

problems with sitting, and that she sat comfortably for up to an hour during the evaluation. (Tr. 611). But, Dr. Daggs stated that she had “no idea” what Ding’s capacity is for an eight-hour day. (Id.). She did not assess Ding’s postural limitations, but suspected that they would be “occasionally” limited based on her pain. (Id.). No manipulative, visual/communicative, and/or environmental limitations were identified. (Tr. 612-613).

At the ALJ hearing on August 23, 2010, Ding testified that in 2005<sup>9</sup> she started missing work, mostly during her menstrual cycle, because her pain from endometriosis got worse. (Tr. 31). She stated that she missed maybe a day or two out of the month because she was bedridden from the pain. (Id.). Ding noted that her pain then was not as bad as it was at the time of the hearing. (Id.). She testified that the week before the hearing, her pain was “horrible” and that she “was just curled up in a ball laying in bed.” (Tr. 36). Ding stated that a symptom of the endometriosis is to worsen her menstrual periods, resulting in heavier bleeding, more cramping, and stabbing pain. (Tr. 34-35). The pain is also worse during sex and with bowel movements. (Tr. 35). She testified that sometimes after a bowel movement, she has to lay down for hours, which makes working difficult because she cannot simply leave work after a bowel movement. (Id.). Ding claimed that she has pain every day, that on a good day it is a four or five out of ten (4-5/10) and a ten out of ten (10/10) on a bad day. (Tr. 35-36). When she is at a ten in pain, it usually lasts for hours and she cannot do much but lay down and try to relax. (Tr. 36). Ding testified that there is no cure for her condition, that she takes Yaz to stop her periods and

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9. Ding testified that she started missing work in “2005 I think” and that her pain got worse in 2006. (Tr. 30-31). She stated that her three laparoscopic surgeries took place in 2004, 2005, and 2006. (Tr. 31-32). However, according to the medical records, Ding’s pain increased in severity in 2005 and she underwent surgery in 2005, 2006, and 2007. (Tr. 209, 255, 332). Notably, the ALJ’s decision also states that the surgeries occurred in 2004, 2005, and 2006. See (Tr. 16).

medication to help the pain, and that she has surgery every two to five years to remove adhesions and the like. (Tr. 37-38). She stated that she has not driven since 2006 because she never knows how pain will affect her. (Tr. 40). Ding testified that she will help her parents cook a meal, but only for about ten minutes at a time. (Tr. 40). For hobbies, Ding likes gaming, doing cross stitch, reading, and listening to music. (Tr. 45). She stated that she is unable to play the flute because her pelvic pain prevents her from breathing from the diaphragm. (Tr. 46).

Andrew Caparall, a vocational expert, also testified at the ALJ hearing. See (Tr. 48-53). Mr. Caparall stated that he did not find any of Ding's past work relevant and there were no substantial gainful activity earnings. (Tr. 48). The ALJ asked the vocational expert to consider a hypothetical individual of Ding's same age, education, with no past relevant work experience, who was unable to drive due to pain, and whose sedentary exertion required an option to alternate sitting and standing at will; never to climb ladders, ropes, or scaffolds, or to kneel, crawl, or crouch; but could occasionally climb ramps and stairs, occasionally balance and stoop; who had to avoid even moderate exposure to temperature extremes, wetness, humidity, loud noises, vibrations, environmental irritants, and hazards such as heights, moving machinery, and sharp edges; and who was restricted to simple, routine tasks and to goal-oriented rather than production-paced tasks. (Tr. 49-50). The vocational expert, after clarifying that the sit/stand option is not narratively described in the Dictionary of Occupational Titles, testified that such an individual would be able to function as a call out operator, a food and beverage order clerk, and a surveillance systems monitor. (Tr. 50-52). He stated that, combined, there are more than 383,000 of these jobs nationally and approximately 2,900 in the south central region of Pennsylvania. (Tr. 50-51).

Ding's counsel asked the vocational expert to add an impairment in the ability to concentrate to the hypothetical individual and questioned what impact that would have on the individual's ability to work. (Tr. 52). Mr. Caparall testified that the surveillance systems monitor job requires focus 100% of the day and the other two jobs would be precluded if the individual could not focus for at least 80% of the day. (Tr. 53). Counsel then asked Mr. Caparall to explain what jobs the hypothetical individual could perform if he/she missed more than two days a month of work because of pain. (Id.). The vocational expert explained that unless there was a special accommodation, consistent absences of two days a month or more would be grounds for termination. (Id.).

### **Discussion**

Initially, the ALJ concluded that Ding met the insured status requirements of the Social Security Act through March 31, 2009. (Tr. 14). The ALJ then proceeded through each step of the sequential evaluation process and determined that Ding is not disabled. (Tr. 14-19).

