UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

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| LISA BRIDGETTE BANSA, | : |
| | :CIVIL ACTION NO. 3:16-CV-2286 |
| Plaintiff, | : |
| | :(JUDGE CONABOY) |
| v. | : |
| | : |
| NANCY A BERRYHILL,[1] | : |
| Acting Commissioner of | : |
| Social Security, | : |
| | : |
| Defendant. | : |

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**MEMORANDUM**

Pending before the Court is Plaintiff's appeal from the Commissioner's denial of Disability Insurance Benefits ("DIB") under Title II of the Social Security Act. (Doc. 1.) Plaintiff filed an application for benefits on May 16, 2013, alleging a disability onset date of December 29, 2012. (R. 15.) After Plaintiff appealed the initial denial of the claim, a hearing was held on September 26, 2014, and Administrative Law Judge ("ALJ") Jarrod Tranguch issued his Decision on April 24, 2015, concluding that Plaintiff had not been under a disability during the relevant

[1] Nancy A. Berryhill is now the Acting Commissioner of Social Security. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure which addresses the substitution of parties when a public officer is replaced, Nancy A. Berryhill should be substituted for Acting Commissioner Carolyn W. Colvin as the defendant in this suit. Fed. R. Civ. P. 25(d). No further action needs to be taken to continue this suit by reason of the last sentence of section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), which states that "[a]ny action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office."

time period. (R. 28.) Plaintiff requested review of the ALJ's decision which the Appeals Council denied on September 19, 2016. (R. 1-6.) In doing so, the ALJ's decision became the decision of the Acting Commissioner. (R. 1.)

Plaintiff filed this action on November 14, 2016. (Doc. 1.) She asserts in her supporting brief that the Acting Commissioner's determination should be reversed or remanded for the following reasons: 1) the ALJ erred in failing to assign controlling weight to Plaintiff's treating physician; and 2) the ALJ's residual functional capacity ("RFC") is not reviewable or not supported by substantial evidence. (Doc. 11 at 7.) After careful review of the record and the parties' filings, the Court concludes this appeal is properly granted.

## I. Background

Plaintiff was born on December 23, 1967, and was forty-five years old on the disability onset date. (R. 32.) She has a high school education and past relevant work as a letter carrier and carrier supervisor. (R. 32; Doc. 11 at 2.)

### *A. Medical Evidence*

Plaintiff reported a history of diabetes since 1994. (R. 210.) In February 2013, Plaintiff saw Christoper Yusko, D.O., of Geisinger Pocono's Family Practice Dpeartment for a diabetes mellitus evaluation with the chief complaint of burning pain in her feet. (R. 455.) He noted that Plaintiff had "a LONG history of

poor compliance with her [Diabetes Mellitus] control, multiple cancelled and no showed apts." (*Id.*) Dr. Yusko found decreased sensation in her feet and discussed with Plaintiff how her poor compliance had lead to her neuropathy and foot pain. (R. 450.) He stressed the need for daily exercise, weight loss/management, and medication compliance, and he prescribed Lyrica for the foot pain. (*Id.*)

Howard Katz, M.D., of PMC Physician Associates noted in March 2013 that Plaintiff complained of persistent ankle pain, noting she had sprained her ankle and was using an aircast. (R. 555.) In April, Dr. Katz found a limited range of motion of the left ankle with dorsiflexion, pain over the deltoid ligament and peroneal tendon distribution. (R. 553.) He noted that the sprained ankle/foot was causally related to work accident in December 2012 where she dislocated her elbow. (*Id.*)

At a follow up visit with Dr. Yusko on May 20, 2013, Plaintiff again complained of foot pain which she described as a sensation of both feet being on fire. (R. 488.) Dr. Yusko recorded that Plaintiff was frustrated with her diabetes mellitus and she was not following her MTM (medication therapy management) as suggested. (*Id.*) He again stressed the need for better compliance with suggested management and control strategies, stating that Plaintiff needed "to be more serious" about these things. (R. 489.) Dr. Yusko added Gabapentin to her medication regimen to address the

foot pain. (*Id.*)

On May 21, 2013, Dr. Katz noted that Plaintiff's ankle range of motion was improving steadily and the ankle felt better. (R. 551.) He noted that the sprain and strain without tendon injury was resolving and Plaintiff was able to work light duty only. (R. 551.)

