December 6, 2011, Perry returned to physical therapy. She reported "significant relief" after the relocation of her right knee and an ability to "walk normally." (R. 386.) She noted recurring swelling and stiffness and ranked her pain level as 1/10 at rest with increases up to 5/10. (*Id.*) In particular, she experienced "sharp pain in the right medial knee with overpressure" and "lacked eccentric control for the right knee." (*Id.*) On December 13, 2011, Perry stated that "her knees felt very good after the reevaluation" and "denied any sharp pain in right knee with passive range of motion," demonstrating "improved range of motion." (R. 384.)

On December 19, 2011, however, Perry returned to Dr. Garino with severe pain in her right knee. (R. 18, 239.) He determined that she had again dislocated the knee and directed her to the ER for another relocation procedure. (R. 238–46.) After the December 19 procedure, Perry reported decreased pain—from 10/10 to 2/10. (R. 242.)

On January 24, 2012, upon returning to physical therapy, Perry reported general laxity in her right knee and "tenderness over her left patellar tendon and her right lateral joint line." (R. 379.) She ranked her pain as 3/10 at rest with increases to 6/10. (*Id.*) She noted difficulty with stairs and stated she had been limited with her walking capabilities. (*Id.*) Notwithstanding these limitations, Perry reported that "recently she has been helping to take care of her mother-in-law which includes prolonged standing and going up and down stairs multiple times of the day." (*Id.*) On January 26, 2012, Perry reported increased pain at a level of 6/10. (R. 374.) On February 7, 2012, Perry stated that her knees were feeling better and that she was not experiencing any pain in her right knee. (R. 374–75.) On February 9, Perry stated that her right knee was bothering her and she "continues to not have time to rest at home." (R. 373.) On February 21, she reported that her right knee was again dislocated. (R. 376.) Dr. Garino recommended a right knee revision. (R. 425–27.)

On March 2, 2012, Perry went to the Paoli Hospital ER complaining of back pain after she "strained her lower back" while "attempting to move her mother." (R. 249–59.) She did not report pain in her lower extremities. (*Id.*) She ambulated without difficulty and exhibited normal range of motion in her extremities, which were noted as "nontender." (R. 250.) She was released in stable condition. (*Id.*)

D.

On March 20, 2012, Perry was admitted to Paoli Hospital for an "elective revision" total right knee replacement. (R. 18, 29, 261–77.) According to hospital records, Perry had "a failed knee replacement secondary to lateral instability which she developed after falling over her dog in the early postoperative period back in November

or December 2011. She has now dislocated her knee on numerous occasions and she is indicated for revision of total knee." (R. 275.) Perry's pain was well-controlled after the procedure and she was discharged with instructions for medication and physical therapy. (R. 18, 263.) Upon discharge, Dr. Garino diagnosed failed total knee replacement, right side and status post revision knee replacement. (R. 18, 275.)

Perry continued attending physical therapy with Todd. On April 24, 2012, Perry stated that she had been assisting her mother-in-law and her legs had been "more achy." (R. 369.) On May 10, she reported increased pain in her left knee and pain in her back and hips. (R. 367.) On May 15, she stated that both of her knees had been really bothering her, the left in particular. (R. 367–68.) On May 17, Todd wrote: "Patient still feels that her knees are so much better. Patient notes that her mother-in-law is in the hospital so she has not been doing the heavy lifting. Patient is no longer reporting significant sensitivity to touch on the lower leg. Patient also notes that the tape has really helped the left knee." (R. 364.) On May 29, 2012, however, Perry reported that her knees had been bothering her more lately and ranked her pain level at 9/10. (R. 364.) The same day, Todd noted that Perry "ha[d] been making fair progress" and demonstrated increased strength and range of motion. (R. 366.)

On June 1, 2012, Todd noted that Perry was "frustrated by persistent pain" and continued to have lateral knee pain on the right with pinpoint tenderness and sharp discomfort. (R. 363.) On June 12, Todd noted that Perry "ha[d] not been very diligent about doing the exercises at home." (R. 362.) Perry nevertheless stated that her shooting pains had ceased and that her "knees have been feeling better lately." (R. 362.) On June 19, Perry again reported that her knees were feeling better and she

was "planning on going to the shore this weekend, where she will be doing a lot more walking." (R. 361.) Though she continued to report some pain in her right knee, she demonstrated improved gait with decreased compensations. (*Id.*) On June 26, 2012, Perry again stated that her knees felt great and though she felt some "tightness," she was "doing a lot of walking on the sand and denied any knee pain." (*Id.*) Todd noted "improved range of motion and improved strength." (*Id.*) Perry apparently ceased attending physical therapy at this point.[4]

On July 20, 2012, Dr. Garino completed a Physical Capabilities Questionnaire in conjunction with Perry's claim for continued long-term disability benefits. (R. 440–45.) He found her able to work at a light exertional level defined as exerting up to twenty pounds of force occasionally, ten pounds of force frequently or a negligible amount of force constantly. He limited her to no squatting, climbing ladders or stairs, kneeling or crawling; occasional sitting, standing, walking and bending at her waist; frequent use of foot controls and driving; and no limitations on the use of her upper extremities. (R. 441.) Dr. Garino did not, however, complete a Social Security Medical Source Statement delineating Perry's functional capacity.

E.

Several months later, Perry consulted with another orthopedic surgeon, Gregory Deirmengian, M.D. (R. 18, 407, 424.) Dr. Deirmengian examined Perry on October 4, 2012 and described her as "well-appearing, in no acute distress." (R. 408.) He noted her complaints of bilateral knee pain, right worse than left. (R. 18, 407.) Perry reported that her knees were "worse than before surgery," "sore all the time" and

[4] The final entry, on June 26, 2012, notes that Perry planned to return to physical therapy on June 28 and then go out of town for two weeks. (R. 361.) It appears Perry did not return for any additional sessions.

caused "sharp pain." (*Id.*) Dr. Deirmengian's examination of her knees showed normal alignment, full extension and no instability. (*Id.*) Though he noted mild effusions and some joint tenderness, Dr. Deirmengian stated that he was unable to identify a mechanical issue to explain Perry's pain. (R. 18, 407–08.) He noted that x-rays of her knees showed "well-aligned and well-fixed knee replacement, the right side is a stem revision and the left side is a primary knee replacement." (R. 408.) He wrote: "She really does not have any instability, loosening, malalignment, patellofemoral tracking, or any other mechanical issue that would explain her pain." (R. 408.) He recommended pain management, physical therapy and a follow-up with Dr. Garino.

On October 17, 2012, Dr. Garino examined Perry's knees and noted that both were "[n]eurovascularly intact" and exhibited "satisfactory range of motion and normal strength and tone." (R. 18, 418–20.) He diagnosed her with stiff knee joints and referred her to pain management. (R. 18, 419–20.)