At step one, the ALJ found that Ding had not engaged in substantial gainful work activity from her alleged onset date of August 1, 2006, through her date last insured, March 31, 2009. (Tr. 14).

At step two, the ALJ determined that Ding suffered from the severe<sup>10</sup> impairments of

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10. An impairment is "severe" if it significantly limits an individual's ability to perform basic work activities. 20 C.F.R. § 404.921. Basic work activities are the abilities and aptitudes necessary to do most jobs, such as walking, standing, sitting, lifting, pushing, seeing, hearing, speaking, and remembering. Id. An impairment or combination of impairments is "not severe" when medical and other evidence establish only a slight abnormality or a combination of slight abnormalities that would have no more than a minimal effect on an individual's ability to work. 20 C.F.R. § 416.921; Social Security Rulings 85-28, 96-3p and 96-4p.

endometriosis and headaches.<sup>11</sup> (Tr. 17).

At step three of the sequential evaluation process, the ALJ found that Ding did not have an impairment or combination of impairments that met or medically equaled a listed impairment. (Tr. 15).

At step four, the ALJ determined that Ding had no past relevant work, but had the residual functional capacity to perform less than a full range of sedentary work.<sup>12</sup> (Tr. 15, 17). Specifically, Ding required an option to alternate sitting and standing at will; she could never climb ladders, ropes, or scaffolds; she could never kneel, crawl, or crouch; she could occasionally climb ramps and stairs; she could occasionally balance and stoop; she had to avoid even moderate exposure to temperature extremes, wetness, humidity, loud noises, vibrations, environmental irritants and hazards such as heights, moving machinery, and sharp edges; and she was limited to simple, routine tasks and to goal-oriented rather than production-paced tasks. (Tr. 15).

At step five of the sequential evaluation process, the ALJ determined that there were jobs

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11. The ALJ found that Ding also had right lateral femoral cutaneous nerve entrapment, a nonsevere impairment as it did not last the required duration of twelve months. (Tr. 14). Additionally, the ALJ concluded that Ding did not have a medically determinable mental impairment. (Tr. 14-15), citing (Tr. 417-440).

12. The Social Security regulations define sedentary work as follows:

(a) Sedentary work. Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. §§ 404.1567(a) and 416.967.

in significant numbers in the national economy that Ding could have performed. (Tr. 18).

The ALJ therefore concluded that Ding was not under a disability as defined in the Social Security Act at any time between the alleged onset date of August 1, 2006, and the date last insured, March 31, 2009. (Tr. 19).

The instant appeal challenges the ALJ's credibility determination and residual functional capacity assessment. (Doc. 13).<sup>13</sup> Ding asserts that the ALJ erred in concluding that she was not credible. (Id. at pp. 10-11). She complains that it is unclear what parts of her testimony the ALJ found not credible as he accepted her testimony that sometimes her pain was severe. (Id.), citing (Tr. 17) (finding that "[s]he no doubt does suffer from intense pain at times"). She suggests that the ALJ's determination that she was capable of performing sedentary work is incompatible with the great weight he accorded to the state agency doctor's opinion, which included a statement that Ding's allegations were credible. (Doc. 13, pp. 8-10). Dings argues that her allegations regarding the frequency and severity of pain from her endometriosis are supported by, inter alia, the findings from her third laparoscopic surgery in May 2007, and that the ALJ may not simply dismiss the evidence as not credible without pointing to other contrary medical evidence. (Id. at p. 11) (citing Williams v. Sullivan, 970 F.2d 1178, 1184-85 (3d Cir. 1992)). Ding further asserts that the ALJ erred in failing to discuss why he did not give controlling weight to her surgeon's opinion regarding her surgery on May 24, 2007, at which her stage III endometriosis was documented. See (Doc. 13, pp. 6-9), citing 20 C.F.R. § 404.1527; Fagnoli v. Halter, 247 F.3d 34, 43-44 (3d Cir. 2001) (holding that the ALJ's failure to explain his implicit rejection of

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13. The appeal focuses on Ding's severe impairment of endometriosis, not her headaches; therefore, this opinion will address the ALJ's findings as they relate to the endometriosis.

contradictory findings was error because it left the court to “wonder whether he considered and rejected them, considered and discounted them, or failed to consider them at all”).

Additionally, Ding argues that residual functional capacity is the most that an individual can do, not the least, and; therefore, it should not matter what her functioning was on her best days, but how it was on her worst days. (Doc. 13, p. 7) (citing the medical records dated July 7, 2010, when Ding reported that she had overwhelming pain two days a week, see (Tr. 631-632)). Ding suggests that the ALJ, by failing to address what limitations she had on her worst days, apparently believed there was no difference in her functioning on a day with less pain and on a day with overwhelming pain, which is inconsistent with her testimony. (Doc. 13, pp. 9-11). She contends that the ALJ erred by failing to evaluate the limiting effects of her impairments. (Id. at p. 10) (citing SSR 96-7p). Ding claims that the ALJ did not explain how he could find that she suffered from “intense pain at times” while also concluding that she was able to perform sedentary work on a regular and continuing basis. (Id. at pp. 8-10). She argues that if the ALJ could not determine what limitations she had during periods of severe pain, he was obligated to re-contact the treating sources. (Doc. 13, p. 8) (citing 20 C.F.R. § 404.1512(e)).