On June 4, 2013, Plaintiff had her initial visit at Mountain Valley Orthopedics with the chief complaint of left elbow pain. (R. 501.) Records signed by Gregory Mineo, M.D., indicate that Plaintiff reported the December 29, 2012, elbow dislocation which was reduced and she had done well postoperatively. (*Id.*) She said she had started with numbness and tingling in her left little finger which was worse if she rested her elbow on a hard surface. (*Id.*) Plaintiff also reported joint pain and stiffness and trouble walking using hip/knee joints. (R. 502.) Physical examination showed that Plaintiff ambulated "in a heel-to-toe fashion without noticeable limp." (*Id.*) Dr. Mineo noted full range of motion of the elbow without instability, normal motor exam and muscle development, and minimal tenderness over the cubital tunnel. (*Id.*) He planned to review her EMG and see her in two weeks to discuss the results. (*Id.*) Dr. Mineo also noted that Plaintiff could work with limited use of her upper extremity. (*Id.*)

At her June 7, 2013, visit with Dr. Yusko, he recorded that Plaintiff presented "for disability" for bilateral carpal tunnel

and she was following with podiatry for foot pain. (R. 504.) He noted that Plaintiff was a mail carrier who did a lot of walking, and she was awaiting the results of the EMG. (*Id.*) Although physical examination did not reveal any problems, Dr. Yusko recorded that he would give six weeks disability related to carpal tunnel and neuropathy problems. (R. 505.)

In June and July of 2013, EMG testing showed peripheral neuropathy of Plaintiff's upper and lower extremities. (R. 525-26, 528, 534-35.)

In January 2014, Dr. Yusko noted that Plaintiff had a history of poor diabetes control and she was following at the time with a diabetes educator and endocrinology for her diabetes mellitus. (R. 609.) He recorded that her diabetes control was "horrible," her compliance was "terrible," and this would likely lead to worsening problems. (*Id.*)

On May 8, 2014, Plaintiff saw Gary Hrobuchak, D.P.M., for the chief complaint of painful feet with numbness. (R. 550.) She also complained of a sore ankle for two months and pain when walking and reported high blood sugars. (*Id.*) Physical examination findings included non-palpable PT pulses and pain on range of motion of left ankle. (*Id.*) Dr. Hrobuchak noted that he explained poor circulation, neuropathy, and the importance of maintaining good blood sugar to Plaintiff. (*Id.*) At her next visit, Dr. Hrobuchak administered a steroid injection. (R. 549.) Two weeks later,

Plaintiff reported that she felt much better after the injection but still felt pain. (R. 548.) Dr. Hrobuchak gave Plaintiff another injection and instructed her to take motrin. (*Id.*) At her next two-week follow up appointment on June 26, 2014, Plaintiff reported that she was no better since the last injection and she could not walk due to pain. (R. 547.) Dr. Hrobuchak prescribed Tramadol and noted that he awaited MRI results. (*Id.*) The MRI showed osteochondral lesion of the medial talar dome and mild edema in Kaker's fat pad, nonspecific but consistent with mild Achilles peritendinitis. (R. 603.)

On Dr. Yusko's referral, Plaintiff was seen by Douglas C. Nathanson, M.D., of Geisinger Pocono's Neurology Department on July 31, 2014, for a chief complaint of neuropathy. (R. 600.) Plaintiff stated that her symptoms were getting progressively worse, she had burning pain in both feet which increased with ambulation and standing, she had more recent onset of pain in the lower lumbar area with radiation into her buttocks and posterior aspect of both legs into her feet, and she had pain/numbness/tingling in both hands, especially upon wakening. (R. 600-01.) Plaintiff told Dr. Nathanson that she had difficulty driving and occasionally dropped things. (R. 601.) Physical examination showed 5/5 strength in upper and lower extremities, decreased sensation to pinprick in bilateral feet with radiation to ankles, vibratory sense decreased at bilateral toes, positive

Tinel's bilaterally, decreased sensation to pinprick in fingertips of bilateral hands, deep tendon reflexes +2 and symmetrical in bilateral upper extremities, +2 at the knees and absent at the ankles, and a normal gait and stance. (R. 598.) Dr. Nathanson diagnosed neuropathy, lower back pain, and carpal tunnel syndrome. (R. 598.) He noted that the Neurontin dosage was recently increased, he encouraged tight blood glucose control in regard to modifying symptomatology, and he prescribed wrist splints for bilateral carpal tunnel. (*Id.*)