On November 6, 2012, Perry had an initial evaluation with pain management specialist Brian Pierson, M.D. (R. 18, 485–86.) She reported that pain had returned in both knees after initially doing "extremely well" following her knee replacements. (R. 485.) She stated that climbing stairs was particularly painful. (*Id.*) Dr. Pierson noted Perry's long history of degenerative joint disease. He observed that her knee replacements were "mechanically doing well" and, notwithstanding a little "popping on the left," did not exhibit instability. (*Id.*) He further noted "routine postoperative appearance," mildly antalgic gait, full extension in both knees, tenderness in both incisions and "decreased sharp/dull discrimination bilaterally, lateral to the incisions."

(R. 486.) He diagnosed probable neuromas,[5] DJD of knees bilaterally, status post bilateral total knee arthroplasty, gastroesophageal reflux disease, obesity and well-controlled depression. (R. 18, 486.) He referred Perry to Dr. Nestor Veitia and then wrote: "Given the pain she is experiencing and lack of response to medication, I think it will be essentially impossible for [Perry] to return to work at this time."[6] (*Id.*)

On December 4, 2012, Dr. Veitia examined Perry and indicated that he would "attempt exploration of left knee scar for possible neuroma." (R. 489, 18, 488–91, 493–94.) In an unsigned note dated January 17, 2013, Dr. Veitia stated that Perry "will be under [his] care for surgery and follow up care, and will be able to return to work on a date which will be determined at a post-operative evaluation. Restrictions will also be determined, at that time." (R. 495.) On March 20, 2013, Dr. Veitia performed the surgical procedure on Perry's left leg and reported "possible left leg neuroma." (R. 18, 29, 497.) He identified some "small structures" in the mid lateral knee calf area that "may have represented small neuromas" and successfully cut and cauterized them back into the soft tissue. (*Id.*) In post-operative visits on April 2 and April 9, 2013, Perry reported "significant improvement" in her symptoms and that she "no longer ha[d] pain over the sensitive area" in her left knee. (R. 19, 498–501.)

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[5] A neuroma is "a benign neoplasm composed chiefly of neurons and nerve fibers, usually arising from a nerve tissue." *Neuroma*, Mosby's Medical Dictionary (8th ed. 2009). Retrieved July 18, 2017 from http://medical-dictionary.thefreedictionary.com/neuroma.

[6] Dr. Pierson did not complete a Social Security Medical Source Statement or identify any functional limitations related to Perry's impairments. On January 4, 2013, he wrote: "Due to persistent pain, [Perry] is unable to return to work in any capacity [at] this time. We hope this will change [with] upcoming surgery for neuromas." (R. 482–83.)

F.

On August 5, 2013, Perry returned to Dr. Pierson complaining of knee pain.[7] (R. 18–19, 502–09.) Upon examination, Dr. Pierson noted a slow but not antalgic gait, full extension of both knees, a nicely healing incision, and "decreased sharp/dull discrimination bilaterally." (*Id.*) On September 5, 2013, notwithstanding Perry's continued complaints of pain, Dr. Pierson noted normal affect, normal conversation, normal gait, healthy incisions, no effusions, no swelling and full range of motion. (R. 509.) He continued Perry on her narcotic medication and provided cortisone injections that provided "excellent initial relief." (R. 506.) In subsequent visits, Perry reported that her knee pain returned after each injection and increased significantly. (R. 504–09.) On October 4, 2013, Dr. Pierson stated: "The current complaints of increased symptoms a full week following the injections are very difficult for me to explain. [Perry] is looking for other solutions to her pain and at this point I really have none to offer, particularly inasmuch as I have a hard time explaining the residual pain." (R. 506.) He continued her medication and ordered an electromyogram ("EMG").[8] (R. 19, 511.)

The November 14, 2013 EMG of Perry's lower extremities was "unremarkable." (R. 19, 511–12.) Dr. Jeffrey J. Citara, who performed the EMG, wrote: "I did not find any measurable neurologic cause on today's study to explain her symptoms,

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[7] Dr. Pierson noted a gap in treatment between February and August 2013 due to Perry's incarceration related to a "DUI." (R. 502.) At the time of her August 5, 2013 visit to Dr. Pierson, Perry reported that she was on "house arrest and following with the parole officer." (*Id.*)

[8] An EMG, which records the electrical activity of muscles, is used to detect abnormal electrical muscle activity that can result from, *inter alia*, muscular dystrophy, muscular inflammation, pinched nerves or peripheral nerve damage (in the arms and legs). *See* William C. Shiel Jr., MD, *Electromyogram (EMG)*, MEDICINENET.COM (Sep. 1, 2016), http://www.medicinenet.com/electromyogram/article.htm.

particularly on the right side. I do not believe the left side appeared to be neurologic as much as the right did, but based on her history and physical examination, I believe there is an element of complex regional pain syndrome (CRPS) on the right." (R. 512.)

G.

Perry testified at the November 15, 2013 hearing before the ALJ that she had severe pain in both knees, with pain radiating down her right leg causing tingling and numbness in her right foot. (R. 17, 35, 37.) She stated she was very limited in her ability to go up and down stairs and could only walk for one block and around the house for thirty to forty minutes. (R. 32–35.) Perry testified that her legs would throb after sitting for forty minutes but that the throbbing subsided after she elevated her legs for five to eight minutes. (R. 35–36.) She stated that other than elevating her legs and changing positions, nothing helped her pain. (*Id.*) Perry testified that she was able to care for her young son and, according to physical therapy notes, described herself as "very active" in his care. (R. 370.) She was also able to prepare meals, do laundry with assistance, drive, grocery shop, handle her own finances, socialize with family and friends, attend family events and swim three times a week, though it caused her pain afterwards. (R. 249, 298, 369, 377.)

III.

The Social Security Administration ("SSA") has promulgated a five-step process for evaluating disability claims. First, the Commissioner considers whether the claimant is currently engaged in substantial gainful activity. *Woodson v. Comm'r Soc. Sec.*, 661 F. App'x 762, 765 (3d Cir. 2016) (citing *Sykes v. Apfel*, 228 F.3d 259, 262–63 (3d Cir. 2000)). If she is not, then the Commissioner considers in the second step

whether the claimant has a 'severe impairment' that significantly limits her physical or mental ability to perform basic work activities. *Id.* If the claimant suffers a severe impairment, the third inquiry is whether, based on the medical evidence, the impairment meets the criteria of an impairment included in the 'listing of impairments,' which result in a presumption of disability, or whether the claimant retains the capacity to work. *Id.* If the impairment does not meet the criteria for a listed impairment, then the Commissioner assesses in the fourth step whether, despite the severe impairment, the claimant has the residual functional capacity ("RFC")[9] to perform her past work. If the claimant cannot perform her past work, then the final step is to determine whether there is other work in the national economy that the claimant can perform. *Id.* The claimant bears the burden of proof for steps one, two, three and four of this test. The Commissioner bears the burden of proof for the last step. *Id.*; *see also* 20 C.F.R. § 404.1520(a)(4)(i)–(v).