In describing Ding’s allegations that she is disabled and unable to work due to endometriosis, the ALJ stated, inter alia, that Ding’s pain was worse during menstrual periods, with sex, and with bowel movements, and that she had good days and bad days. (Tr. 16). He recounted Ding’s testimony that on a good day, her pain was a 4 or 5 out of 10, and could be a 10 out of 10 on a bad day. (Id.). The ALJ listed the dates for Ding’s three surgeries as 2004, 2005, and 2006.<sup>14</sup> (Id.). The ALJ noted that she allegedly had to lay down to get relief from the pain

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14. As discussed in footnote 9 above, the correct dates of the surgeries are 2005, 2006, and 2007.

and that her medication only helped for a brief time. (Id.). He indicated that Ding reportedly had difficulty standing and sitting for long periods of time, and that she may need another surgery. (Id.). The ALJ detailed Ding's allegations that she had not worked or driven since 2006, and while enjoying video games and cross-stitch, she could only help her parents with cooking for brief periods. (Id.). He then concluded that Ding's medically determinable impairments could reasonably be expected to cause her alleged symptoms, but that her statements concerning the intensity, persistence, and limiting effects of those symptoms were not credible. (Id.).

Once an ALJ concludes that there is a medical impairment that could reasonably cause the alleged symptoms, "he or she must evaluate the intensity and persistence of the pain or symptom, and the extent to which it affects the individual's ability to work." Hartranft v. Apfel, 181 F.3d 358, 362 (3d Cir. 1999) (citing 20 C.F.R. § 404.1529(c)). This "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." Id. In evaluating the intensity and persistence of a claimant's symptoms, such as pain, an ALJ should consider (1) the claimant's history; (2) medical signs and laboratory findings; (3) medical opinions; and (4) statements from the claimant, treating and nontreating sources, and other persons about how the claimant's symptoms affect him/her. See 20 C.F.R. § 404.1529. Importantly, "[a]n individual's statements about the intensity and persistence of pain or other symptoms or about the effect the symptoms have on his or her ability to work may not be disregarded solely because they are not substantiated by objective medical evidence." 1996 SSR LEXIS 4 (1996); 20 C.F.R. § 404.1529(c)(2).

"Generally, 'an ALJ's findings based on the credibility of the applicant are to be accorded great weight and deference, particularly since an ALJ is charged with the duty of observing a

witness's demeanor and credibility.” Fell v. Astrue, 2013 U.S. Dist. LEXIS 167100, \*29 (M.D. Pa. 2013) (Conaboy, J.) (quoting Walters v. Commissioner of Social Sec., 127 F.3d 525, 531 (6th Cir. 1997)); Frazier v. Apfel, 2000 WL 288246 (E.D. Pa. 2000). Social Security Ruling 96-7p gives the following instructions in evaluating the credibility of the claimant's statements:

In general, the extent to which an individual's statements about symptoms can be relied upon as probative evidence in determining whether the individual is disabled depends on the credibility of the statements. In basic terms, the credibility of an individual's statements about pain or other symptoms and their functional effects is the degree to which the statements can be believed and accepted as true. When evaluating the credibility of an individual's statements, the adjudicator must consider the entire case record and give specific reasons for the weight given to the individual's statements.

SSR 96-7p. “In particular, an ALJ should consider the following factors: (1) the plaintiff's daily activities; (2) the duration, frequency and intensity of the plaintiff's symptoms; (3) precipitating and aggravating factors; (4) the type, dosage, effectiveness, and side effects of any medication taken to alleviate the symptoms; (5) treatment, other than medication for relief of the symptoms; (6) any measures the plaintiff uses or has used to relieve the symptoms; (7) the plaintiff's prior work record; and (8) the plaintiff's demeanor during the hearing.” Jury v. Colvin, 2014 U.S. Dist. LEXIS 33067, \*33 (M.D. Pa. 2014) (Conner, J.) (citing 20 C.F.R. § 404.1529(c)(3)).

After review, this Court finds several inconsistencies and/or errors in the ALJ's credibility determination and residual functional capacity assessment, which require remand to the Commissioner.

First, the ALJ concluded that Ding's allegations regarding her degree of pain were not supported by the imaging and treatment records. (Tr. 16). He highlighted Ding's negative “laparoscopy of April 2006” and the normal/negative results from five other scans/tests in 2006



and one in 2009. (Tr. 16).