On September 5, 2014, Plaintiff presented as a new patient to Elmo Baldassari, D.P.M., at his Pocono facility. (R. 575.) Plaintiff exhibited pain on range of motion and palpation, medial aspect of the anterior aspect of her left ankle. (*Id.*) On September 12, 2014, Dr. Baldassari saw Plaintiff for follow up of her left ankle pain, noting that he reviewed earlier x-rays and her MRI. (R. 574.) He also noted that Plaintiff fractured her ankle in December 2013, she was not treated properly for it, and she was "somewhat noncompliant," having showed up at the emergency room and never followed up with orthopedics. (*Id.*) He further noted that Plaintiff had a lot of ankle instability and she had not played volleyball since the injury because her ankle kept giving out on her and she had pain. (*Id.*) Dr. Baldassari recommended "ankle arthroscopy with ankle arthrotomy with lateral ankle stabilization with a Mitek anchor if needed." (*Id.*) He added that surgery would

be scheduled for October. (*Id.*)

***B. Opinion Evidence***

On June 11, 2013, Carol Latzanich, D.P.M., wrote on Pocono Podiatry Associates, P.C., prescription pad paper that Plaintiff "may not do prolonged standing or walking, may not drive mail truck. She has severe neuropathy--this is for indefinite time." (R. 520.)

On June 17, 2013, Dr. Katz completed a Physical Residual Functional Capacity Questionnaire. (R. 576-79.) He stated that Plaintiff needed a "sedentary job that she can change positions from at will." (R. 579.) He also opined that every other day Plaintiff would need to take unscheduled breaks of five minutes, she would need to elevate her legs knee high thirty percent of the day, she would be limited in her abilities to reach, handle and finger with her right side seventy percent of the day and with her left side five percent of the day, and she would miss work about four days per month as a result of her impairments. (R. 578-79.)

State agency consultant Alex Siegel, Ph.D., reviewed Plaintiff's records on July 2, 2013, and concluded that Plaintiff had no medically determinable mental health impairments. (R. 97-98.)

On August 1, 2013, state agency consultant Louis B. Bonita, M.D., reviewed the records and concluded that Plaintiff's diabetes mellitus and peripheral neuropathy were severe impairments. (R.

97.) His assessments included findings that Plaintiff could lift and carry up to twenty pounds, and could sit and stand/walk for six hours in an eight-hour workday. (R. 99.)

***C. Function Report and Hearing Testimony***

**1. <u>Function Report</u>**

Plaintiff completed a Function Report on June 3, 2013. (R. 168-77.) She stated that her ability to work was limited by her illnesses because she was in constant severe pain, she was unable to walk or stand for long periods, and her sleeplessness and continual fatigue made it very difficult to be behind the wheel of a vehicle for eight hours daily. (R. 168.)

Plaintiff described what she did from the time she awakened to the time she want to bed to be reading her bible, eating, going to doctors' appointments and thinking. (R. 169.) She indicated that she prepared meals like frozen dinners and sandwiches, and she did laundry and cleaned which each took about one hour once a week. (R. 170.) Plaintiff also said she shopped for clothing and groceries about once a week for thirty to sixty minutes. (R. 171.) Regarding hobbies and interests, Plaintiff said she could no longer play sports but she continued to watch TV daily. (R. 172.) Plaintiff indicated that her abilities to stand, walk and climb stairs were affected by her illnesses as a result of severe pain, burning, and numbness in her feet. (R. 173.) She said she could walk one block before needing to stop and rest. (*Id.*)

**2. Hearing Testimony**

Plaintiff testified at the September 26, 2014, hearing that she had not worked since the day she fell in December 2012. (R. 66.) She said her conditions affected her ability to work because the neuropathy caused constant pain in her feet and her foot often goes numb which causes her to fall. (R. 67.) She said she was still working on getting the diabetes under control and had recently seen an endocrinologist and nutritionist. (R. 67, 69, 70.) Plaintiff said the neuropathy caused constant pain from her waist to her feet. (R. 70.) She indicated she could walk or stand for about fifteen to twenty minutes at a time and she could sit for twenty to twenty-five minutes. (R. 72.) When asked by her attorney about lifting and carrying limitations, Plaintiff said she could not lift anything over five pounds with her left arm and the hand gets numb and she could lift a little more with the right side. (R. 75-76.) Plaintiff said she was not undergoing any treatment for carpal tunnel at the time. (R. 73.)