In a March 18, 2014 decision, the ALJ applied the SSA's five-step sequential evaluation and determined that Perry was not disabled as defined by the Social Security Act. (R. 15–21.) At step one, the ALJ found that Perry had not engaged in gainful employment since the alleged onset date of May 20, 2011. (R. 15.) At step two, the ALJ found that Perry suffers from the severe impairment of bilateral knee pain. (R. 15–16.) At step three, he found that Perry's knee impairment, either alone or in combination with other impairments, did not met the severity of one of the listed impairments in 20 C.F.R. pt. 404, Subpt. P, App. 1. (R. 16.) At step four, he

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[9] Residual functional capacity ("RFC") is "what an individual can still do despite his or her limitations. RFC is an administrative assessment of the extent to which an individual's medically determinable impairment(s), including any related symptoms, such as pain, may cause physical or mental limitations or restrictions that may affect his or her capacity to do work- related physical and mental activities." 20 C.F.R. § 404.1545(a)(1).

determined that Perry had the RFC to "perform the light work as defined in 20 C.F.R. § 404.1567(b) except she needs a sit/stand option. She needs to elevate both of her legs to waist level for 8 minutes, as needed, up to 4 times a day." (*Id.*) Given his RFC assessment, the ALJ determined that Perry could not perform her past relevant work. (R. 20.) Considering Perry's age, education, work experience and RFC, and the testimony of a vocational expert, the ALJ determined at step five that jobs exist in significant numbers in the national economy that Perry could perform including security guard, locker room attendant or non-postal mail clerk. (R. 20–21.) He accordingly found that Perry was not disabled under the Act. (R. 21.)

IV.

The Court reviews *de novo* those portions of the Report and Recommendation to which Perry has objected. *See* 28 U.S.C. § 636(b)(1); *see also Cont'l Cas. Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 250 (3d Cir. 1998). The Court "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). In reviewing the ALJ's decision, the Court is not permitted to weigh the evidence or substitute its own conclusions for those reached by the ALJ. *See Burns v. Barnhart*, 312 F.3d 113, 118 (3d Cir. 2002). Rather, the Court reviews the ALJ's findings to determine whether they were supported by substantial evidence. *See* 42 U.S.C. § 405(g); *Rutherford v. Barnhart*, 399 F.3d 546, 552 (3d Cir. 2005).

Substantial evidence is evidence that a "reasonable mind might accept as adequate to support a conclusion." *Rutherford*, 399 F.3d at 552 (internal quotations omitted). "It is 'more than a mere scintilla but may be somewhat less than a

preponderance of the evidence.'" *Id.* (quoting *Ginsburg v. Richardson*, 436 F.2d 1146, 1148 (3d Cir. 1971)). If the decision of the ALJ is supported by substantial evidence, the Court may not set it aside "even if [the Court] would have decided the factual inquiry differently." *Hartranft v. Apfel*, 181 F.3d 358, 360 (3d Cir. 1999)). The ALJ's decision "must therefore present a sufficient explanation of the final determination in order to provide the reviewing court with the benefit of the factual basis underlying the ultimate disability finding." *D'angelo v. Colvin*, No. 14-6594, 2016 WL 930690, at *1 (E.D. Pa. Mar. 11, 2016) (citing *Cotter v. Harris*, 642 F.2d 700, 704–05 (3d Cir. 1981)). The decision need only discuss the most relevant evidence concerning a claimant's disability, "but it must provide sufficient discussion to allow the reviewing Court to determine whether its rejection of potentially significant evidence was proper." *Id.* (citing *Johnson v. Comm'r of Soc. Sec.*, 529 F.3d 198, 203–04 (3d Cir. 2008)).

V.

A.

First, Perry contends the ALJ erred by failing to adequately consider and address her obesity. (Pl.'s Obj., at 1–5, ECF No. 15.) She claims he erroneously failed to find that she has the medically determinable impairment of obesity, failed to adequately consider the combined effect of her obesity and joint problems in assessing her RFC and improperly characterized her physical examination results as "within normal limits" when, in fact, her obesity and Body Mass Index ("BMI") were not within normal limits. (*Id.* at 2–5.)

Two Third Circuit decisions provide guidance on this issue. In *Rutherford v. Barnhart*, 399 F.3d 546 (3d Cir. 2005), the plaintiff similarly argued that the ALJ had

erred by failing to explicitly consider her weight throughout the disability determination. *Id.* at 552. The Court of Appeals noted that the plaintiff, who alleged disability due to back and arm impairments, had never mentioned obesity as a condition that contributed to her inability to work and had not specified how that factor would affect the analysis beyond a generalized assertion that her weight made it more difficult for her to stand, walk and manipulate her hands and fingers. *Id.* The court further noted that although the ALJ had not explicitly mentioned the plaintiff's obesity, he adopted the limitations suggested by specialists and reviewing doctors, who were aware of her obesity. *Id.* Thus, because the plaintiff's doctors "must also be viewed as aware of [the plaintiff's] obvious obesity, [the court found] that the ALJ's adoption of their conclusions constitutes a satisfactory if indirect consideration of that condition." *Id.* The court concluded that the plaintiff's generalized assertion regarding the effects of her obesity was "insufficient to require remand, particularly when the administrative record indicates clearly that the ALJ relied on the voluminous medical evidence as a basis for his findings regarding her limitations and impairments." *Id.*

In *Diaz v. Comm'r of Soc. Sec.*, 577 F.3d 500 (3d Cir. 2009), the ALJ determined at step two that the plaintiff's obesity constituted a "severe impairment." *Id.* at 504. At step three, however, he failed to consider her obesity's impact in combination with her other impairments, including joint disease, on her ability to perform work functions, as instructed by Social Security Ruling ("SSR") 02-1p.[10] *Id.* The District Court upheld the ALJ's decision, relying on *Rutherford*. The Court of Appeals, however, reversed and

[10] The Ruling instructs adjudicators "to consider the effects of obesity not only under the listings but also when assessing a claim at other steps of the sequential evaluation process, including when assessing an individual's residual functional capacity," and reminds them to consider "the combined effects of obesity with other impairments" when making disability determinations. SSR 02-1P, 2002 WL 34686281, at *1 (Sep. 12, 2002).