Initially, this Court notes that Ding did not have a laparoscopy in April 2006; rather, her first laparoscopy was in April 2005, and revealed endometriosis. See (Tr. 209, 255). Her second laparoscopy was performed on February 22, 2006, and did not show any evidence of endometriosis. See (Tr. 253, 456, 599-600). Presumably it is the February 2006 surgery to which the ALJ was referring. Regardless of the incorrect date, the fact that he failed to discuss the first laparoscopy, which confirmed endometriosis, is significant, as the ALJ recognized that the only definitive method for diagnosing endometriosis is surgical. (Tr. 16, 209, 255). He also apparently ignored the MRI from April 6, 2007, which revealed signs of endometrial implants, (Tr. 545), and the diagnoses following Ding's third surgery on May 24, 2007, of pelvic pain, stage III endometriosis, collisional dyspareunia, and left ovarian adhesions, (Tr. 332-334).

The ALJ's failure to discuss this evidence is problematic because "there is a particularly acute need for some explanation by the ALJ when s/he has rejected relevant evidence or when there is conflicting probative evidence in the record." Cotter v. Harris, 642 F.2d 700, 706 (3d Cir. 1981) (holding that the "ALJ's failure to explain his implicit rejection of [probative] evidence or even to acknowledge its presence was error"). Accordingly, the ALJ's finding that Ding's allegations were not supported by the imaging and treatment records was not based on substantial evidence. See Universal Camera Corp., 340 U.S. at 488 (explaining that substantial evidence "must take into account whatever in the record fairly detracts from its weight"); Irizarry v. Barnhart, 233 Fed. Appx. 189, 192-93 (3d Cir. 2007) (remanding because the ALJ did not discuss all of the relevant evidence or explain his rejection of certain medical evidence).

Additionally, pursuant to 20 C.F.R. § 404.1527, if "a treating source's opinion on the

issue(s) of the nature and severity of [the claimant's] impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record, [an ALJ] will give it controlling weight." If an ALJ determines that the treating source's opinion should not be given controlling weight, he/she is required to "give good reasons" for the weight that was accorded. 20 C.F.R. § 404.1527. Ding argues on appeal that the ALJ erred in failing to discuss why he did not give controlling weight to the surgeons' reports regarding her laparoscopy on May 24, 2007, which listed her diagnosis of stage III endometriosis.<sup>15</sup> (Doc. 13, pp. 7-9). In response, Defendant argues that because the ALJ accepted, without question, Ding's endometriosis diagnosis as a severe impairment, that his failure to find stage III was at most harmless error. (Doc. 14, p. 18), citing Brown v. Astrue, 649 F.3d 193, 195 (3d Cir. 2011) ("An error is 'harmless' when, despite the technical correctness of an appellant's legal contention, there is also 'no set of facts' upon which the appellant could recover."). To the extent the ALJ failed to identify Ding's endometriosis as stage III in the second step of the sequential evaluation process, this Court agrees that the error was harmless. However, because the ALJ failed to even mention the 2007 surgery and stage III<sup>16</sup> endometriosis diagnosis in his decision, this Court cannot determine whether his error was harmless in assessing Ding's credibility and residual functional capacity, and the matter should be remanded. See Irizarry, 233 Fed. Appx. at 192-93 (holding that "to the

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15. According to the Johns Hopkins Medicine website, there are four stages of endometriosis ranging in level of severity from minimal at stage I, mild at stage II, moderate at stage III, and severe at stage IV. See [http://www.hopkinsmedicine.org/healthlibrary/conditions/gynecological\\_health/endometriosis\\_85,P00573/](http://www.hopkinsmedicine.org/healthlibrary/conditions/gynecological_health/endometriosis_85,P00573/) (last visited March 27, 2014).

16. On July 9, 2008, Dr. Kennedy characterized Ding's endometriosis as stage IV. (Tr. 460).

extent that the ALJ reaches a finding contradictory to that of [the claimant's] treating physicians, he must explain the reasoning behind such a finding, including reconciling conflicts and discussing how and why probative evidence supporting [the] claim was discounted or rejected”).