When asked about household chores, Plaintiff testified that she could do a little bit of everything. (R. 79.) She said she previously had played golf and was in a volleyball league but had stopped both activities as of December 2012. (R. 80.) Plaintiff reported that she did volunteer at the food pantry work one day a week for an hour. (R. 81.)

***D. ALJ Decision***

With his April 24, 2015, Decision, ALJ Tranguch found that Plaintiff had the severe impairments of diabetes mellitus, peripheral neuropathy, degenerative joint disease/osteoarthritis of the left ankle, a history of left ankle fracture, bilateral carpal tunnel syndrome, and ulnar neuropathy of the left elbow, and that she did not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments. (R. 25-26.) He concluded that Plaintiff had the RFC to perform sedentary work except that she

> is limited to lifting and carrying up to 10 pounds; could stand/walk for up to 2 hours in an 8-hour workday; could sit for up to 6 ours in an 8-hour workday; could occasionally use her upper and lower extremities for pushing/pulling, such as in the operation of hand controls, levers, pedals, or foot controls; could occasionally balance, crouch, crawl and use ramps/climb stairs; should avoid occupations that require climbing ladders, ropes, and scaffolds; must avoid concentrated exposure to vibrations and wet/slippery conditions; and should avoid workplace hazards such as unprotected heights and dangerous moving machinery.

(R. 27-28.) After finding that Plaintiff could not perform past relevant work, the ALJ found that she jobs existed in significant numbers in the national economy that Plaintiff could perform. (R. 32.) Therefore, he found that Plaintiff had not been under a disability from December 29, 2012, through the date of the decision. (R. 33.)

Other relevant portions of the ALJ's Decision will be referenced in the Discussion section of this Memorandum.

## II. Disability Determination Process

The Commissioner is required to use a five-step analysis to determine whether a claimant is disabled.[2] It is necessary for the Commissioner to ascertain: 1) whether the applicant is engaged in a substantial activity; 2) whether the applicant is severely impaired; 3) whether the impairment matches or is equal to the requirements of one of the listed impairments, whereby he qualifies for benefits without further inquiry; 4) whether the claimant can perform his past work; 5) whether the claimant's impairment together with his age, education, and past work experiences preclude him from doing any other sort of work. 20 C.F.R. §§

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[2] "Disability" is defined as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ." 42 U.S.C. § 423(d)(1)(A). The Act further provides that an individual is disabled

> only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423(d)(2)(A).

404.1520(b)-(g), 416.920(b)-(g); *see Sullivan v. Zebley*, 493 U.S. 521, 110 S. Ct. 885, 888-89 (1990).

If the impairments do not meet or equal a listed impairment, the ALJ makes a finding about the claimant's residual functional capacity based on all the relevant medical evidence and other evidence in the case record. 20 C.F.R. § 404.1520(e); 416.920(e). The residual functional capacity assessment is then used at the fourth and fifth steps of the evaluation process. *Id.*

The disability determination involves shifting burdens of proof. The initial burden rests with the claimant to demonstrate that he or she is unable to engage in his or her past relevant work. If the claimant satisfies this burden, then the Commissioner must show that jobs exist in the national economy that a person with the claimant's abilities, age, education, and work experience can perform. *Mason v. Shalala*, 993 F.2d 1058, 1064 (3d Cir. 1993).

As set out above, the instant decision was decided at step five of the sequential evaluation process when the ALJ found that Plaintiff could perform jobs that existed in significant numbers in the national economy. (R. 32.)

## III. Standard of Review

This Court's review of the Commissioner's final decision is limited to determining whether there is substantial evidence to support the Commissioner's decision. 42 U.S.C. § 405(g); *Hartranft v. Apfel*, 181 F.3d 358, 360 (3d Cir. 1999). Substantial evidence

means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *see also Cotter v. Harris*, 642 F.2d 700, 704 (3d Cir. 1981). The Third Circuit Court of Appeals further explained this standard in *Kent v. Schweiker*, 710 F.2d 110 (3d Cir. 1983).