held that the ALJ had erred, noting that "an ALJ must clearly set forth the reasons for his decision" and "conclusory statements that a condition does not constitute the medical equivalent of a listed impairment are insufficient." *Id.* (citations omitted). The court distinguished *Rutherford*, noting that in that case, the plaintiff had not asserted obesity as an impairment or argued that it impacted her job performance. *Id.* The court then stated:

> Here, by contrast, Diaz asserted—and the ALJ specifically determined—that Diaz's obesity constituted a severe impairment. Further, we cannot conclude, as we did in *Rutherford*, that Diaz's obesity had no impact, alone or in combination with her other impairments, on her workplace performance. To the contrary, Diaz's morbid obesity would seem to have exacerbated her joint dysfunction as a matter of common sense, if not medical diagnosis. Although in *Rutherford* we expressed some willingness to view the reference to the reports of the claimant's examining physicians as constituting adequate, implicit treatment of the issue by the ALJ, we decline to do so here, where Diaz's obesity was urged, and acknowledged by the ALJ, as a severe impairment that was required to be considered alone and in combination with her other impairments at step three.

Id. The Court of Appeals stated that "[w]ere there *any* discussion of the combined effect of Diaz's impairments, we might agree with the District Court. However, absent analysis of the cumulative impact of Diaz's obesity and other impairments on her functional capabilities, we are at a loss in our reviewing function." *Id.* Thus, the court remanded because "the ALJ, having recognized obesity as an impairment, should determine in the first instance whether, and to what extent, Diaz's obesity, in combination with her asthma, diabetes, arthritis, back pain, and hypertension, impacted her workplace performance." *Id.* at 505.

Here, as in *Rutherford*, Perry neither alleged obesity as a basis for her disability nor testified that it limits her ability to engage in work-related activities. Nor did the

ALJ list obesity as a severe impairment at step two.[11] The ALJ nevertheless noted Perry's obesity on several occasions: when discussing tenderness and sensation in Perry's right knee, he noted that she weighed 212 pounds; when analyzing pain and range of motion issues, he cited her weight of 210 pounds; and he specifically mentioned a diagnosis of obesity by pain management physician, Dr. Pierson. (R. 18–19.) He also noted the records of Drs. Frankel, Garino, Deirmengian and Veitia, all of which documented Perry's weight. (R. 17–19.)

Moreover, all of the medical evidence on which the ALJ relied was supplied by doctors who were clearly aware of Perry's obesity, and to the extent Perry's obesity contributed to the limitations of her knees or the pain she experienced, those effects would have been captured and reflected in her doctors' assessments of the same, which the ALJ considered in depth. Thus, as in *Rutherford*, the ALJ "relied on the voluminous medical evidence as a basis for his findings regarding her limitations and impairments," and adequately considered her obesity in assessing her limitations, albeit indirectly. *See Rutherford*, 399 F.3d at 553; *see also Martin v. Comm'r of Soc. Sec.*, 369 F. App'x 411, 414–15 (3d Cir. 2010) (ALJ adequately considered obesity by

[11] Perry contends that her case is more analogous to *Diaz* than *Rutherford* and argues it is of no import that (1) Perry did not allege obesity as a disability or testify about its effects and (2) the ALJ did not explicitly recognize obesity as a severe impairment. *See* (Pl.'s Objections, at 1–3). She claims that "reading *Rutherford* and *Diaz* as establishing a bright-line rule produces an undesirable result." (*Id.* at 3.) The Court does not read these cases as establishing a bright-line rule. However, the *Diaz* court relied heavily on these distinctions, s*ee Diaz*, 577 F.3d at 404–405, and Third Circuit decisions make clear that these differences can be significant in the analysis. *See Cooper v. Comm'r of Soc. Sec.*, 268 F. App'x 152, 155–56 (3d Cir. 2008) (ALJ erred by failing to consider combined effects of obesity where ALJ found obesity to be a severe impairment at step two and plaintiff specifically requested consideration of his obesity in conjunction with his musculoskeletal condition); *Jones v. Comm'r of Soc. Sec.*, 275 F. App'x 166, 168 (3d Cir. 2008) (ALJ's indirect consideration of plaintiff's obesity via medical evidence was sufficient where plaintiff did not allege obesity as an impairment or identify any functional limitations related to obesity, the ALJ did not classify it as an impairment at step two and the medical evidence did not specify that obesity contributed to any impairment); *Sassone v. Comm'r of Soc. Sec.*, 165 F. App'x 954, 958 (3d Cir. 2006) (ALJ's indirect consideration of plaintiff's obesity was sufficient where plaintiff did not allege obesity as an impairment).

considering opinions of doctors who were aware of the claimant's obesity); *Jones*, 275 F. App'x at 168 (district court correctly determined ALJ did not err by failing to explicitly consider plaintiff's obesity because medical evidence of plaintiff's limitations encompassed those effects and the ALJ thus considered the plaintiff's obesity indirectly).

Contrary to Perry's contentions, the ALJ did not err in failing to draw further conclusions about the effects or combined effects of Perry's obesity on her ability to work. For one, Perry did not even mention her obesity at the hearing, much less testify that it limited her ability to work, and the ALJ did not consider her obesity to be a severe impairment. More significantly, none of Perry's physicians referred to her weight in connection with functional limitations or pain in her knees. Thus, even if the ALJ had listed obesity as an impairment at step two, there was no record evidence from which he could have drawn conclusions about its effects or combined effects on her ability to work at steps three and four. *See* SSR 02-1p ("[W]e will not make assumptions about the severity or functional effects of obesity combined with other impairments. Obesity in combination with another impairment may or may not increase the severity or functional limitations of the other impairment. We will evaluate each case based on the information in the case record."); *see also id.* ("As with any other medical condition, we will find that obesity is a 'severe' impairment when, alone or in combination with another medically determinable physical or mental impairment(s), it significantly limits an individual's physical or mental ability to do basic work activities."). Thus, as in *Rutherford*, remand is not required because neither Perry's own testimony nor the medical evidence indicated that her obesity contributed

to her inability to work. *See Rutherford*, 377 F.3d at 552–53; *see also Woodson*, 661 F. App'x at 765–66 (ALJ did not commit reversible error where plaintiff did not point to specific medical evidence demonstrating that his obesity, in combination with other impairment, was sufficiently disabling); *Sassone*, 165 F. App'x at 958 (ALJ did not err by failing to classify the plaintiff's obesity as an impairment or otherwise discuss it where the record contained no objective medical evidence of the plaintiff's weight in relation to any resulting disability).