A second inconsistency/error has been found in the ALJ's evaluation of the intensity and persistence of Ding's pain and the extent to which it affected her ability to work. The ALJ found that “[s]he no doubt does suffer from intense pain at times, but as of August 20, 2008, she had lost 5 pounds by getting out of the house two or three times per week and was feeling better” and that she “has been in no acute distress on multiple occasions.” (Tr. 17), citing (Tr. 590). This Court disagrees with the ALJ that Ding's ability to leave the house two or three times a week is consistent with a residual functional capacity assessment that she was able to perform less than the full range of sedentary work on a regular and continuing basis, which essentially equates to working five days a week, eight hours a day. See Perl v. Barnhart, 2005 U.S. Dist. LEXIS 3776, \*24-25 (E.D. Pa. 2005) (concluding that the ALJ erred in determining residual functional capacity by not fully crediting the claimant's testimony and the reports of his treating physicians that he would miss work at least four days per month). Furthermore, the ALJ erroneously failed to discuss the remainder of Dr. Kennedy's notes from August 20, 2008, which explained that Ding reported feeling the best she had in a month and that previously she only got out of the house two or three times a month. See (Tr. 590). Importantly, an ALJ may not “‘pick and choose’ among the evidence, selecting only that which supports his ultimate conclusions.” Middlemas v. Astrue, 2009 U.S. Dist. LEXIS 19090, \*29-30 (W.D. Pa. 2009). See also Hardman v. Barnhart, 362 F.3d 676, 681 (10th Cir. 2004) (“It is improper for the ALJ to pick and choose among medical reports, using portions of evidence favorable to his position while

ignoring other evidence.”).

Third, aside from the reports mentioned above and the opinions of Dr. Daggs and Dr. Gopal, which will be addressed below, the ALJ failed to discuss more than four hundred pages of medical records.<sup>17</sup> See (Tr. 203-657). These records show that Ding had regular and continuous treatment throughout the period of disability, as well as prior to and after the date last insured.<sup>18</sup> See id. Significantly, the evidence establishes that throughout the period of disability, Ding’s medications were repeatedly changed in both type and dose, heavy narcotics were prescribed, and she underwent different types of therapies in an attempt to manage the pain, including physical therapy and treatment at a pain clinic. See Dominguez v. Astrue, 2012 U.S. Dist. LEXIS 114049, \*35 (W.D. Pa. 2012) (remanding because the ALJ failed to discuss, inter alia, that the claimant’s medications were consistently changed and increased throughout his treatment); Smith v. Comm’r of Soc. Sec., 2009 U.S. Dist. LEXIS 77594, \*24 (W.D. Pa. 2009) (remanding to the Commissioner for a further assessment of the claimant’s credibility regarding disabling fibromyalgia pain and fatigue because, inter alia, the ALJ incorrectly stated that “there is no evidence that the claimant[’s] ... medications have been frequently changed or the dosages altered

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17. The administrative record in this case consists of 670 pages. (Doc. 10).

18. This Court recognizes that medical records outside the alleged period of disability have limited significance, see Kinney v. Astrue, 2013 U.S. Dist. LEXIS 32035, \*20 (M.D. Pa. 2013) (Conaboy, J.) (stating that medical records prior to and after the date last insured “have limited relevance other than to show the nature of her medical condition for historical purposes”); however, because the ALJ relied on such reports to support his decision, see (Tr. 16-17) (discussing the laparoscopy from February 2006, an ultrasound from May 5, 2009, physical therapy reports from May 27, 2010, and the opinion of Dr. Daggs dated August 11, 2010), he should have also considered any conflicting evidence. See Lintz v. Astrue, 2009 U.S. Dist. LEXIS 39987, \*35-36 (W.D. Pa. 2009) (explaining that because the ALJ did not differentiate between two reports, one issued after the date last insured, the ALJ did not properly support his decision to totally discount the reports).

due to side effects and/or ineffectiveness”). Furthermore, these records tend to corroborate Ding’s testimony regarding the limiting effects of her pain. See, e.g. (Tr. 255-256) (On September 7, 2006, Ding reported that her pain was so debilitating that she was unable to work.); (Tr. 208, 226) (In late 2006, Ding went to the emergency room three times in two weeks for severe pelvic pain. On her third trip, she was “crying in pain” and it was noted that she was “unable to work/walk well.”); (Tr. 317, 321, 363-365, 520) (In January and February 2007, Ding stated that her pain had progressively worsened over the previous six months to the degree she had been unable to work or engage in usual activities.); (Tr. 356, 411) (On May 10, 2007, Ding reported feeling depressed because she could not enjoy usual activities.). Because the ALJ failed to discuss the medical records tending to support Ding’s allegations, his decision was not based on substantial evidence. See Irizarry, 233 Fed. Appx. at 192-93 (remanding because the ALJ did not discuss all of the relevant evidence or explain his rejection of certain medical evidence).

A fourth concern has been identified in the ALJ’s discussion of the opinion evidence, specifically the opinions of Dr. Daggs and Dr. Gopal. (Tr. 17). The ALJ gave “great weight” to the opinion of Dr. Daggs, rendered sixteen months after the date last injured,<sup>19</sup> as consistent with an ability to perform at least sedentary work. (Tr. 17), citing (Tr. 610-613). The ALJ noted that Dr. Daggs “defers in part to the physical therapist.” (Id.).

