IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

SANTOS S. CARBO-ROMAN,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

Civil No. 15-1010 (BJM)

OPINION AND ORDER

Santos S. Carbo-Roman ("Carbo") seeks review of the Commissioner's decision finding that he is not entitled to disability benefits under the Social Security Act ("Act"), 42 U.S.C § 423, as amended, and filed a memorandum of law in support of his position. (Docket Nos. 1, 19). Carbo asks for judgment to be reversed and an order awarding disability benefits or in the alternative to remand the case to the Commissioner for further proceedings. The Commissioner answered the complaint and filed a memorandum. (Docket Nos. 11, 25). This case is before me on consent of the parties. (Docket Nos. 6, 7). After careful review of the administrative record and the briefs on file, the Commissioner's decision is affirmed.

STANDARD OF REVIEW

The court's review is limited to determining whether the Commissioner and her delegates employed the proper legal standards and found facts upon the proper quantum of evidence. *Manso-Pizarro v. Secretary of Health & Human Services*, 76 F.3d 15, 16 (1st Cir. 1996). The Commissioner's findings of fact are conclusive when supported by substantial evidence, 42 U.S.C. § 405(g), but are not conclusive when derived by ignoring evidence, misapplying the law, or judging matters entrusted to experts. *Nguyen v. Chater*, 172 F.3d 31, 35 (1st Cir. 1999); *Ortiz v. Secretary of Health & Human Services*, 955 F.2d 765, 769 (1st Cir. 1991). "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.'" *Visiting Nurse Association Gregoria Auffant, Inc. v. Thompson*, 447 F.3d 68, 72 (1st Cir. 2006) (*quoting Richardson v. Perales*, 402 U.S. 389,

401 (1971)). The court "must affirm the [Commissioner's] resolution, even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence." *Rodriguez Pagan v. Secretary of Health & Human Services*, 819 F.2d 1, 3 (1st Cir. 1987).

A claimant is disabled under the Act if he is unable "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). Under the statute, a claimant is unable to engage in any substantial gainful activity when 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." 42 U.S.C. § 423(d)(2)(A). In determining whether a claimant is disabled, all of the evidence in the record must be considered. 20 C.F.R. § 404.1520(a)(3).

Generally, the Commissioner must employ a five-step evaluation process to decide whether a claimant is disabled. 20 C.F.R. § 404.1520; *see Bowen v. Yuckert*, 482 U.S. 137, 140–42 (1987); *Goodermote v. Secretary of Health & Human Services*, 690 F.2d 5, 6–7 (1st Cir. 1982). In step one, the Commissioner determines whether the claimant is currently engaged in "substantial gainful activity." If so, the claimant is not disabled. 20 C.F.R. § 404.1520(b). At step two, the Commissioner determines whether the claimant has a medically severe impairment or combination of impairments. 20 C.F.R. § 404.1520(c). If not, the disability claim is denied. At step three, the Commissioner must decide whether the claimant's impairment is equivalent to a specific list of impairments contained in the regulations' Appendix 1, which the Commissioner acknowledges are so severe as to preclude substantial gainful activity. 20 C.F.R. § 404.1520(d); 20 C.F.R. § 404, Subpt. P, App. 1. If the claimant's impairment meets or equals one of the listed impairments, he is conclusively presumed to be disabled. If not, the evaluation proceeds to the fourth step, through which the Administrative Law Judge ("ALJ") assesses the claimant's residual functional capacity ("RFC") and determines whether the impairments prevent the claimant from doing the work he has performed in the past. An individual's RFC is his ability to do physical and mental work activities on a

sustained basis despite limitations from his impairments. 20 C.F.R. § 404.1520(e) and 404.1545(a)(1). If the claimant is able to perform his previous work, he is not disabled. 20 C.F.R. § 404.1520(e). If he cannot perform this work, the fifth and final step asks whether the claimant is able to perform other work available in the national economy in view of his RFC, as well as age, education, and work experience. If the claimant cannot, then he is entitled to disability benefits. 20 C.F.R. § 404.1520(f).