Lastly, Perry contends the ALJ erred by characterizing Perry's physical examinations as "within normal limits" and relying on the same to explain his rejection of Perry's testimony regarding her knee limitations and pain. According to Perry, this was error because those examinations noted her weight and her BMI, which, due to her obesity, are "markedly abnormal." (Pl.'s Obj., at 3–4.) She claims the ALJ "could not have satisfactorily considered obesity without recognizing that a BMI of 39.7 is not within normal limits." (*Id.* at 4.) Perry therefore argues that "[i]n view of the ALJ's reliance on allegedly normal examination results to reject Plaintiff's claim, his failure to address obesity is error, and the error is not harmless." (*Id.*)

The portion of the ALJ's analysis to which Perry refers centered on her alleged disability—bilateral knee pain and the attendant limitations. In the context of explaining why Perry's "statements concerning the intensity, persistence and limiting effects of" her alleged knee injuries were not entirely credible, the ALJ summarized the medical evidence that appeared to conflict with her testimony about her knees' limitations and pain. He stated: "Physical examinations have been within normal limits (Exhibits 10F, 14F and 15F). There is no evidence of significant neurological

deficits. There are no objective findings to support a diagnosis of a complex regional pain syndrome." (R. at 19.) He then went on to discuss the lack of muscle atrophy in Perry's legs, her doctors' inability to explain her knee pain and the "unremarkable" EMG results. (*Id.*)

Read in context, the ALJ's characterization of the physical examinations as "within normal limits" refers to the findings relevant to Perry's knees and their functionality, rather than to every single body-related statistic, including her weight and BMI, noted in the physical exams. More specifically, Exhibit 10F noted that Perry's gait was normal and both of her knees were "[n]eurovascularly intact" and exhibited "satisfactory range of motion and normal strength and tone." (R. 419.) The physical examination assessment in Exhibit 14F states, *inter alia*: "Affect is normal. Conversation is normal. Gait is slow rather than antalgic. Bilateral knees are status post total knee arthroplasty, incision has healed nicely without any keloid formation. She has full extension of both knees and flexion to slightly past 90 degrees bilaterally." (R. 502.) And Exhibit 15F's physical examination noted "some degree of dysesthesias on the right medial to the midline knee incision" and "some tenderness" on the left side although "[s]ensations below the left knee are relatively intact." (R. 504.) To be sure, all of the physical exams also noted Perry's weight and BMI, which would likely not fall within normal limits. *See* (R. 421, 430, 437, 493, 504–05). However, in the context of discussing inconsistencies between the examination results and Perry's allegations related to her knees, the ALJ was clearly referencing the portion of the exam results most relevant to this inquiry: that related to Perry's knees. The ALJ's statement that the exam results were "within normal limits" in this respect is fair and supported by

substantial evidence, and his reliance on this evidence in rejecting Perry's testimony was not error.

B.

Perry next contends that the ALJ erred by implicitly rejecting medical opinion evidence "without good reason or adequate explanation." (Pl.'s Obj., at 5.) Specifically, Perry objects to the ALJ's failure to consider and specifically reference three isolated statements made by two treating physicians: (1) Dr. Pierson's November 6, 2012 statement that "[g]iven the pain [Perry] is experiencing and lack of response to medication, I think it will be essentially impossible for her to return to work at this time," (R. 486); (2) Dr. Pierson's January 4, 2013 statement that "[d]ue to persistent pain, [Perry] is unable to return to work in any capacity [at] this time. We hope this will change [with] upcoming surgery for neuromas," (R. 482–83); and (3) Dr. Veitia's unsigned January 17, 2013 statement that Perry "will be under [his] care for surgery and follow-up care, and will be able to return to work on a date which will be determined at a post-operative evaluation. Restrictions will also be determined, at that time." (R. 495.)

While Perry is correct that the ALJ did not specifically mention these statements, his failure to do so does not warrant remand. An ALJ "has a duty to hear and evaluate all relevant evidence in order to determine whether an applicant is entitled to disability benefits. The ALJ's decision must be in writing and contain findings of fact and a statement of reasons in support thereof." *Cotter,* 642 F.2d at 704. The ALJ must not only state the evidence considered which supports the result reached, but also indicate what evidence was rejected. *Id.* at 705. An ALJ's failure to

address evidence in direct conflict with his findings or to reject uncontradicted evidence without a clear statement of the reasoning is erroneous. *Id.* at 707; *see also Fargnoli v. Massanari*, 247 F.3d 34, 41–42 (3d Cir. 2001); *Burnett v. Comm'r of Soc. Sec.*, 220 F.3d 112, 119–21 (3d Cir. 2000).

However, "[a] written evaluation of every piece of evidence is not required, as long as the ALJ articulates at some minimum level [his] analysis of a particular line of evidence." *Phillips v. Barnhart*, 91 F. App'x 775, 780 (3d Cir. 2004) (citing *Green v. Shalala*, 51 F.3d 96, 101 (7th Cir. 1995)). "Moreover, the ALJ's mere failure to cite specific evidence does not establish that the ALJ failed to consider it." *Id.* (citing *Black v. Apfel*, 143 F.3d 383, 386 (8th Cir. 1998)).

Here, the ALJ considered all of the medical opinion evidence, including that submitted by Dr. Pierson and Dr. Veitia. *See* (R. 18–19, 482–91, 493–512). The ALJ discussed Dr. Pierson's diagnosis of Perry, the recommended treatment and his ultimate inability to explain Perry's complaints of residual pain. (R. 18–19 (citing to R. 482–86, 504–12).) Though Perry contends that the ALJ did not consider Dr. Pierson's November 6, 2012 statement, the ALJ discussed the November 6, 2012 visit and the accompanying records at length, devoting an entire paragraph to Dr. Pierson's November 6, 2012 observations and diagnoses. (R. 18.) The ALJ provided similar discussion of Dr. Veitia's examination, evaluation and treatment of Perry, including but not limited to the March 2013 surgery to excise a left leg neuroma. (R. 18 (citing to R. 487–91, 493–503).) This is not a situation where "the reviewing court cannot tell if significant probative evidence was not credited or simply ignored," *Cotter*, 642 F.2d at 705; the ALJ clearly considered the evidence submitted by both Dr. Pierson and Dr.

Veitia, including the three statements above, consistent with his duty to consider all relevant evidence. *See Phillips*, 91 F. App'x at 780 ("[T]he ALJ's mere failure to cite specific evidence does not establish that the ALJ failed to consider it." (citing *Black*, 143 F.3d at 386)).