Contrary to the ALJ’s representation, Dr. Daggs did not defer “in part” to the physical therapist; rather, she stated that physical therapy’s functional assessment would be “more

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19. The ALJ commented that Dr. Daggs’ opinion post-dated the date last insured of March 31, 2009, and that there were not any medical opinions supporting disability prior to the date last insured. (Tr. 17). Although this is correct, this Court notes that according to Dr. Kennedy’s outpatient note dated December 10, 2008, she informed Ding that she would “write a letter for her in support of either disability or medical assistance.” (Tr. 450).

accurate.” (Tr. 611). Dr. Daggs provided only a “guesstimate at best” as to how much Ding could lift/carry. (Tr. 611). As to any sitting limitations, Dr. Daggs noted that Ding conveyed no problems and that she sat comfortably for up to an hour during the evaluation, but Dr. Daggs had “no idea” what her capacity was for an eight-hour day. (Tr. 611). Dr. Daggs did not assess Ding’s postural limitations, but “suspect[ed] they would be limited based on her pain.” (Tr. 611). Consequently, this Court finds that the ALJ’s decision to accord “great weight” to Dr. Daggs’ opinion to be unsupported by substantial evidence. See Green v. Astrue, 2011 U.S. Dist. LEXIS 133036, \*13-14 (E.D. Va. 2011) (finding no error in the ALJ’s decision to afford “some weight” to a treating physician’s opinion that provided a “guesstimate” as to how much the claimant could carry), adopted by 2011 U.S. Dist. LEXIS 132598 (E.D. Va. 2011).

Additionally, in citing the physical therapy reports in his discussion of Dr. Daggs’ opinion, the ALJ omits significant portions of those records.<sup>20</sup> See (Tr. 17), citing (Tr. 572, 595). Specifically, the ALJ stated that the physical therapist “found [Ding] to have begun a mild walking program for exercise, to have generally 5/5 strength, to be independently ambulatory without gait dysfunction (Exhibit 17F/9), and to be generally within functional limits (Exhibit 17F/32).” (Id.). The ALJ implied that the physical therapist found Ding “to be generally within functional limits,” see (Tr. 17); however, the report cited, dated September 28, 2009, also indicates that at her prior functional level, when she was experiencing less pain, Ding was unable to work. (Tr. 594-595). The physical therapy report notes that at her then-current functional level, Ding “is limited with everything throughout the day. She has difficulty getting out of bed.

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20. Notably, Ding was eventually discontinued from physical therapy because there had been only minimal changes in her pain levels. (Tr. 569, 633).

She has pain with simple tasks, such as standing or doing things in her home.” (Tr. 595).

Accordingly, these reports do not support the ALJ’s residual functional capacity assessment and it was error for him to “pick and choose” only those portions of the physical therapist’s report that supported his ultimate conclusions. See Middlemas, 2009 U.S. Dist. LEXIS 19090 at \*29-30.

The ALJ also afforded “great weight” to the opinion of Dr. Gopal, who completed a Physical Residual Functional Capacity Assessment on October 23, 2007. (Tr. 17), citing (Tr. 386-393). Initially, this Court notes that there are some inconsistencies within Dr. Gopal’s assessment. Dr. Gopal stated that he reviewed Ding’s Function Report<sup>21</sup> and found her allegations to be credible. (Tr. 387). However, his findings as to the amount Ding could lift, how long she could sit in an eight-hour work day, and how long she could stand and/or walk in an eight-hour work day conflict with the Function Report. Compare (Tr. 387), with (Tr. 127-129). Additionally, Dr. Gopal did not acknowledge Ding’s allegation in her Function Report that “[t]he pain is sometimes so severe that I am unable to get out of bed.” See (Tr. 127-129). In light of these inconsistencies, which the ALJ apparently failed to consider, this Court is troubled by the ALJ’s decision to afford “great weight” to Dr. Gopal’s opinion. See Hursh v. Astrue, 2013 U.S. Dist. LEXIS 139164, \*39-40 (N.D. Okla. 2013) (holding that although the ALJ is not required to resolve internal inconsistencies in a consultative examiner’s reports, they are to be considered), citing 20 C.F.R. § 404.1519p(a)(2); Veal v. Comm’r, SSA, 2013 U.S. Dist. LEXIS

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21. On September 24, 2007, Ding, who was living with her husband at the time, completed a Function Report describing her limited abilities and daily activities. See (Tr. 120-129). She stated, inter alia, that “I can’t lift more than 5-10 pounds.”; “I can only walk a block or two before hurting or having to stop.”; “It hurts to bend over.”; “The pain is sometimes so severe that I am unable to get out of bed.”; and “I am unable to sit or stand for long periods.” (Tr. 127-129).

133929, \*8 (D. Md. 2013) (determining that the ALJ's assignment of "little weight" to the opinion of the state consultant was appropriate given the internal inconsistencies).

