a. **Musculoskeletal Impairments-**

i. **Degenerative Disc Disease**

Plaintiff argues that Claimant's multilevel DDD met Listing 1.04A, Disorders of the Spine. (Doc. 1, p. 7); (Doc. 7, p. 4). To satisfy Listing 1.04A, Plaintiff had the burden of proving that Claimant had a disorder of the spine, (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, or vertebral fracture), resulting in compromise of a nerve root or the spinal cord, with evidence of nerve root compression characterized by neuro-anatomic distribution of pain; limitation of motion of the spine; motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss; and, if there is involvement of the lower back, with positive straight-leg raising tests in the sitting and supine position. 20 C.F.R. pt. 404, subpt. P, app. 1, § 1.04 (2013).

Upon review, this Court finds that there is substantial evidence to support the ALJ's conclusion that Claimant's DDD did not meet the requirements of Listing 1.04A. The ALJ did not deny that Claimant continually complained of pain in his neck, back, and right arm, and right hand numbness and weakness. (Tr. 24). In fact, the ALJ noted that Claimant's DDD, in combination with the aforementioned impairments, was severe. (Tr. 24). The ALJ considered all the relevant medical reports regarding the DDD, including those prepared by Dr. Setlock and the Schuylkill Medical Center, and ultimately accorded significant weight to the opinion of Dr. Menio. (Tr. 26-29). Dr. Menio concluded that Claimant's DDD presented no neuro deficits, with the DDD, therefore, not meeting all criteria under Listing 1.04A. (Tr. 27).

The ALJ accorded less weight to the report prepared on October 26, 2009 by Dr. Setlock, Claimant's treating physician, in which he stated that the combination of Claimant's impairments

rendered him temporarily disabled for a period of twelve (12) months or more. (Tr. 28). The preference for the treating physician's opinion has been recognized by the Third Circuit Court of Appeals and by all of the federal circuits. See, e.g., Morales v. Apfel, 225 F.3d 310, 316-18 (3d Cir. 2000). When the treating physician's opinion conflicts with a non-treating, non-examining physician's opinion, the ALJ may choose whom to credit in his or her analysis, but "cannot reject evidence for no reason or for the wrong reason." Morales, 225 F.3d 316-18. In choosing to reject the evaluation of a treating physician, an ALJ may not make speculative inferences from medical reports and may reject the treating physician's opinions outright only on the basis of contradictory medical evidence. Id. An ALJ may not reject a written medical opinion of a treating physician based on his or her own credibility judgments, speculation or lay opinion. Morales, 225 F.3d at 316-18. An ALJ may not disregard the medical opinion of a treating physician based solely on his or her own "amorphous impressions, gleaned from the record and from his evaluation of the [claimant]'s credibility." Id. As one court has stated, "Judges, including administrative law judges of the Social Security Administration, must be careful not to succumb to the temptation to play doctor" because "lay intuitions about medical phenomena are often wrong." Schmidt v. Sullivan, 914 F.2d 117, 118 (7th Cir 1990).

In this case, in rejecting the opinion of Dr. Setlock, the treating physician, the ALJ pointed to contrary medical evidence provided by Dr. Menio as discussed. The ALJ stated, "I find that Dr. Setlock's articulation does not rise to the level of a well-supported opinion referencing the medical findings or testing results that would be the underpinnings of such an opinion. This is not conjecture of substituted medical reasoning, but a critical evaluation of the weight to be ascribed an opinion offered into the record on the question of the subject

individual's possible disability." (Tr. 28).

While Dr. Setlock indicates by checked boxes that he relied on medical reports, diagnostic tests, and clinical exams to declare Claimant temporarily disabled, it is understandable why the ALJ would give little weight to this report. Dr. Setlock's report does not specifically reference any exam findings, or point to any specific diagnostic tests or procedures, that show that not only did Claimant have DDD, but that he also met the criteria of nerve root or spinal cord compression with evidence of nerve root compression, spinal arachnoiditis, or lumbar spinal stenosis resulting in pseudoclaudication. Therefore, the ALJ properly rejected Dr. Setlock's report.

It also must be noted that while MRIs of Claimant's cervical and thoracic spines conducted on September 26, 2011 showed DDD with neural compression, stenosis and neuroforaminal narrowing, this new evidence was found and presented after the ALJ made his decision, and thus cannot be a basis for remand because it did not concern the relevant time period on which the ALJ's decision was based. (Tr. 510-512). Evidence submitted after the ALJ's decision cannot be used to argue that the ALJ's decision is not supported by substantial evidence. Matthews v. Apfel, 239 F.3d 589, 594-95 (3d Cir. 2001). Such evidence can be considered to determine whether it provides a basis for remand under sentence six (6) of section 405(g). Szubak v. Secretary of Health and Human Servs., 745 F.2d 831, 833 (3d Cir. 1984). Under sentence six (6) of section 405(g), the evidence must be "new" and "material" and a claimant must show "good cause" for not having incorporated the evidence into the administrative record. Id. The Third Circuit Court of Appeals explained that to be material "the new evidence [must] relate to the time period for which benefits were denied, and that it not

concern evidence of a later-acquired disability or of the subsequent deterioration of the previously non-disabling condition."[11] Id. In the present case, the additional evidence is not new and material because it does not relate to the relevant time period of the ALJ's decision, but relates to an MRI that was conducted on September 26, 2011, after the ALJ made his decision on June 10, 2011, and thus concerns evidence of either a later-acquired disability or a deterioration of Claimant's previously non-disabling DDD. (Tr. 510). Therefore, the September 26, 2011 MRIs showing neural compression, stenosis, and neuroforaminal narrowing are not material, and cannot be used to argue that the ALJ's decision was not supported by substantial evidence.