Perry also contends that by finding she was not disabled, the ALJ "implicitly" rejected the physicians' statements and therefore erred by failing to articulate his reasons for doing so. (Pl.'s Obj., at 5). Though Dr. Pierson noted on November 6, 2012 and January 4, 2013 that Perry was temporarily unable to return to work due to persistent pain, these statements were based on Perry's subjective statements of pain and merely reflected Perry's temporary inability to work at a fixed period of time, prior to her March 2013 surgery. Likewise, Dr. Veitia's January 17, 2013 "statement" is actually an unsigned standard form acknowledging that Perry would be under his care for surgery and that her future restrictions and the date she could return to work would be determined at a post-operative evaluation. Neither Dr. Pierson nor Dr. Veitia completed a Medical Source Statement or opined on Perry's functional limitations, and neither physician opined that Perry's inability to work was expected to last for an extended or indefinite period of time. These statements—ascribing to Perry a temporary inability to work before her surgery based entirely on her subjective complaints of pain—are in no way inconsistent with the ALJ's characterization of the medical evidence, the other medical evidence on which he ultimately relied or his ultimate determination that Perry is not permanently disabled. He thus cannot be said to have "implicitly" rejected this evidence. *See Landeta v. Comm'r of Soc. Sec.*, 191 F. App'x 105, 110 (3d Cir. 2006) (ALJ did not err by failing to specifically mention doctor's

findings of moderate limitations where it did not conflict with other medical evidence or ALJ's ultimate findings); *Garcia v. Comm'r of Soc. Sec.*, 94 F. App'x 935, 937–38 (3d Cir. 2004) (ALJ did not err by failing to specifically reference test results where he considered the physician reports containing them and they were not inconsistent with his ultimate conclusion); *Cf. Cotter,* 642 F.2d at 705 (an ALJ's failure to address evidence *in direct conflict* with his findings without a clear statement of reasoning is erroneous (emphasis added)).

Moreover, due to the statements' limited temporal scope, and the fact that Perry subsequently underwent surgery, their relevance was necessarily somewhat limited. Indeed, Perry reported significant improvement in her symptoms after the March 2013 surgery. (R. 19, 498–501.) And Dr. Pierson ultimately opined, after an October 2013 visit, that he was unable to explain Perry's residual complaints of pain. (R. 19, 506.) Particularly here, where the statements were of limited relevance, did not directly contradict other medical evidence or dictate a different end result and were considered by the ALJ, it was not error for the ALJ to emphasize other, more relevant aspects of the doctors' assessments in his opinion. *See Quaglia v. Comm'r of Soc. Sec.*, 42 F. App'x 543, 546 (3d Cir. 2002) (ALJ did not fail to explain rejection of evidence where he clearly considered all of the doctor's assessments but emphasized only certain aspects in his opinion); *see also Hernandez v. Comm'r of Soc. Sec.*, 89 F. App'x 771, 773–74 (3d Cir. 2004) ("The Commissioner need not undertake an exhaustive discussion of all the evidence. And where we can determine that there is substantial evidence supporting the Commissioner's decision, as we determine here, the *Cotter* doctrine is not implicated." (internal citation omitted)).

C.

Perry next argues that the ALJ "rejected [her] testimony without good reason or adequate explanation." (Pl.'s Obj., at 8.) Pursuant to the regulations, the ALJ uses a two pronged analysis to make a credibility determination. *See* 20 C.F.R. § 416.929. The ALJ must first determine if there is an underlying medically determinable impairment that could reasonably be expected to produce the alleged symptoms.
See 20 C.F.R. § 416.929(c)(1). If the ALJ finds that such an underlying condition exists, the ALJ must then decide to what extent the symptoms actually limit the claimant's ability to work, *see id.*, which requires the ALJ "to determine the extent to which a claimant is accurately stating the degree of pain or the extent to which he or she is disabled by it," *Hartranft v. Apfel*, 181 F.3d 358, 362 (3d Cir.1999) (citing 20 C.F .R. § 404.1529(c)).

"Credibility determinations are the province of the ALJ and only should be disturbed on review if not supported by substantial evidence." *Pysher v. Apfel*, No. 00-1309, 2001 WL 793305, at *3 (E.D. Pa. July 11, 2001) (citing *Van Horn v. Schweiker*, 717 F.2d 871, 973 (3d Cir. 1983)). Moreover, such determinations are entitled to deference. *See Hoyman v. Colvin*, 606 F. App'x 678, 681 (3d Cir. 2015); *Zirnsak v. Colvin*, 777 F.3d 607, 612 (3d Cir. 2014). An ALJ "may reject a claimant's subjective testimony if [he] does not find it credible so long as [he] explains why [he] is rejecting the testimony." *See Hall v. Comm'r of Soc. Sec.*, 218 F. App'x 212, 215 (3d Cir. 2007). Allegations of pain must be supported by objective medical evidence. *See* 20 C.F.R. § 404.1529(c). "If the symptoms suggest a greater functional restriction than is demonstrated by the objective evidence alone, the Commissioner considers evidence

such as the claimant's statements, daily activities, duration and frequency of pain, medication, and treatment. The Commissioner has discretion to evaluate the credibility of the complaints and draw a conclusion based upon medical findings and other available information." *Landeta*, 191 F. App'x at 111 (citing 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3)). "Although allegations of pain and other subjective symptoms must be consistent with objective evidence . . . the ALJ must still explain why he is rejecting the testimony." *Burnett*, 220 F.3d at 122 (citations omitted).

Here, the ALJ found that Perry had an underlying medically determinable impairment that could reasonably be expected to produce her alleged symptoms but, "[a]fter careful consideration of the evidence," concluded that Perry's "statements concerning the intensity, persistence and limiting effects of these symptoms [were] not entirely credible." (R. at 19.) The ALJ considered the medical records from Drs. Frankel, Garino, Deirmengian, Pierson and Veitia that contradicted Perry's subjective complaints of pain. *See* (R. 17–19, 156–259, 261–78, 361–402, 405–91, 493–512). More specifically, the ALJ relied on the normal EMG report from November 2013 and numerous physical examinations that reflected "neurovascularly intact knees" with "satisfactory range of motion," no muscle atrophy and "normal strength and tone." (R. 17–19, 203, 408, 419–20, 422, 424, 498–99, 502–03.) He also considered the relatively conservative treatment recommended by her treating physicians and the fact that several of Perry's treating physicians were ultimately unable to identify a "mechanical issue" or other reason to explain her continued complaints of pain. (R. 18, 407–08, 424, 506, 512.) Finally, the ALJ considered Perry's reported activities of daily living, which included actively caring for her young child and mother-in-law,

doing household chores, driving, grocery shopping and swimming multiple times a week. (R. 19.)