At steps one through four, the claimant has the burden of proving that he cannot return to his former employment because of the alleged disability. *Santiago v. Secretary of Health & Human Services*, 944 F.2d 1, 5 (1st Cir. 1991). Once a claimant has demonstrated a severe impairment that prohibits return to his previous employment, the Commissioner has the burden under step five to prove the existence of other jobs in the national economy that the claimant can perform. *Ortiz v. Secretary of Health & Human Services*, 890 F.2d 520, 524 (1st Cir. 1989). Additionally, to be eligible for disability benefits, the claimant must demonstrate that his disability existed prior to the expiration of his insured status, or his date last insured. *Cruz Rivera v. Secretary of Health & Human Services*, 818 F.2d 96, 97 (1st Cir. 1986).

BACKGROUND

Carbo was born on November 10, 1965. Transcript ["Tr."] 23, 447. He completed high school, does not speak English, and worked for eight years as a newspaper delivery driver (which involved a medium level of exertion and semi-skilled mental demands). Carbo claims to have been disabled since May 6, 2010 (alleged onset date) at 44 years of age[1] due to lower back, right arm, and elbow pain and has not worked since. He last met the Social Security Administration's ("SSA") insured status requirements on December 31, 2015 (date last insured). Tr. 15, 18, 23, 34, 40, 79, 326, 455-458, 488.

[1] Carbo was considered to be a younger individual (Tr. 22, 701), and "[i]f you are a younger person (under age 50), we generally do not consider that your age will seriously affect your ability to adjust to other work." 20 C.F.R. 404.1563(c).

Treating Physicians

Dr. Elvin Vigo

From January 1, 2009 to February 22, 2010, Dr. Elvin Vigo-Paredes ("Dr. Vigo") treated Carbo with pharmacotherapy for lumbar radiculopathy and bulging lumbar disc. On February 22, Dr. Vigo found that Carbo's neurological examination was normal. On August 20, 2010, Dr. Vigo reported on a SSA disability statement form that Carbo had difficulty standing and sitting for prolonged periods of time, could not walk long distances, and could not lift weight. Dr. Vigo did not express limitations as to reaching over the head, pushing, pulling, driving, using a keyboard, or performing repetitive hand movements. Dr. Vigo believed that Carbo could sign checks and manage earnings, and did not check-mark any psychiatric impediment in the corresponding section. He stated that the duration of Carbo's limitations was unpredictable. Tr. 82, 117-122, 354, 500-505.

Dr. Jose Busquets

Dr. Jose Busquets ("Dr. Busquets") also treated Carbo with pharmacotherapy for bulging lumbar disc from January 12 to February 11, 2010. On January 12, Carbo's straight leg raise test was negative. He had full strength throughout his extremities and his reflexes were intact. An MRI performed on Carbo's lower back dated January 16 revealed a bulging disc at L4-L5 and L5-S1, but no fracture, dislocation, body canal stenosis, scoliosis, or significant degenerative spondylosis. Tr. 81, 491-494.

Salud a tu Alcance

On February 11, 2010, Carbo went for an initial evaluation at *Salud a tu Alcance* physical therapy clinic. He was found to be oriented during the examination. Carbo reported having pain in his elbow for two years, and right gluteus and leg pain for about a year. His pain was moderate (4-6 on the Wong scale). He had muscle weakness in his right lower extremity, but appeared to walk without difficulty. His balance while sitting, standing and walking was good and he tolerated doing these three activities for 11-30 minutes.[2] He showed no contractions or deformities. He was diagnosed with a sprain. Neuropathy was ruled out. He received physical therapy February 11, 12, 17, 19, and 20,

[2] In this portion of the record, the options for check-marking under "Tolerance" were 0 minutes, 1-5 minutes, 6-10 minutes and 11-30 minutes.

and the record shows that on February 17 Carbo noticed improvement in his right elbow but not in his right gluteus. Tr. 4, 87, 91, 110-116, 353, 495-499.