Therefore, to the extent that Plaintiff is asserting that Claimant's DDD met the 1.04A Listing criteria, this Court finds that there is substantial evidence that supports the will affirm Commissioner's decision that Claimant's DDD did not meet Listing 1.04A.

ii. Occasional Hand Numbness

Plaintiff asserts that Claimant suffered from occasional hand numbness. Listing 1.02B is as follows:

> 1.02 Major dysfunction of a joint(s) (due to any cause): Characterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joints. With:
>
> > B. Involvement of one major peripheral joint in each upper extremity (i.e., shoulder, elbow, or wrist-hand), resulting in inability to perform fine and gross movements effectively, as

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11. "Material" means that the evidence is "relevant and probative." Szubak v. Secretary of Health and Human Servs., 745 F.2d 831, 833 (3d Cir. 1984). 745 F.2d at 833. The evidence must create a reasonable possibility that the new evidence would have changed the ALJ's decision had it been presented to him. Id.

defined in 1.00B2c.

20 C.F.R. pt. 404, subpt. P, app. 1, § 1.02B (2013). Section 1.00B2c states:

> Inability to perform fine and gross movements effectively means an extreme loss of function of both upper extremities; i.e., an impairment(s) that interferes very seriously with the individual's ability to independently initiate, sustain, or complete activities. To use their upper extremities effectively, individuals must be capable of sustaining such functions as reaching, pushing, pulling, grasping, and fingering to be able to carry out activities of daily living. Therefore, examples of inability to perform fine and gross movements effectively include, but are not limited to, the inability to prepare a simple meal and feed oneself, the inability to take care of personal hygiene, the inability to sort and handle paper or files, and the inability to place files in a file cabinet at or above waist level.

20 C.F.R. pt. 404, subpt. P, app. 1, § 1.00B2c (2013). Claimant testified that he was able to play cards, use the computer, and drive, and that the use of his hands was not affected by any injury or illness. (Tr. 192-193). The ALJ determined that Claimant's issues with his right hand did not meet any impairment Listing, stating, "An October 27, 2008 treatment note indicates cervical tenderness, but not radiating pain, equal hand grip, and intact sensory to light touch." (Tr. 26). Dr. Menio's exam notes were also discussed and accorded significant weight by the ALJ, who stated, "The [C]laimant reported at his consultative examination that his hand is numb in a glove distribution. However[,] he was observed to be able to do fine motor skills with his right hand." (Tr. 27). The ALJ also discussed Dr. Menio's conclusion that Claimant had no neuro deficits, and that there was no evidence of right hand numbness. (Tr. 27).

As such, after reviewing the medical records and Claimant's testimony, there is substantial evidence to support the ALJ's decision that Claimant's occasional hand numbness did not meet Listing 1.02B.

b. Respiratory Ailments

i. COPD

Plaintiff alleges that Claimant's COPD met the criteria of impairment listing 3.02A, and that, therefore, he is disabled. (Doc. 1, p. 7); (Doc. 7, p. 4). Defendant disputes this claim. To meet listing 3.02A, Plaintiff has to demonstrate that the Claimant, whose height without shoes was sixty-eight (68) to sixty-nine (69) inches, had an FEV-1[12] value equal to or less than 1.45 liters. 20 C.F.R. pt. 404, subpt. P, app. 1, § 3.02A. However, the only pulmonary function test in the record, performed on February 10, 2011, indicated that Claimant's FEV-1 level was 2.5 liters. (Tr. 457).

The ALJ acknowledged that "[Claimant] has . . . breathing problems. He uses Albuterol 4 times a day and Simbacort [sic] for maintenance twice a day. He uses his inhaler more than he should[,] and goes through them within 20 days." (Tr. 25). He also stated:

> Associated signs and symptoms [of Claimant's COPD] are noted to include . . . expiratory wheezes, and decreased breath sounds. There are[,] however[,] also objective findings indicating clear lungs and a regular rhythm and rate. Pulmonary Function testing obtained on February 10, 2011 confirms the presence of obstructive airway disease and normal lung volumes.

(Tr. 26). Dr. Menio opined that "[C]laimant's impairments either singly or in combination [did] not meet or medically equal any listing." (Tr. 27). Also, as discussed, the ALJ properly rejected Dr. Setlock's opinion that Claimant was disabled, in part, due to his COPD. (Tr. 28, 269, 389).