The ALJ considered Perry's testimony and did not reject her allegations completely. He nevertheless noted that both the objective medical evidence and other portions of Perry's testimony, namely that related to the number and type of activities she engages in, seemed to belie her assertion that her pain was completely disabling. This was not error; substantial evidence in the record supports the ALJ's determination that Perry's complaints were not entirely credible, and the ALJ adequately explained the basis for his finding. *See, e.g.*, *Garibay v. Comm'r Of Soc. Sec.*, 336 F. App'x 152, 157 (3d Cir. 2009) (ALJ properly evaluated plaintiff's subjective complaints of pain where he rejected them as not fully credible based on objective medical evidence, the plaintiff's treatment plan and her daily activities); *Salles v. Comm'r of Soc. Sec.*, 229 F. App'x 140, 146 (3d Cir. 2007) ("Inconsistencies in a claimant's testimony or daily activities permit an ALJ to conclude that some or all of the claimant's testimony about her limitations or symptoms is less than fully credible."); *Garcia*, 94 F. App'x at 939–40 (ALJ did not err in rejecting plaintiff's subjective complaints of pain where medical evidence suggested no basis for that pain).

Perry also takes issue with the ALJ's description of her knee replacements as "successful." (Pl.'s Obj., at 9–10.) She claims that this description is "egregiously" erroneous because the record contains the entry "failed knee replacement" in eight places, though she did not provide any citations. (*Id.* at 9.) This claim lacks merit. Though Dr. Garino diagnosed Perry with "failed total knee replacement" after her right knee became dislocated on several occasions, he subsequently performed a "revision,

total knee replacement" operation on her right knee in March 2012. (R. 275.) The record contains no indications that the revision was unsuccessful. In fact, nearly all of the objective medical evidence since the March 2012 surgery supports the conclusion that Perry's knee replacements were mechanically sound.

When Perry returned to Dr. Garino complaining of pain in June 2012, x-rays demonstrated "satisfactory position of her knee replacements without evidence of loosening or wear." (R. 424.) Dr. Garino wrote: "[Perry] with some pain still in spite of well healed wounds and no obvious abnormalities." (*Id.*) In October 2012, Dr. Deirmengian noted that x-rays of Perry's knees showed "well-aligned and well-fixed knee replacement" and stated that he was unable to identify a mechanical issue to explain Perry's pain. (R. 18, 407–08.) Also in October 2012, Dr. Garino noted that both of Perry's knees were "[n]eurovascularly intact" and exhibited "satisfactory range of motion and normal strength and tone." (R. 18, 418–20.) He diagnosed her not with failed knee replacement but with "stiff knee joints." (R. 18, 419.) In November 2012, Dr. Pierson observed that both of Perry's knee replacements were "mechanically doing well" and did not exhibit instability. (R. 485.) Because she complained of persistent pain, which she described as sharp and "not the same sort of pain that she had prior to the surgeries," he diagnosed her with probable neuromas in her left leg and referred her to Dr. Veitia. (R. 485–86.)

Dr. Veitia operated on Perry's possible neuromas on March 20, 2013, after which Perry reported improvement of her symptoms. (R. 497–98.) Though Perry returned to Dr. Pierson complaining of knee pain in August, September and October 2013, Dr. Pierson consistently noted that her knees exhibited "normal affect, normal

conversation, normal gait, healthy incisions, no effusions, no swelling and full range of motion." (R. 502–509.) Mechanically, he was unable to explain her residual knee pain. (R. 506.) Likewise, Dr. Citara, after performing an EMG on November 14, 2013, noted that the results were unremarkable and that he "did not find any measurable neurological cause on today's study to explain her symptoms, particularly on the right side." (R. 512.)

In sum, although Perry was initially diagnosed with "failed total knee replacement" on the right side after dislocating her right knee several times, the problem was surgically corrected. Following the March 2012 surgery, her treating physicians consistently noted that both of her knee replacements were mechanically sound and exhibited normal range of motion and strength. (R. 419, 422, 424, 506, 512.) That Perry continued to experience some level of pain or subsequently underwent surgery for an unrelated problem—possible nerve damage in her *left* leg—does not mean that her right knee replacement was not ultimately "successful," particularly in this context, where success could be defined and measured in a number of ways. Given this, and Perry's physicians' consistent characterizations of her knee replacements as mechanically sound, the ALJ's characterization of her knee replacements as "successful" was not clearly erroneous.[12]

D.

Finally, Perry contends the ALJ erred by basing his disability determination on "vocational expert testimony elicited by an improper hypothetical question." (Pl.'s Obj., at 10.)

[12] Even if the ALJ's description of her knee replacements as "successful" was arguably erroneous, remand would not be required because, in any event, substantial other evidence in the record supports the ALJ's credibility determination.

Before moving to steps four and five of the disability evaluation, an ALJ must make an RFC assessment. *See* 20 C.F.R. § 404.1520(a)(4); *Chandler v. Comm'r of Soc. Sec.*, 667 F.3d 356, 361 (3d Cir. 2011). The regulations delineate five RFC classifications—sedentary, light, medium, heavy or very heavy—and exertional criteria for each. *See* 20 C.F.R. §§ 404.1567 and 416.967. In some instances, however, an individual's exertional RFC does not coincide exactly with the exertional criteria of any one of the classifications. For example, here, the ALJ determined that Perry had "the RFC to perform the light work as defined in 20 C.F.R. § 404.1567(b) except she needs a sit/stand option. She needs to elevate both of her legs to waist level for 8 minutes, as needed, up to 4 times a day." (R. 16.)

At step five, the ALJ typically refers to the Medical-Vocational Guidelines, a grid contained in the regulations that directs conclusions of "disabled" or "not disabled" based on a claimant's vocational factors (age, education and work experience) and exertional RFC (sedentary, light, medium, heavy or very heavy). *See* 20 C.F.R. pt. 404, subpt. P, app. 2 § 200.00(a); *see also Martin*, 240 F. App'x at 944. However, where an individual's RFC does not coincide with one of the defined exertional ranges of work, strict application of the grid is not possible. SSR 83-12 provides the framework for adjudicating such claims. *See* SSR 83-12, 1983 WL 31253 (Jan 1, 1983); *see also Martin*, 240 F. App'x at 944; *Henderson v. Soc. Sec. Admin.*, 87 F. App'x 248, 251 (3d Cir. 2004); *Boone v. Barnhart*, 353 F.3d 203, 206 (3d Cir. 2003).