SIF and Dr. Raul Llinas

From February 23, 2010 to 2013, Carbo received temporary disability benefits and physical therapy and medications for right arm and lumbar myositis, right hip bursitis, and right elbow epicondylitis under the auspices of the State Insurance Fund Corporation ("SIF"). SIF notes indicate that he was being treated under a "work with treatment" status. Tr. 83, 94-98, 123-149, 175-208, 270-323, 510-531.

A radiographic report dated March 2, 2010 by Dr. Myrna Diaz-Collazo states that Carbo's right elbow showed early arthritic changes. His right humerus showed peritendinitis calcarea of the right shoulder and his lumbar spine had minimal scoliosis. As to the right hip, no bone lesions or injury were observed, and the diagnostic impression was of normal films of the right hip. Tr. 149, 531.

Dr. Raul Llinas-Sobrino ("Dr. Llinas") treated Carbo both under the auspices of the SIF and as his primary private care doctor, from 2010 to 2013. Tr. 82, 209-258, 324-340. At the initial evaluation with Dr. Llinas on July 15, 2010, Carbo complained of a throbbing constant low back pain of moderate to severe severity (6 to 7 on a scale of 10) radiating to the right lower extremity which would aggravate with sitting, standing for more than 15 minutes, walking, going up the stairs, and lifting, and would be relieved with rest and modifying activity. Dr. Llinas diagnosed lumbar radiculopathy, lumbar joint OA, and hip osteoarthritis. He administered a right hip joint steroid injections, prescribed medications (Tylenol Arthritis for the pain and Norflex for his moderate lower back muscle spasms), and physical therapy in the lumbosacral area and right hip, and instructed Carbo to avoid lumbar extension and lateral (right and left hip) flexion. Dr. Llinas found no other physical abnormalities. Carbo's gait was normal, and he had no abnormalities in his range of motion in general (cervical, lumbar, fingers, wrist, elbow, shoulder, hip, knee, foot, and thorax). Dr. Llinas assessed that Carbo had good rehabilitation potential. Dr. Llinas did not detect any mental health abnormalities (judgment-insight, orientation, recent remote memory, mood-affect, MMSE). Tr. 209-214.

Dr. Llinas's September 1 physical examination remained the same as in the initial evaluation, with no abnormalities detected. Tr. 222. On September 3, Carbo reported to Dr. Llinas that he felt sixty percent improvement in his symptoms. He still felt moderate to severe pain in his lower back, which was abated with medication. His conditions would aggravate after sitting, standing for more than fifteen minutes, walking, and going up stairs. It would also be aggravated by carrying and lifting. He felt relief with rest, activity modification, and steroid injections. Tr. 229. Dr. Llinas again assessed that Carbo's rehabilitation potential was good. He found no physical abnormalities when examining Carbo, except for observing pain when examining the hip and lumbar spine (with lumbar spine extension, side bending and rotation). Tr. 230-232.

January 26, 2011 notes from a physical examination with Dr. Robert Castro reveal that MRI results showed L4/L5 and L5/S1 bulging, but an electromyogram and nerve conduction study was normal and his bilateral straight leg raise test was negative. Tr. 145.

On March 9, Dr. Francisco Frontera-Ensenat[3] ("Dr. Frontera") assessed on a SIF application that Carbo, who was diagnosed with lumbosacral myositis, right hip strain, and right elbow epicondylitis, could perform light work, that is, lift/carry ten pounds frequently and 20 pounds occasionally, and stand/walk at least six hours, and climb, bend, squat, and operate pedals occasionally. Dr. Frontera did not specify any limitations regarding hand use or environmental limitations. Tr. 130-131, 516-517. Later, on July 22, a rehabilitation specialist noted that Carbo's work potential was consistent with his residual abilities as assessed by Dr. Frontera, and that Carbo was interested in returning to the workforce. Tr. 131.