Furthermore, even though it was not mentioned by the ALJ in support of his decision that

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12. FEV-1, or forced expiratory volume, measures how much air a person can force from his lungs in one second. A lower FEV-1 reading indicates more obstruction. See "Spirometry," Mayo Clinic, http://www.mayoclinic.com/health/spirometry/MY00413/METHOD=print.

Claimant's COPD did not meet 3.02A criteria, Defendant is correct that Claimant's COPD did not meet Listing 3.02A because Claimant's FEV-1 was 2.5 liters, not the 1.45 liters which is required in order for COPD to be considered an impairment rendering a person disabled. Therefore, upon review of the objective medical findings and the ALJ's decision, this Court finds that there is substantial evidence that supports the ALJ's decision that Claimant's COPD did not meet the requisite criteria for Listing 3.02A.

ii. Asthma

Plaintiff contends that Claimant is disabled because his asthma met all criteria of Listing 3.03, Asthma. (Doc. 1, p. 7). It is noted that Claimant did not allege asthma as an impairment in his disability application. It is well-settled that "[t]here is no requirement that an ALJ consider impairments that a claimant does not allege are disabling." Podsiad v. Astrue, 2010 U.S. Dist. LEXIS 31636, *63-64 (D. Del. Feb. 22, 2010) (holding that plaintiff's obesity was not a reason to remand the case because plaintiff did not allege obesity in his application or at his hearing) (citing Rutherford v Barnhart, 399 F.3d 546, 552-52 (3d Cir. 2005). Therefore, based on this rationale, the ALJ did not have the obligation to analyze Claimant's asthma because it was not alleged in either the application or at the hearing.

Nevertheless, the ALJ did take Claimant's asthma into account in reaching his determination of the DIB application, which is evident in the oral hearing transcript in which the ALJ questions Claimant regarding his asthma. (Tr. 26-28). Claimant testified that he used both Albuterol and Symbicort to treat his asthma. (Tr. 84-85). Claimant's medical record also reflects that he was prescribed these medications to control his COPD and asthma, and expiratory wheezing was also reported on several occasions. (Tr. 272, 267, 276, 281).

Ultimately, the ALJ determined that Claimant's asthma was a part of a severe combination of impairments in step-two of the analysis, but did not find that it met the criteria of the requisite impairment listing. (Tr. 22-23). The ALJ pointed to the overall opinion of Claimant's "primary care providers" that his lungs were clear, and that his lung volume was normal. (Tr. 26). The ALJ gave significant weight to Dr. Menio's opinion that Claimant had the ability to walk three (3) blocks, and that his asthma in combination with the other aforementioned impairments did not render Claimant disabled, but limited him to sedentary work with lifting restricted to ten (10) pounds or less. (Tr. 27). Dr. Menio also opined that "claimant's impairments either singly or in combination [did] not meet or medically equal any listing." (Tr. 27).

Listing 3.03, Asthma, states that in order for a claimant to meet this listing, a claimant must have asthma with either: "A. Chronic asthmatic bronchitis"; or "B. Attacks (as defined in 3.00C), in spite of prescribe treatment and requiring physician intervention, occurring at least once every 2 months or at least six times a year." 20 C.F.R. pt. 404, subpt. P, app. 1, § 3.03 (2013). Although Claimant had asthma, and was undergoing treatment for this condition, there is nothing in the record that suggests that he met criteria A or B of Listing 3.03. Therefore, upon review of the record and the ALJ's decision, this Court finds that there is substantial evidence to support the ALJ's decision that Claimant's asthma does not meet all criteria for Listing 3.03.

c. Cardiovascular Impairments

i. Myocardial Infarction

Plaintiff alleges that Claimant's MI met the criteria of an impairment listing, and that, therefore, he is disabled. (Doc. 1, p. 7). However, his medical records do not support findings

which would satisfy any listing contained in Section 4.00, which deals with cardiovascular disease. The cardiovascular listings include the following: (1) 4.02 chronic heart failure; (2) 4.03 hypertensive cardiovascular disease; (3) 4.04 ischemic heart disease; (4) 4.05 recurrent arrhythmias; (5) 4.06 symptomatic congenital heart disease; (6) valvular heart disease or other stenotic heart, or valvular regurgitation; (7) 4.08 cardiomyopathies; (8) 4.09 cardiac transplantation; (9) 4.10 aneurysm of aorta or major branches; (10) 4.11 chronic venous insufficiency of lower extremities; and (11) 4.12 peripheral arterial disease. See 20 C.F.R. pt. 404, subpt. P, app. 1. An MI by itself does not meet any of these cardiovascular listings, or any other listings, and there is no evidence in the medical record that indicates Claimant suffered from any of the impairments enumerated in the cardiovascular listings. Therefore, it is determined that there is substantial evidence to support the ALJ's decision that Claimant's MI did not meet any listing impairment.