> This oft-cited language is not . . . a talismanic or self-executing formula for adjudication; rather, our decisions make clear that determination of the existence *vel non* of substantial evidence is *not* merely a quantitative exercise. A single piece of evidence will not satisfy the substantiality test if the Secretary ignores, or fails to resolve, a conflict created by countervailing evidence. Nor is evidence substantial if it is overwhelmed by other evidence--particularly certain types of evidence (e.g., that offered by treating physicians)--or if it really constitutes not evidence but mere conclusion. *See* [*Cotter*, 642 F.2d] at 706 ("'Substantial evidence' can only be considered as supporting evidence in relationship to all the other evidence in the record.") (footnote omitted). The search for substantial evidence is thus a qualitative exercise without which our review of social security disability cases ceases to be merely deferential and becomes instead a sham.

*Kent*, 710 F.2d at 114.

This guidance makes clear it is necessary for the ALJ to analyze all probative evidence and set out the reasons for his decision. *Burnett v. Comm'r of Soc. Sec.*, 220 F.3d 112, 119-20 (3d Cir. 2000) (citations omitted). If he has not done so and has not sufficiently explained the weight given to all probative exhibits,

"to say that [the] decision is supported by substantial evidence approaches an abdication of the court's duty to scrutinize the record as a whole to determine whether the conclusions reached are rational." *Dobrowolsky v. Califano*, 606 F.2d 403, 406 (3d Cir. 1979). In *Cotter*, the Circuit Court clarified that the ALJ must not only state the evidence considered which supports the result but also indicate what evidence was rejected: "Since it is apparent that the ALJ cannot reject evidence for no reason or the wrong reason, an explanation from the ALJ of the reason why probative evidence has been rejected is required so that a reviewing court can determine whether the reasons for rejection were improper." *Cotter*, 642 F.2d at 706-07. However, the ALJ need not undertake an exhaustive discussion of all the evidence. *See, e.g., Knepp v. Apfel*, 204 F.3d 78, 83 (3d Cir. 2000).

A reviewing court may not set aside the Commissioner's final decision if it is supported by substantial evidence, even if the court would have reached different factual conclusions. *Hartranft*, 181 F.3d at 360 (*citing Monsour Medical Center v. Heckler*, 806 F.2d 1185, 1190-91 (3d Cir. 1986); 42 U.S.C. § 405(g) ("[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive . . ."). "However, even if the Secretary's factual findings are supported by substantial evidence, [a court] may review whether the Secretary, in making his findings, applied the correct legal standards to the

facts presented." *Friedberg v. Schweiker*, 721 F.2d 445, 447 (3d Cir. 1983) (internal quotation omitted). Where a claimed error would not affect the outcome of a case, remand is not required. *Rutherford v. Barnhart*, 399 F.3d 546, 553 (3d Cir. 2005). Finally, an ALJ's decision can only be reviewed by a court based on the evidence that was before the ALJ at the time he or she made his or her decision. *Matthews v. Apfel*, 239 F.3d 589, 593 (3d Cir. 2001).

## IV. Discussion

Plaintiff asserts that the Acting Commissioner's determination should be reversed or remanded for the following reasons: 1) the ALJ erred in failing to assign controlling weight to Plaintiff's treating physician; and 2) the ALJ's residual functional capacity ("RFC") is not reviewable or not supported by substantial evidence. (Doc. 11 at 7.)

### *A. Treating Physician Opinion*

Plaintiff asserts that the ALJ erred in failing to assign controlling weight to Dr. Katz's opinion. (Doc. 11 at 9.) Defendant responds that ALJ Tranguch properly evaluated Dr. Katz's opinion. (Doc. 14 at 11.) The Court concludes that remand is required for further consideration of Dr. Katz's opinion.

Under applicable regulations and the law of the Third Circuit, a treating medical source's opinions are generally entitled to

controlling weight, or at least substantial weight.[3] *See*, *e.g.*, *Fargnoli v. Halter*, 247 F.3d 34, 43 (3d Cir. 2001) (citing 20 C.F.R. § 404.1527(c)(2); *Cotter v. Harris*, 642 F.2d 700, 704 (3d Cir. 1981)). Sometimes called the "treating physician rule," the principle is codified at 20 C.F.R. 404.1527(c)(2), and is widely accepted in the Third Circuit. *Mason v. Shalala*, 994 F.2d 1058 (3d Cir. 1993); *see also Dorf v. Brown*, 794 F.2d 896 (3d Cir. 1986). The regulation addresses the weight to be given a treating source's opinion: "If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-

[3] Defendant notes that it is significant that the Social Security Agency has moved away from the treating source rule although the new regulations only affect cases filed after March 27, 2017. (Doc. 14 at 12 n.3.)