Moreover, regardless of any internal inconsistencies in Dr. Gopal's opinion, the ALJ concluded that Ding was "significantly more limited in non-exertional limitations based on the medical records subsequently received." (Tr. 17). In light of the subsequent medical evidence and after examining the factors in 20 C.F.R. § 404.1527(c), this Court questions whether the ALJ accorded the appropriate weight to Dr. Gopal's opinion. See Robinson v. Comm'r, 2013 U.S. Dist. LEXIS 21387, \*6 (D. Md. 2013) (finding that the ALJ's decision to accord "limited" weight to the opinion of the state agency medical consultant to be supported by substantial evidence because subsequent medical evidence suggested further limitations).

A fifth reason to remand has been identified in the ALJ's conclusion that Ding's allegations of significantly limited activities of daily living were "not supported by the medical evidence." (Tr. 17). The ALJ noted that Ding claimed she spent most of her time in bed, needed help with personal care, did not drive, did not help with chores, and only prepared simple meals. (Tr. 17). His decision states: "[s]he is, however, able to watch television, read, do puzzle books, play video games and cross-stitch when her pain is not bad." (Tr. 17).

This Court finds that the ALJ's decision in this regard is unsupported by substantial evidence for at least two reasons. First, the ALJ failed to identify and/or discuss what "medical evidence" he relied on in reaching his conclusion. An "ALJ must indicate in his decision which evidence he has rejected and which he is relying on as the basis for his finding." Smith v. Barnhart, 54 Fed. Appx. 83, 86 (3d Cir. 2002) (concluding "that the ALJ erred by failing to properly consider the evidence of record and adequately explain his decision"); Witkowski v.



Colvin, 2014 U.S. Dist. LEXIS 17707, \*28-29 (M.D. Pa. 2014) (Caldwell, J.) (“The ALJ must discuss the evidence specifically and indicate the evidence she accepted, the evidence she rejected and her reasons for doing so.”), citing Cotter, 642 F.2d at 706-07. Contrary to the ALJ’s determination, this Court finds that there is medical evidence in the record to support Ding’s allegations regarding her activities of daily living. See, e.g. (Tr. 216, 245) (On November 7, 2006, Ding reported being in a fetal position during menstrual periods due to her pain.); (Tr. 356, 411) (On May 10, 2007, Ding reported being unable to enjoy usual activities.); (Tr. 489) (On October 11, 2007, Ding rated her pain as a 10 out of 10 in severity over the last month and reported problems with even household activities due to her pain.); (Tr. 590) (On August 20, 2008, Ding stated that “this is the best she has felt in a month” and was able to get out of the house at least two to three times a week as opposed to only two to three times per month previously.). Therefore, the ALJ was required to explain why he discounted this evidence. The ALJ’s suggestion that Ding’s ability “to watch television, read, do puzzle books, play video games and cross-stitch when her pain is not bad” supports his residual functional capacity determination is unpersuasive. See Vaneman v. Comm’r of SSA, 2009 U.S. Dist. LEXIS 59800, \*28-29 (D.N.J. 2009) (reasoning that daily activities such as “watching television, doing crafts, listening to the radio, reading and sewing” do not generally involve physical exertion).

The ALJ’s decision regarding Ding’s activities of daily living is also troublesome because he failed to address the Third Party Function Report by Ding’s mother, Barbara Burkholder. See (Tr. 143-150). “Similar to the medical reports, the ALJ must also consider and weigh all of the non-medical evidence before him.” Burnett v. Commissioner of SSA, 220 F.3d 112, 122 (3d Cir. 2000), citing Van Horn v. Schweiker, 717 F.2d 871, 873 (3d Cir. 1983) (holding that the ALJ

erred by failing to explain why he rejected the non-medical testimony of the claimant's lay witnesses). According to 20 C.F.R. § 404.1529(c), the "information ... other persons provide about [a claimant's] pain or other symptoms is also an important indicator of the intensity and persistence of [the claimant's] symptoms" and should be "carefully consider[ed]." "Although the ALJ may weigh the credibility of the evidence, he must give some indication of the evidence which he rejects and his reason(s) for discounting such evidence" because "[i]n the absence of such an indication, the reviewing court cannot tell if significant probative evidence was not credited or simply ignored." Burnett, 220 F.3d at 121 (quoting Cotter, 642 F.2d at 706-07). In Burnett, the Third Circuit Court of Appeals concluded that the ALJ erred in failing to mention the testimony of the claimant's husband and neighbor because the ALJ made a credibility determination and these witnesses were presented to bolster the claimant's credibility. Burnett, 220 F.3d at 122. See also Smith, 2009 U.S. Dist. LEXIS 77594 at \*20-23 (remanding because there was "no evidence in the record to contradict Plaintiff's description of her daily activities," which was "corroborated by her daughter during the hearing before the ALJ and by two friends who submitted statements concerning the effects of [her] fibromyalgia on her life"). This Court finds that because Ms. Burkholder's statement corroborated Ding's allegations of significantly limited daily activities, the ALJ erred in failing to discuss this evidence. See Zurich v. Astrue, 2008 U.S. Dist. LEXIS 72781, \*18-21 (M.D. Pa. 2008) (Munley, J.) (remanding, in part, because the ALJ failed to consider a disability function report completed by the claimant's sister); Buckler v. Astrue, 2008 U.S. Dist. LEXIS 46868 (M.D. Pa. 2008) (Conner, J.) (remanding because, *inter alia*, the ALJ did not address the disability function report submitted by the claimant's husband regarding her capabilities and daily activities).