ii. Deep Vein Thrombosis

Plaintiff asserts that the ALJ erred in concluding that Claimant's DVT did not meet or equal the criteria for impairment Listing 4.11, Chronic venous insufficiency of a lower extremity. (Doc. 1, p. 7). In order to meet Listing 4.11, Plaintiff had to provide evidence that there is incompetency or obstruction of the deep venous system in conjunction with either: (A) extensive brawny edema; or (B) superficial varicosities, stasis dermatitis, and recurrent or persistent ulceration which has not healed following at least 3 months of prescribed medical or surgical therapy. 20 C.F.R. pt. 404, subpt. P, app. 1, § 4.11 (2013). Claimant had a confirmed large right thigh varicosity as determined by a venous ultrasound performed in September 2009. (Tr. 252). A PVR test performed on his varicosities in April 2010 revealed a normal resting arterial

circulation bilaterally. (Tr. 424). These tests were discussed by the ALJ. (Tr. 25-26). Although Claimant had varicosities, after a review of the objective medical findings included in the record and the ALJ's decision, it is determined that the ALJ's decision that Claimant's DVT did not meet the listing criteria is supported by substantial evidence.

iii. Coronary Artery Disease

Plaintiff argues that Claimant's coronary artery disease met all criteria of Listing 4.04, Ischemic Heart Disease. (Doc. 1, p. 7). Listing 4.04 is as follows;

> Ischemic heart disease, with chest discomfort associated with myocardial ischemia, as described in 4.00E3, while on a regimen of prescribed treatment (see 4.00A if there is no regimen of prescribed treatment). With one of the following:
>
> > A. Sign- or symptom-limited exercise test demonstrating at least one of the following manifestations at a workload equivalent to 5 METs or less:
> >
> > > 1. Horizontal or downsloping depression, in the absence of digitalis glycoside therapy and/or hypokalemia, of the ST segment of at least -0.10 millivolts (-1.0 mm) in at least 3 consecutive complexes that are on a level baseline in any lead (other than aVR) and that have a typical ischemic time course of development and resolution (progression of horizontal or downsloping ST depression with exercise, and persistence of depression of at least -0.10 millivolts for at least 1 minute of recovery); or
> >
> > > 2. An upsloping ST junction depression, in the absence of digitalis glycoside therapy and/or hypokalemia, in any lead (except aVR) of at least -0.2 millivolts or more for at least 0.08 seconds after the J junction and persisting for at least 1 minute of recovery; or
> >
> > > 3. At least 0.1 millivolt (1 mm) ST elevation above resting baseline during both exercise and 3 or more minutes of recovery in ECG leads with low R and T waves in the leads demonstrating the ST segment displacement; or
> >
> > > 4. Failure to increase systolic pressure by 10 mmHg, or

decrease in systolic pressure below usual clinical resting level (see 4.00C2b); or

5. Documented reversible radionuclide "perfusion" (thallium) defect at an exercise level equivalent to 5 METs or less;

OR

B. Impaired myocardial function, documented by evidence (as outlined under 4.00C3 or 4.00C4b) of hypokinetic, akinetic, or dyskinetic myocardial free wall or septal wall motion with left ventricular ejection fraction of 30 percent or less, and an evaluating program physician, preferably one experienced in the care of patients with cardiovascular disease, has concluded that performance of exercise testing would present a significant risk to the individual, and resulting in marked limitation of physical activity, as demonstrated by fatigue, palpitation, dyspnea, or anginal discomfort on ordinary physical activity, even though the individual is comfortable at rest;

OR

C. Coronary artery disease, demonstrated by angiography (obtained independent of Social Security disability evaluation), and an evaluating program physician, preferably one experienced in the care of patients with cardiovascular disease, has concluded that performance of exercise testing would present a significant risk to the individual, with both 1 and 2:

1. Angiographic evidence revealing:

a. 50 percent or more narrowing of a nonbypassed left main coronary artery; or

b. 70 percent or more narrowing of another nonbypassed coronary artery; or

c. 50 percent or more narrowing involving a long (greater than 1 cm) segment of a nonbypassed coronary artery; or

d. 50 percent or more narrowing of at least 2 nonbypassed coronary arteries; or

e. Total obstruction of a bypass graft vessel; and

> 2. Resulting in marked limitation of physical activity, as demonstrated by fatigue, palpitation, dyspnea, or anginal discomfort on ordinary physical activity, even though the individual is comfortable at rest.

20 C.F.R. pt. 404, subpt. P, app. 1, § 4.04 (2013) (footnote omitted). Regarding Claimant's ischemic heart disease, which is also otherwise known as coronary artery disease, Dr. Menio's opinion was discussed by the ALJ, who stated:

> coronary artery disease with a history of an acute myocardial infarction on March 1, 2009, confirmed by a myocardial perfusion scan showing distal inferior wall infarct with mild to moderate peri-infarct ischemia, Ejection Fraction (EF) of 58%, and a cardiac cath showing mild disease except for apical hypokensises and ballooning[.]