On April 7 and June 2, Carbo was administered epidural lumbar blocks under fluoroscopy. Tr. 136-137, 139, 142, 144. On July 6, Carbo informed Dr. Frontera that he continued with right arm and elbow pain, which he described as mild to moderate, and his lower back bothered him and extended down his right leg. Dr. Frontera prescribed medications and referred him to an orthopedist for reevaluation of his right elbow condition and to an anesthesiologist for his lumbosacral condition. A nurse observed that

[3] The English translation incorrectly states "Rivera" instead of "Frontera".

Carbo was oriented and cooperative, with no edema in extremities or movement limitations. Tr. 134-135.

On June 1, Dr. Llinas provided a physical RFC assessment to the SSA. In his opinion, Carbo's impairments had lasted or could be expected to last at least twelve months; emotional factors (depression and anxiety) contributed to the severity of Carbo's symptoms and functional limitations; and Carbo's pain or other symptoms were severe enough to occasionally interfere with the attention and concentration needed to perform even simple work tasks during a typical workday. Carbo could sit and stand/walk for less than two hours in a normal 8-hour work day. He could sit 45 minutes and stand for 30 minutes at a time before needing to shift positions. He also needed to walk every 30 minutes. Carbo therefore needed a job that permitted him to shift positions at will from sitting, standing or walking, and to take unscheduled breaks every 15 minutes for 5 to 10 minutes. Carbo could rarely lift and carry less than 10 pounds, twist, stoop/bend, crouch/squat, or climb ladder/stairs. He also had significant limitations with reaching, handling or fingering. With his right hand and arm he could grasp, turn, and twist objects, do fine manipulation (use his fingers), and reach with his arms (including overhead) for 30 minutes each with periods of rest. He had no limitations with his left arm. He could frequently look up or down, turn his head right or left, and hold his head in a static position. Dr. Llinas opined that Carbo's impairments likely would produce good days and bad days, and that he would likely be absent from work as a result of his impairments or treatments more than four days per month. Tr. 506-509.

On June 8, Dr. Llinas examined Carbo's lumbar range of movement and observed that Carbo felt pain when extending or flexing but was able to heel and toe walk. He diagnosed Carbo with lumbar radiculopathy, hip osteoarthritis, hip bursitis, and sacroiliac dysfunction. Dr. Llinas prescribed more physical therapy for the lumbar and sacral spine and the right hip, Tylenol for the pain, and Norflex for the muscle spasm. Tr. 337-340.

On September 7, Carbo again complained to Dr. Frontera of pain in his right elbow, lack of strength in his right arm, and lower back pain. That day, a nurse observed Carbo arriving to the outpatient clinic walking without difficulty. He was oriented and cooperating, stated that he understood the instructions provided to him, and showed no edema in the extremities or movement limitations. Tr. 123-125.

In November, Carbo continued describing his right elbow and shoulder pain as moderate to severe in intensity, chronic (lasted more than three months) and continuous. The pain interfered with his sleep and housework, as it interfered with his ability to grasp and hold objects in his right hand. His balance was good (from a scale of none to good), and his tolerance for sitting, standing and walking was of 11-30 mins (from a scale of zero to a maximum of 11-30 minutes). His gait pattern appeared affected but he walked without difficulty even in the presence of pain and mild muscle spasm. His muscle tone was normal. Tr. 155-156, 159-163, 537-538, 541-545.

On January 17 and 31, and February 7, 2012, Carbo was given infiltrations in both his elbow and lower back by Dr. Marisol Rivera-Misla ("Dr. Rivera-Misla"), anesthesiologist, as part of treatment under the SIF. Tr. 165-168, 489. Dr. Rivera-Misla noted on September 13 that Carbo had low back pain and tenderness. Tr. 195. Later on, in March 7, 2013, Dr. Rivera-Misla noted that Carbo suffered from intractable low back pain. Tr. 490.