Finally, as to the ALJ's residual functional capacity determination, this Court disagrees with Ding's argument that "it should not matter" what her functioning was on a good day, but only what it was on a bad day. See Seabon v. Comm'r of Soc. Sec., 2011 U.S. Dist. LEXIS 85938, \*28 (D.N.J. 2011) (finding no evidence that the claimant's bad days would preclude work with the limitations specified by the ALJ). But, in light of evidence in the record indicating that Ding may have suffered from a bad day more than two days a month and that her pain on those days prevented her from getting out of bed, see e.g. (Tr. 31-36, 129, 590, 631-632), her functioning on such days should have been addressed. See Cruz v. Colvin, 2013 U.S. Dist. LEXIS 133509, \*72 n.55 (M.D. Pa. 2013) (Caldwell, J.) ("Vocational experts frequently testify that missing more than 2 days per month would make an individual unemployable."). This is particularly true because the vocational expert testified at Ding's hearing that consistent absences of two days a month or more would be grounds for termination. (Tr. 53). See Jester v. Astrue, 2009 U.S. Dist. LEXIS 128731, \*19-20 (E.D. Pa. 2009) (remanding for the ALJ to consider whether the evidence supported the offered medical opinion that the claimant would miss at least three days of work each month due to pain because the vocational expert testified that the claimant would be disabled with such a limitation). Accordingly, for this reason and for those previously discussed herein, this Court finds that the ALJ's residual functional capacity assessment is not supported by substantial evidence. See Queen v. Astrue, 2010 U.S. Dist. LEXIS 50568, \*27-30 (D. Del. 2010) (finding that the ALJ's decision to rely upon the vocational expert's testimony that the claimant could perform a significant number of jobs in the national economy lacked substantial evidence because the vocational expert also testified that if the claimant's limitations would cause him to miss work more than three times per month, no work

would be available, and there was evidence in the record to support this limitation).

### **Conclusion**

Upon review, this Court concludes that substantial evidence does not support the ALJ's finding that Ding was not fully credible or the residual functional capacity assessment.

The ALJ failed to consider probative medical evidence that supported Ding's claim of disabling pain from endometriosis and; instead, he decided to "pick and choose" among the evidence to support his findings. The ALJ did not explain what specific evidence he relied upon in determining that Ding's allegations regarding significantly limited activities of daily living were not credible. He also failed to address the disability Function Report prepared by Ding's mother. Also, in light of evidence in the record suggesting that Ding's endometriosis would have caused her to miss more than two days of work per month, the ALJ erred in failing to consider this evidence and testimony. Accordingly, the case will be remanded to the Commissioner for further assessment of Ding's credibility and residual functional capacity.

On remand, the ALJ must consider and make specific findings as to all of the relevant probative medical evidence. He should address, *inter alia*, the reports regarding Ding's 2007 surgery and those portions of the medical record that support Ding's allegations. The ALJ must fully explain the reasoning behind his determination, including reconciling conflicts and discussing how and why probative evidence supporting disability is discounted or rejected.

Consistent with this Memorandum, the ALJ is further directed to reconsider the weight afforded to the opinions of Dr. Daggs and Dr. Gopal after considering all the factors in 20 C.F.R. § 404.1527.

The ALJ must also address Ding's activities of daily living on remand, discussing

specific evidence and indicating what evidence is accepted, what evidence is rejected, and explaining the reasons for his decision. The ALJ should discuss, inter alia, the Third Party Function Report by Ding's mother, Barbara Burkholder.

Finally, the ALJ should determine how many days of work a month Ding's pain would have caused her to miss during the alleged disability period and, if necessary, seek additional evidence regarding the same. See Pulimi v. Colvin, 2013 U.S. Dist. LEXIS 58486, \*34 (N.D. Ill. 2013) (stating that "[o]n remand, the ALJ shall seek medical evidence to determine whether Plaintiff's pancreatitis would cause him to miss multiple days of work per month" and then reassess Plaintiff's residual functional capacity).

Date: March 28, 2014



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United States District Judge