(Tr. 27, 331, 337-338). The medical records show that Claimant was taking Aspirin as part of a prescribed treatment regiment, and that he had experienced chest pain as a result of the CAD. (Tr. 238, 308, 310, 331, 342, 428). However, a review of the objective medical findings reveals that none of criteria A, B or C for Listing 4.04 were met. Therefore, there is substantial evidence that supports the ALJ's determination that Claimant's CAD did not meet impairment listing 4.04, or any other listing.

iv. Pulmonary Embolism

Plaintiff asserts that Claimant's PE met the requisite impairment listing. However, the ALJ was under no obligation to address this issue because PE was not an allegation in his DIB application. See Rutherford, 399 F.3d at 552-52. Furthermore, a PE is not included in the Listing of Impairments considered "to be severe enough to prevent an individual from doing any gainful activity." See 20 C.F.R. pt. 404, subpt. P, app. 1. Therefore, the ALJ did not err in

failing to discuss Claimant's PE.

v. Hyperlipidemia

Plaintiff contends that Claimant suffered from hyperlipidemia and met Listing 104.14. (Doc. 1, p. 7). Listing 104.14, Hyperlipidemia, states:

> 104.14 *Hyperlipidemia.* Documented Type II homozygous hyperlipidemia with repeated plasma cholesterol levels of 500 mg/ml or greater, with one of the following:
>
> A. Myocardial ischemia, as described in 4.04B or 4.04C;
>
> OR
>
> B. Significant aortic stenosis documented by Doppler echocardiographic techniques or cardiac catheterization;
>
> OR
>
> C. Major disruption of normal life activities by repeated hospitalizations for plasmapheresis or other prescribed therapies, including liver transplant; OR D. Recurrent pancreatitis complicating hyperlipidemia.

20 C.F.R. pt. 404, subpt. P, app. 1, § 104.14 (2013). It is noted that Claimant did not allege this impairment in his disability application. As discussed, it is well-settled that "[t]here is no requirement that an ALJ consider impairments that a claimant does not allege are disabling." Rutherford, 399 F.3d at 552-52. Furthermore, Plaintiff fails to cite any medical evidence to support this claim. Accordingly, the ALJ did not err in failing to address Claimant's hyperlipidemia because it was not alleged in either the application or at the oral hearing.

d. Mental Health Impairments

Plaintiff claims that Claimant should have received disability benefits because he met the listings for severe depression, Bipolar Disorder Type II and feelings of worthlessness and helplessness under impairment listing 12.04, anxiety under listing 12.06, and past alcohol

dependency under 12.09. (Doc. 1, pp. 6-7); (Doc. 7, p. 4). Defendant alleges that there is substantial evidence to support the ALJ's finding that Claimant's mental health disorders were not severe, and even if they were, did not meet their respective listing impairment criteria. (Doc. 10, pp. 17-19). Defendant asserts that criteria "B" of Listings 12.04 and 12.06 were not met because "Claimant did not have marked restrictions in two or more of the categories of function and [did not] have repeated episodes of decompensation." (Doc. 10, p. 18). Defendant also asserts that Claimant could not meet the criteria of Listing 12.09, Substance Abuse Addiction Disorders, because he had to meet all criteria of one (1) of eight (8) listed mental health impairments. (Id. at 19).

The ALJ acknowledged that Claimant was diagnosed with Anxiety, Depression and Bipolar Disorder Type II, and was treated with medication by his primary care physicians until February 2011, at which time he had an outpatient intake evaluation with CFSS. (Tr. 23). The ALJ acknowledged this evaluation, which revealed a "litany of depressive and anxiety symptoms, memory problems, difficulty focusing, fair eye contact, slouched posture [and] an anxious mood." (Tr. 23). The ALJ also discussed that there was no record of visits to the ER or hospitalization attributable to these mental health impairments. (Tr. 23). The ALJ determined that Claimant's alleged mental impairments were not severe, thus not necessitating a step three (3) analysis, stating the following:

> The scant mental health treatment record supports the following degree of limitation in the broad areas of functioning set out in the disability regulations for evaluating mental disorders and in the mental disorders listing in 20 C.F.R., Part 404, Subpart P, Appendix 1: no restriction of activities of daily living; no difficulties in maintaining social functioning; mild difficulties in maintaining concentration, persistence or pace; and no episodes of decompensation.

> Accordingly, the undersigned finds that the record fails to establish the claimant's depression, bipolar disorder, or anxiety, either singly or in combination with his other impairments, would have more than a minimal effect on his ability to do basic work activities, and are, therefore based on the existing record, not severe. However, to accommodate these conditions[,] the jobs cited by the impartial vocational expert are all unskilled.

(Tr. 23).

Furthermore, the ALJ found that even if Claimant's mental health impairments were severe, they still did not meet criteria "B" or "C" of Listing 12.04 or 12.06. Criteria "B" was not met because Claimant had no restriction of daily living activities, only mild difficulties regarding concentration, persistence and pace, no episodes of decompensation, and no social function difficulties. (Tr. 23). Regarding criteria "C," the ALJ held that the record failed to establish that Claimant's mental impairments satisfied the "C" criteria of 12.04 because: (1) there were no repeated episodes of decompensation, each of extended duration; (2) there was no evidence of a residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; and (3) there was no current history of one or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement. (Tr. 23).