> For claims filed after March 27, 2017, the regulations have eliminated the treating source rule and in doing so have recognized that courts reviewing claims have "focused more on whether we sufficiently articulated the weight we gave treating source opinions, rather than on whether substantial evidence supports our decision." 82 FR 5844-01, 2017 WL 168819, *at 5853 (Jan. 18, 2017). The agency further stated that in its experience in adjudicating claims using the treating source rule since 1991, the two most important factors for determining persuasiveness are consistency and supportability, which is the foundation of the new regulations. *Id.* Therefore, the new regulations contain no automatic hierarchy for treating sources, examining sources, or reviewing sources, but instead, focus on the analysis of these factors. *Id.*

(Doc. 14 at 12 n.3.)

supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case, we will give it controlling weight." 20 C.F.R. § 404.1527(c)(2).[4] "A cardinal principle guiding disability eligibility determinations is that the ALJ accord treating physicians' reports great weight, especially when their opinions reflect expert judgment based on continuing observation of the patient's condition over a prolonged period of

[4] 20 C.F.R. § 404.1527(c)(2) states in relevant part:

> Generally, we give more weight to opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations. If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight. When we do not give the treating source's opinion controlling weight, we apply the factors listed in paragraphs (c)(2)(i) and (c)(2)(ii) of this section, as well as the factors in paragraphs (c)(3) through (c)(6) of this section in determining the weight to give the opinion. We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.

time." *Morales v. Apfel*, 225 F.3d 310, 317 (3d Cir. 2000) (citations omitted); *see also Brownawell v. Commissioner of Social Security*, 554 F.3d 352, 355 (3d Cir. 2008). In choosing to reject the treating physician's assessment, an ALJ may not make "speculative inferences from medical reports and may reject a treating physician's opinion outright only on the basis of contradictory medical evidence and not due to his or her own credibility judgments, speculation or lay opinion." *Morales*, 225 F.3d at 317 (citing *Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999); *Frankenfield v. Bowen*, 861 F.2d 405, 408 (3d Cir. 1988)).

Pursuant to 20 C.F.R. § 404.1527(c)(2), an ALJ must assign controlling weight to a well-supported treating medical source opinion unless the ALJ identifies substantial inconsistent evidence. SSR 96-2p explains terms used in 20 C.F.R. § 404.1527 regarding when treating source opinions are entitled to controlling weight. 1996 WL 374188, at *1. For an opinion to be "well-supported by medically acceptable clinical and laboratory diagnostic techniques," 28 U.S.C. § 404.1527(c)(2), "it is not necessary that the opinion be fully supported by such evidence"--it is a fact-sensitive case-by-case determination. SSR 96-2p, at *2. It is a determination the adjudicator must make "and requires an understanding of the clinical signs and laboratory findings in the case record and what they signify." *Id.* Similarly, whether a medical opinion "is not inconsistent with the other substantial

evidence in your case record," 28 U.S.C. § 404.1527(c)(2), is a judgment made by the adjudicator in each case. SSR 96-2p, at*3. The ruling explains that

> [s]ometimes, there will be an obvious inconsistency between the opinion and the other substantial evidence; for example, when a treating source's report contains an opinion that the individual is significantly limited in the ability to do work-related activities, but the opinion is inconsistent with the statements of the individual's spouse about the individual's activities, or when two medical sources provide inconsistent medical opinions about the same issue. At other times, the inconsistency will be less obvious and require knowledge about, or insight into, what the evidence means. In this regard, it is especially important to have an understanding of the clinical signs and laboratory findings and any treatment provided to determine whether there is an inconsistency between this evidence and medical opinions about such issues as diagnosis, prognosis . . . , or functional effects. Because the evidence is in medical, not lay, terms and information about these issues may be implied rather than stated, such inconsistency may not be evidence without an understanding of what the clinical signs and laboratory findings signify.