SSR 83-12 instructs the ALJ to consider and assess the extent to which the claimant's additional restrictions would erode the relevant occupational base.[13] *See* SSR 83-12. SSR 83-12 recognizes that the degree of such erosion will vary depending on the nature and significance of the claimant's additional restrictions and instructs that "[w]here the extent of erosion of the occupational base is not clear, the adjudicator will need to consult a vocational resource." *Id.*

SSR 83-12 also specifically discusses "Special Situations," analogous to Perry's, where a claimant must be able to alternate sitting and standing while at work. The pertinent section provides:

> In some disability claims, the medical facts lead to an assessment of RFC which is compatible with the performance of either sedentary or light work except that the person must alternate periods of sitting and standing. The individual may be able to sit for time, but must then get up and stand or walk for awhile before returning to sitting. Such an individual is not functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in a seated position) or the prolonged standing or walking contemplated for most light work. (Persons who can adjust to any need to vary sitting and standing by doing so at breaks, lunch periods, etc., would still be able to perform a defined range of work.)
>
> There are some jobs in the national economy -- typically professional and managerial ones -- in which a person can sit or stand with a degree of choice. If an individual had such a job and is still capable of performing it, or is capable of transferring work skills to such jobs, he or she would not be found disabled. However, most jobs have ongoing work processes which demand that a worker be in a certain place or posture for at least a certain length of time to accomplish a certain task. Unskilled types of jobs are particularly structured so that a person cannot ordinarily sit or stand at will. In cases of unusual limitation of ability to sit or stand, a VS should be consulted to clarify the implications for the occupational base.

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[13] SSR 83-10 defines "occupational base" as "[t]he number of occupations, as represented by RFC [residual functional capacity], that an individual is capable of performing. These 'base' occupations are unskilled in terms of complexity. The regulations take notice of approximately 2,500 medium, light, and sedentary occupations; 1,600 light and sedentary occupations; and 200 sedentary occupations. Each occupation represents numerous jobs in the national economy." SSR 83-10, 1983 WL 31251, at *7 (Jan. 1, 1983).

Id.

Testimony from a vocational expert ("VE") or vocational specialist ("VS") "typically includes, and often centers upon, one or more hypothetical questions posed by the ALJ. . . . The ALJ will normally ask the expert whether, given certain assumptions about the claimant's physical capability, the claimant can perform certain types of jobs, and the extent to which such jobs exist in the national economy. While the ALJ may proffer a variety of assumptions to the expert, the vocational expert's testimony concerning a claimant's ability to perform alternative employment may only be considered for purposes of determining disability if the question accurately portrays the claimant's individual physical and mental impairments." *Id.*; *see also Chrupcala v. Heckler*, 829 F.2d 1269, 1276 (3d Cir. 1987) (A hypothetical question posed to a vocational expert "must reflect all of a claimant's impairments.").

Perry contends that the ALJ erred by relying on the VE's testimony because his hypothetical to the VE did not specify the frequency with which she must alternate sitting and standing. In essence, she claims that due to the lack of specificity regarding the sit/stand option, the VE was unable to clarify, and the ALJ was unable to adequately assess, the degree to which her additional limitations would erode the occupational base of those otherwise capable of light work. This claim lacks merit.

At the hearing, Perry testified that her "knees start to throb after sitting for 40 minutes, maybe, tops," after which she needs to stand to make herself more comfortable. *See* (R. 34). She then stated that "after standing for half an hour . . . an hour, tops," she would need to sit down and elevate her legs. (R. 34–35.) The ALJ then solicited testimony from the VE based on these limitations. Specifically, the ALJ asked

the VE about the availability of jobs assuming a capacity for light work, lifting 20 pounds occasionally and 10 pounds frequently, standing and walking two out of eight hours and sitting six of eight hours, with a sit/stand option. (R. 42.) The VE identified several jobs consistent with those limitations, including security guard; locker room, coat room or dressing room attendant; and a non-postal mail clerk. (R. 43–44.) The ALJ then referenced the additional limitation that Perry must elevate her legs for up to eight minutes at a time as needed and asked the VE to estimate the extent to which that would further erode her occupational base. (R. 40, 44–45.) The VE estimated that this would reduce the base of jobs by 80 percent. (R. 44.)

The ALJ followed the mandates of SSR 83-12. "SSR 83-12 does not automatically dictate a finding of disability where an individual is limited by a sit/stand option. Rather, SSR 83-12 indicates that a VE should be consulted, and here, one was." *Martin*, 240 F. App'x at 945. After finding that Perry could perform a limited range of light work, the ALJ properly consulted a VE and accurately conveyed all of Perry's limitations in soliciting her testimony. Moreover, the VE's testimony adequately addressed the equitable considerations underlying SSR 83-12. The Ruling explains that VE testimony is necessary to clarify the effects on the occupational base in this context specifically because a claimant who needs a sit/stand option may not be "functionally capable of doing either the prolonged sitting contemplated in the definition of sedentary work (and for the relatively few light jobs which are performed primarily in the seated position) or the prolonged standing and walking contemplated for most light work." SSR 83-12. Here, the ALJ not only specified that Perry could only perform light work with a sit/stand option but also provided the VE with the precise

number of hours per day that Perry was capable of sitting and standing, respectively. (R. 42.) Finally, the ALJ solicited and considered VE testimony regarding the extent to which Perry's occupational base would be eroded by her need to sit and elevate her legs at will, a limitation that requires the same kind of flexibility and autonomy to dictate one's position as would an at-will sit/stand option. (R. 44–45.) Based on the VE's testimony, the ALJ found that though Perry's additional limitations render her capable of performing only a limited range of light work, there is nonetheless a significant number of jobs in the economy which she can perform.

The VE's testimony was specifically directed to the effects that Perry's unique limitations would have on her occupational base, and the ALJ did not err by relying on it. *See Martin*, 240 F. App'x at 944–46 (ALJ complied with SSR 83-12 by consulting a VE where the claimant was limited by a sit/stand option); *Leech v. Barnhart*, 177 F. App'x 225, 228 (3d Cir. 2006) (same); *Henderson*, 87 F. App'x at 251 (ALJ's decision was supported by substantial evidence "where he specifically consulted a VE to determine the available number of jobs in light of the fact that [the claimant] did not fall within a single category because of limitations on his ability to sit or stand for prolonged periods."); *Boone*, 353 F.3d at 210 ("[W]e shall not interpret SSR 83-12 to mandate reversal whenever the ALJ does not set out specific findings concerning the erosion of the occupational base if, as here, the ALJ has received the assistance of a VE in considering the more precise question whether there are a significant number of jobs in the economy that the claimant can perform."); *cf. Boone*, 353 F.3d at 209–10 (reversing ALJ's decision where he neither articulated, nor solicited VE testimony regarding the effect that the claimant's sit/stand limitation would have on his occupational base).

VI.

For the above reasons, the Court overrules Perry's objections, approves and adopts the magistrate judge's Report and Recommendation finding that the ALJ's disability determination is supported by substantial evidence and grants judgment in favor of the Commissioner.

An appropriate order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.