In reviewing the ALJ's decision, this Court finds that there is substantial evidence that supports the ALJ's conclusion that Claimant's mental health impairments were not severe. According to his evaluation performed at CFSS, Claimant denied having any behavioral issues at home or at school, and denied having any problems maintaining relationships with both his

family and friends. (Tr. 445). He indicates that he has a supportive family, stable housing and is compliant with medication. (Tr. 447). His appearance was noted as casual, his hygiene was noted as good, his eye contact was fair, his weight was average, his motor behavior was calm, gait was normal, his speech quality and quantity was good, his affect was calm, his estimated fund of information was average, his thought process was logical and coherent, his insight and judgment were adequate, and his patient orientation was times three (3). He did not experience any periods of decompensation, and there was no restriction of activities of daily living as he was able to do the following by himself: get dressed; shower; care for his hair; shave; eat; use the toilet; prepare his meals; do the dishes; swim; go out alone; walk three (3) blocks to the store; count change, use his checkbook; and drive his mother two (2) to three (3) miles to Walmart. (Tr. 189 -191). He had no difficulties in maintaining social functioning as his family environment was stable, he got along with family and friends, and his friends would come to his house to play cards. (Tr. 192). He did report only mild difficulties in maintaining concentration, persistence or pace, and no episodes of decompensation. Therefore, it is evident that there is substantial evidence to support the ALJ's decision that Claimant's mental illnesses were not severe, either singly or in combination.

Furthermore, while it is accurate that Claimant was hospitalized on February 1, 2012, at Schuylkill Medical Center for suicidal ideation and alcohol abuse, as discussed, new evidence that materialized after the ALJ made his decision is not appropriate for this Court to consider in determining whether substantial evidence exists to affirm the ALJ's decision because it does not concern the relevant time period up to, and including, the date of the ALJ's decision. (Tr. 537, 543). See Szubak v. Secretary of Health and Human Servs., 745 F.2d at 833 (holding that "the

new evidence [must] relate to the time period for which benefits were denied, and that it not concern evidence of a later-acquired disability or of the subsequent deterioration of the previously non-disabling condition.").

As such, it is determined that there is substantial evidence to support the ALJ's decision that Claimant's mental health impairments were not severe, and, therefore, did not require an analysis under the step three (3). Furthermore, this Court finds that even if Claimant's mental health impairments were severe, there is substantial evidence to support the ALJ's finding that Claimant's mental health impairments did not meet all criteria of Listings 12.04, 12.06, and 12.09.

e. Other Impairments

i. Migraines

Plaintiff alleges that Claimant suffered from migraines and occasional hand numbness that met or medically equaled an impairment listing. However, there is no listing for either migraines or occasional hand numbness. See 20 C.F.R. pt. 404, subpt. P, app. 1. As such, the ALJ did not err in not addressing Claimant's migraines.

2. Residual Functional Capacity

Plaintiff challenges the ALJ's residual functional capacity ("RFC") assessment that Claimant can perform sedentary work with a ten (10) pound lifting maximum, claiming that the assessments provided by Ms. Blackwell with the OVR and Dr. Menio, and the response provided by the vocational expert at the oral hearing with regards to a second hypothetical, support the argument that Claimant was disabled. (Doc. ___).

First, Plaintiff is incorrect that Dr. Menio's assessment supports the argument that Claimant was disabled. Dr. Menio acknowledged that Claimant had the following impairments: coronary artery disease with a history of an acute myocardial infarction with mild to moderate peri-infarct ischemia, apical hypokenises and ballooning; COPD with associated dyspnea on exertion; neck pain due to disc bulges and DDD with no neuro deficits; and right hand numbness with no documentation for the numbness. (Tr. 27). However, as the ALJ stated, Dr. Menio "indicated that the [C]laimant's coronary artery disease was secondary to smoking and not associated with any evidence of blocked coronary arteries; his COPD associated with complaints of dyspnea on exertion but the ability to walk 3 blocks; neck pain but no neuro deficits; and right hand numbness with no evidence of loss of function." (Tr. 27). Ultimately, this led Dr. Menio to conclude that "the [C]laimant [was] limited to sedentary work[,] and due to his neck pain[,] should avoid lifting or carrying over 10 pounds." (Tr. 27). Dr. Menio clearly did acknowledge the impairments Claimant had, but concluded that these impairments still allowed performance of sedentary work with lifting restricted to ten (10) pounds. (Tr. 461). Therefore, Plaintiff's argument that Dr. Menio's assessment supports the argument that Claimant was disabled is without merit.