SSR 96-2P, 1996 WL 374188, at *2. The ruling further provides that additional development may be needed to determine the appropriate weight assigned a treating source opinion, "for example, to obtain more evidence or to clarify reported clinical signs or laboratory findings." *Id.* at *4. In contrast to those cases where the record is adequately developed, SSR 96-2p specifically states that the ALJ or Appeals Council "may need to consult a medical expert to gain

more insight into what the clinical signs and laboratory findings signify in order to decide whether a medical opinion is well-supported or whether it is not consistent with the other substantial evidence in the case record." *Id.*

The ruling reinforces the need for careful review of an ALJ's decision to discount a treating source opinion, with particular attention paid to the nature of the evidence cited as contradictory. Consistent with SSR 96-2p's explanation of regulatory terms, Third Circuit caselaw indicates that "lay reinterpretation of medical evidence does not constitute 'inconsistent . . . substantial evidence.'" *Carver v. Colvin*, Civ. A. No. 1:15-CV-00634, 2016 WL 6601665, at *16 (M.D. Pa. Sept. 14, 2016)[5] (citing *Gober v. Matthews*, 574 F.2d 772, 777 (3d Cir. 1978); *Frankenfeld v. Bowen*, 861 F.2d 405, 408 (3d Cir. 1988); *Doak v. Heckler*, 790 F.2d 26, 29-30 (3d Cir. 1986); *Ferguson v. Schweiker*, 765 F.2d 31, 36-37 (3d Cir. 1985); *Kent v. Schweiker*, 710 F.2d 110, 115 (3d Cir. 1983); *Van Horn v. Schweiker*, 717 F.2d 871, 874 (3d Cir. 1983); *Kelly v. Railroad Retirement Bd.*, 625 F.2d 486, 494 (3d Cir. 1980); *Rossi v. Califano*, 602 F.2d 55, 58-59 (3d Cir. 1979); *Fowler v. Califano*, 596 F.2d 600, 603 (3d Cir. 1979)). Thus, the reviewing court should disregard medical evidence cited as

[5] Magistrate Judge Gerald B. Cohn's Report and Recommendation was adopted by United States District Judge Sylvia H. Rambo on November 7, 2016. *Carver v. Colvin*, Civ. A. No. 1:15-CV-0634, 2016 WL 6582060 (M.D. Pa. Nov. 7, 2016).

contradictory if it is really lay interpretation or judgment rather than that of a qualified medical professional. *See*, *e.g.*, *Carver*, 6601665, at *11.

ALJ Tranguch's review of opinion evidence included consideration of the Physical Residual Functional Capacity Questionnaire (R. 5776-79) completed by Dr. Katz.

> On June 17, 2013, Howard V. Katz, MD completed a physical residual functional capacity assessment of the claimant that limited the claimant to a range of sedentary work. Numerous added limitations were included that further restricted the claimant, including recommendations that the claimant: required an ability to take unscheduled breaks at will; must be afforded an opportunity to elevate her legs for 30% of the workday; and must be able to change positions at will (Exhibit 12F). Limited weight is given to this opinion overall. Although the undersigned agrees with the conclusion of this evaluator, namely, that the claimant retains a light residual functional capacity, the specific added qualifiers greatly exceed the claimant's limitations and are not supported by the evidence of record overall. The residual functional capacity assessment offered by Dr. Katz is therefore given limited weight, subject to the aforementioned explanation.

(R. 30.)

Plaintiff points to specific problems with the ALJ's decision to afford this opinion limited weight: the opinion is entitled to controlling weight because it is well-supported; the ALJ did not identify any substantial evidence inconsistent with Dr. Katz's opinion; the ALJ did not address certain limitations set out in Dr.

Katz's opinion; and the state agency physician's opinion cannot constitute substantial inconsistent evidence. (Doc. 11 at 10-17.)