Likewise, Plaintiff's argument that Claimant should have been declared disabled based on his unsuccessful attempt with the OVR is unfounded. The ALJ also acknowledged the opinion of Blackwell from the OVR that Claimant would be unable to perform any of his past relevant work, unable to work outdoors in extreme weather conditions and temperatures, unable to work in an environment in which there are large amounts of particles in the air, and unable to work in a job in which he would be required to lift up to seventy (70) pounds throughout an eight (8) to

twelve (12) hour shift. (Tr. 28). However, according to 20 C.F.R. § 404.1504, a determination made by another governmental agency, such as Pennsylvania's OVR, that an individual is unable to work is not binding on the Commissioner. 20 C.F.R. § 404.1504. Furthermore, according to 20 C.F.R. §§ 404.1513, 404.1527(a)(2), Blackwell is not an "acceptable medical source" that can make medical conclusions regarding impairments, and, therefore, is not a medical source the ALJ must take into account. Therefore, the ALJ did not even have to consider, let alone provide an explanation for the rejection of, Blackwell's conclusion regarding Claimant's impairments and resulting RFC. As such, Plaintiff's assertion that the ALJ's RFC did not properly take Blackwell's opinion into account is without merit.

3. Vocational Expert Testimony

Plaintiff argues that the ALJ erred in relying on the testimony of the vocational expert, Carmine Abraham ("Abraham"), who, in response to a first hypothetical at the hearing, stated that given Claimant's age, education, work experience, and RFC, he would be able to perform "the requirements of representative sedentary[,] exertional, unskilled occupations in the Pennsylvania state and Northeastern Pennsylvania regional economies such as visual inspector (17,290 and 1,180 available jobs in the state and regional economies respectively); bench assembler (9,070 and 1,460 available jobs in the state and regional economies respectively); and surveillance monitor (36,600 and 1,400 available jobs in the state and regional economies respectively)." (Tr. 30, 91-92). Abraham also testified, in response to a second hypothetical, that there would be no employment available for an individual who had to elevate his feet to avoid fluid buildup, who had frequent bouts of memory lapses, and had concentration problems. (Tr. 92-93).

Ultimately, the ALJ relied on Abraham's response to the first hypothetical, stating that while Claimant was unable to perform any past relevant work due to exertional requirements, he was still capable of performing "some level of work as evidenced by the testimony of the impartial vocational expert. . . " (Tr. 28). However, Plaintiff argues that Abraham's response to the second hypothetical proves that Claimant is unable to work in any capacity, and, therefore, is disabled and entitled to benefits. (Doc. 1, p. 8); (Doc. 7, pp. 6-7). In response to this assertion, Defendant states that "[b]ecause the [first] hypothetical question to the vocational expert fairly set forth all of Claimant's limitations, the vocational expert's testimony provides substantial evidence for the ALJ's conclusion that Plaintiff was not disabled." (Doc. 10, pp. 24-25).

The Third Circuit Court of Appeals has held that when a hypothetical posed to a vocational expert is inconsistent with the evidence in the record, the ALJ has the authority to disregard the vocational expert's response. Jones v. Barnhart, 364 F.3d 501, 506 (3d Cir. 2004). After a review of the record, it is determined that there is not enough evidence that supports the memory lapses, concentration problems, and the need for Claimant to elevate his legs to avoid fluid build-up that are used as the basis for the second hypothetical. Therefore, substantial evidence supports the ALJ's reliance on Abraham's response to the first hypothetical that there was work Claimant could perform given his age, education, work experience, and RFC.

4. Claimant's Age

Plaintiff contends that because Claimant was forty-nine (49) years old at the time of the ALJ's decision, and thus on the borderline of a higher age bracket, his claim should have been evaluated under the standards of the higher age bracket of age fifty (50) to fifty-four (54). (Doc.

7, p. 7). Plaintiff alleges that Claimant would have received benefits if his claim were evaluated under the higher age bracket because "[t]he Social Security Administration considers a [C]laimant 50 to 54 who has a severe impairment and limited work experience as someone who may not be able to adjust to other work." (Id.). Initially, Abraham testified that Claimant "is a 48 year-old individual who is a younger person." (Tr. 88). On the date of the ALJ's decision, Claimant was forty-nine (49) years old.

In a situation where a claimant is on an age category borderline, the ALJ "will not apply the age categories mechanically" where the claimant is "within a few days to a few months of reaching an older age category, and using the older age category would result in a determination or a decision that [the claimant] is disabled." 20 C.F.R. § 404.1563(b). The Third Circuit Court of Appeals has held that a claimant forty-eight (48) days (approximately a month and a half) away from age fifty (50) was on the age category borderline, and, therefore, should have his claim analyzed under the guidelines for the older age category. Kane v. Heckler, 776 F.2d 1130, 1134 (3d Cir. 1985). Similarly, the Third Circuit Court of Appeals found a borderline age situation where claimant was one hundred six (106) days (approximately three and a half months) from reaching the older age category. Lucas v. Barnhart, 184 F. App'x 204, 207-08 (3d Cir. 2006). However, there is no borderline situation where a claimant is within five (5) or six (6) months from the older age category. Roberts v. Barnhart, 139 F.App'x 418, 420 (3d Cir. 2005).

In the case at hand, Claimant was a full ten (10) months away from turning fifty (50) years old when the ALJ issued his decision, and thus not "within a few days to a few months" of reaching the older age category. (Tr. 17, 126). Therefore, there is substantial evidence that supports the ALJ's determination that Claimant was a "younger individual," and it was

appropriate for the ALJ to determine his claim within the guidelines of this age category.