The Court cannot conclude that ALJ Tranguch's decision to assign limited weight to Dr. Katz's opinion is supported by substantial evidence. As argued by Plaintiff, the ALJ did not adequately explain his decision. ALJ Tranguch's statement that Dr. Katz's "added qualifiers greatly exceed the claimant's limitations and are not supported by the record overall," falls far short of the requirement that an ALJ explain the basis for his conclusion. The ALJ must provide *specific* evidence which contradicts the treating physician's opinion and here he does not do so. (*See* R. 30.) In this situation, the Court can only speculate as to the evidence relied upon, a practice prohibited by the law of this Circuit in that a reviewing court cannot provide a *post hoc* rationalization for the ALJ's decision. *See, e.g., Christ the King Manor, Inc. v. Sec'y U.S. Dep't of Health and Human Services*, 730 F.3d 291, 305 (3d Cir. 2013); *see also Fargnoli v. Massanari*, 247 F.3d 34, 42 (3d Cir. 2001) ("Where there is conflicting probative evidence in the record, we recognize a particularly acute need for an explanation for the reasoning behind the ALJ's conclusions, and will vacate or remand a case where such an explanation is not provided."). For similar reasons, Defendant's explanation of the basis for the ALJ's finding regarding Dr. Katz's opinion (Doc. 14

at 11-19) is unavailing in that the Third Circuit Court of Appeals "requires *the ALJ* to set forth the reasons for his decision." *Burnett*, 220 F.3d at 119 (emphasis added).

When further considering the opinion upon remand, the basis for the statement that "specific added qualifiers greatly exceed the claimant's limitations and are not supported by the evidence of record overall" (R. 30) must be explained and supported by identified evidence of record without reliance on impermissible lay interpretation of evidence.[6] Further, Dr. Katz's opinion regarding limitations in reaching, handling, and fingering (R. 579) must also be addressed. A thorough explanation of the determination of the proper weight to be afforded Dr. Katz's opinion should be undertaken in the context of authority which provides that reliance on a non-examining source's opinion which was not based on a review of all the evidence can be problematic, especially in cases where the opinion of the treating source is supported by competent

[6] Plaintiff avers that lack of compliance with recommended treatment and conservative treatment cannot be considered inconsistent evidence unless these aspects of the record are further explored by the ALJ. (Doc. 15 at 6-7.) The Court concurs that the ALJ may not rely on evidence of lack of treatment compliance and/or conservative treatment without additional consideration. Here the ALJ factored Plaintiff's alleged lack of compliance into his credibility determination. (R. 31.) He may only properly do so after considering the reasons for the lack of compliance. *See*, *e.g.*, *Newell v. Comm'r of Soc. Sec.*, 347 F.3d 541, 547 (3d Cir. 2007). Pursuant to SSR 96-7p, "the adjudicator must not draw any inferences about an individual's symptoms and their functional effects from a failure to seek or pursue regular treatment without first considering any explanations that the individual may provide." SSR 96-7p, 1996 WL 374186, at *7.

evidence and evidence of record shows that the claimant's condition worsened after the reviewing consultant provided an opinion. *See*, *e.g.*, *Blum v. Berryhill*, Civ. A. No. 3:16-CV-2281, 2017 WL 2463170, at *5-9 (M.D. Pa. June 7, 2017).

***B. Residual Functional Capacity Assessment***

Plaintiff contends that the ALJ's RFC assessment, hypothetical questions to the vocational expert, and step five findings are not supported by substantial evidence even if the Dr. Katz's opinion is not entitled to controlling weight. (Doc. 11.) Defendant responds that the RFC is supported by substantial evidence in that the ALJ appropriately reviewed the evidence of record and formulated a comprehensive RFC consistent with the regulations. (Doc. 14 at 23.) The Court concludes that the RFC assessment should be generally reviewed upon remand in that reconsideration and further explanation regarding the analysis of Dr. Katz's opinion relates to the RFC assessment and the Court's finding of error in the lack of specificity in the ALJ's analysis of the treating physician's opinion also applies to his analysis of Dr. Bonita's opinion.[7]

## V. Conclusion

For the reasons discussed above, the Court concludes that

[7] Defendant asserts that Plaintiff "mistakenly argues that the ALJ was required to adopt a medical opinion verbatim into the RFC. However, the RFC assessment is an administrative finding, not a medical opinion." (Doc. 14 at 20 (citing Social Security Ruling (SSR) 96-5p, 1996 WL 374183).) To the extent Plaintiff may infer that an RFC must mirror precise medical opinion findings, Defendant correctly notes that the RFC determination is the province of the ALJ.

Plaintiff's appeal is properly granted. This matter is remanded to the Acting Commissioner for further consideration consistent with this opinion. An appropriate Order is filed simultaneously with this Memorandum.

S/Richard P. Conaboy
RICHARD P. CONABOY
United States District Judge

DATED: July 19, 2017