5. ALJ Terminated

Plaintiff alleges that Claimant's disability application should be remanded because the ALJ who denied the claim was terminated from his position due to being intoxicated during work hours. (Doc. 7, p. 3). Plaintiff states the following:

> Plaintiff and her counsel have since learned through information and belief that Judge Boini has been terminated as an Administrative Law Judge due to a violation of Social Security personnel's civil rights and possibly violating the public's civil rights, including the Claimants. Through further information and belief, Plaintiff and her counsel have [sic] since learned that Judge Boini consumed alcohol during work hours in which he was holding hearing[s] for disability claims. Judge Boini may have been under the influence of alcohol during Michael Chaplick's hearing, or while reviewing his file[,] and [he] did not receive a fair hearing, a fact that the appeals would not be aware of.

(Id.). On June 28, 2013, Plaintiff filed a Motion to Remand to the Social Security Administration Appeals ("SSA") Council on the basis that Judge Boini may have been intoxicated during the hearing or while reviewing Claimant's file. (Doc. 6). Judge Caldwell denied the motion on July 23, 2013, stating the following:

> Plaintiff points to no evidence in the record indicating that the ALJ violated her rights. In fact[,] when pursuing this matter before the Appeals Council of the Social Security Administration, Plaintiff did not claim that the ALJ was under the influence of alcohol at [Claimant's] hearing or when he was drafting the decision denying benefits.

(Doc. 9, p. 2). In Wood v. Colvin, 2014 U.S. Dist. LEXIS 40507 (M.D. Pa. Mar. 27, 2014), Judge Jones of this Court addressed an identical argument as the plaintiff alleged that Judge Boini appeared to be under the influence of alcohol or a controlled substance during his hearing,

and, as a result, was not focused on the hearing. Id. at *12. The plaintiff supported this assertion with the fact that ALJ Boini had been placed on administrative leave for intoxication and inappropriate contact with a staff member during work hours. Id. However, the plaintiff failed to point to any evidence that ALJ Boini was intoxicated during his own hearing or while ALJ Boini was reviewing and deciding his claim.

Judge Jones stated the following:

> The Court has carefully reviewed the transcript of the hearing in this case, and while we do note instances where the ALJ asked the Plaintiff to repeat her answers, there is no indication that the ALJ was under the influence of any substances. It appears more likely that the ALJ did not hear the Plaintiff's responses in the first instance, and thus asked her to repeat them. Further, we do not find that the ALJ was being discourteous to the Plaintiff or her counsel during the hearing. Rather, we find that the ALJ's interactions with the claimant and her counsel were entirely appropriate, and that the ALJ was running an efficient and professional hearing room. Moreover, Plaintiff's counsel did not ask the ALJ to recuse himself at the time of the hearing, nor is there any indication that counsel followed up with any type of formal complaint, which greatly discredits Plaintiff's contentions in this regard. Accordingly, we reject the Plaintiff's argument that the ALJ was biased.

Colvin, 2014 U.S. Dist. LEXIS 40507 at *12-13.

In the case at hand, there is no evidence that indicates that ALJ Boini was under the influence of alcohol either during Claimant's hearing or while reviewing and rendering a decision on his claim. Plaintiff has based this assertion solely on articles attached as exhibits to the Brief in Support, that simply describe why ALJ Boini was terminated. In accordance with Judge Jones' decision, and due to lack of evidence of intoxication during the hearing or claim determination, Plaintiff's contention is unsupported.

6. Subsequent Award of Benefits Based on New Application

Plaintiff alleges that because Claimant was awarded benefits in April 2013 based on a subsequent benefits application, this Court should either grant benefits or remand the case for further hearing. (Doc. 7, p. 8). Defendant asserts that this determination involved a different period, and was based on different medical evidence, and, therefore, the subsequent award does not warrant a remand or a grant of benefits. (Doc. 10, p. 28).

Each benefits application adjudicates a discrete time period, the "effective filing period" of the application, which ends when the ALJ issues a decision. 20 C.F.R. § 404.620(a). The April 2013 award of benefits to Claimant was based on a different period, and was decided on different medical evidence involving Claimant's worsening condition that did not arise until after the ALJ had issued his decision regarding the application at issue. According to the Third Circuit Court of Appeals, a subsequent award of benefits does not warrant a remand of the denial of benefits for an earlier application. See Cunningham v. Commissioner of Social Security, 507 F. App'x 111, 120 (3d Cir. 2012). As such, Plaintiff's argument that this Court should award benefits or remand the denial of benefits based on the success of Claimant's second benefits application is without merit.

CONCLUSION

Based upon a thorough review of the evidence of record, the Court finds that the Commissioner's decision is supported by substantial evidence. Therefore, pursuant to 42 U.S.C. § 405(g), the decision of the Commissioner will be affirmed. An appropriate order will be issued.

Date: August 26, 2014

United States District Judge