May 17 and 12 notes indicate that Carbo continued reporting low back, right shoulder, arm, and elbow pain. He was oriented and cooperative, and showed no limitation of movement. Both a nurse and a physical therapist observed him walking without difficulty. Tr. 311, 314, 316. June 1 notes show that Carbo continued with physical therapy treatments and showed partial improvement in his right elbow and forearm condition, with increased range of movement and muscle strength. He walked without difficulty and his movement pattern was normal. His muscle tone was normal in spite of showing a mild brachioradialis spasm with some mild to moderate inflammation. His balance was good, and his tolerance for sitting, standing and walking was of 11-30 minutes. He was instructed to continue with therapeutic exercises at home. Tr. 175-176, 181-183, 308-309.

On June 29, Dr. Llinas further assessed that Carbo could sit and stand for 30 minutes for a total of 2 hours each and walk for 15 minutes for a total of 30 minutes in an 8-hour workday. Carbo, who is right hand dominant, could never lift/carry 1 to 10 pounds with his right arm, frequently lift/carry 11 to 20 pounds with his left arm, never bend at the waist, never kneel or crouch, and occasionally drive. In his opinion, Carbo's physical progress remained unchanged, it was not known how long his limitations were

expected to last, he did not have a psychiatric/cognitive impairment, and was competent to endorse checks and direct the use of the proceeds. Dr. Llinas recommended that Carbo avoid repetitive lumbar bending and twisting. Tr. 679.

Carbo was referred to Dr. Jorge Roman-Deynes ("Dr. Roman"), orthopedic surgeon, who had already recommended exercises and heat for stretching and strengthening the right elbow (Tr. 163, 545), and later operated on Carbo on August 27, 2012 for right elbow lateral epicondylitis with partial tear olecranon bursitis. The procedure was performed without complications and Carbo was referred to physical therapy to strengthen the extensor forearm mass. Tr. 163, 193, 198-199, 204, 207, 259-260, 263, 265-267, 545, 680-689. Carbo continued with physical therapy (exercises, fluid therapy and massage) and pain medications. Tr. 197, 207.

SIF notes from September 2012 through May 2013 indicate that Carbo continued receiving physical therapy, lumbar blocks, and prescriptions for his pain. During his evaluations, his postural responses to seating, standing, and walking were good and his tolerance for performing these activities was the maximum standard that the evaluation form allotted (11-30 minutes).[4] He was sometimes observed walking with difficulty, and at other times without difficulty and with a normal gait. At all times he was oriented and cooperative. On his September and October 2012 physical therapy evaluations, Carbo stated that he felt increased mobility of the operated right elbow but continued feeling moderate to intense pain with limitation of movement, especially when squeezing or performing exertion, such as when writing. The therapist noted that Carbo increased his right elbow and forearm range of movement. Tr. 184-194, 270-297, 712. On October 2, x-rays showed a calcaneal spur in the right foot, with no identifiable fracture or dislocation. Tr. 21, 602. An MRI of the lumbosacral spine dated October 11 showed straightening of the normal curvature and evidence of generalized osteophyte formation and disc desiccation with narrowing of the disc at L5-S1 level, mild to moderate central and lateral canal stenosis, bilateral neural foramina stenosis secondary to a posterior disc bulge and hypertrophy of the apophyseal joints at the L4-L5 level, and mild posterior disc bulge without canal stenosis at the L5-S1 level. Tr. 185, 712. By January 2013, although

[4] In this portion of the record, the options for check-marking under "Tolerance" were 0 minutes, 1-5 minutes, 6-10 minutes and 11-30 minutes.

still with pain in his elbow, especially when performing exertion, he showed improvement in his right elbow condition. Tr. 276-277, 281-284.

Dr. Llinas's treatment notes from March to May 2013 indicate that Carbo still felt constant waist and right hip and leg pain which he rated between 8 and 9 on a scale of 10 and would become aggravated with prolonged walking, standing, and sitting. Dr. Llinas prescribed Relafen and Toradol for the pain, and Flexeril and Norflex for the muscle spasm. Tr. 327-332. On April 9 and June 18, Dr. Llinas assessed that Carbo could sit and stand for 30 minutes for a total of 2 hours each in an 8-hour worday, walk 15 minutes for a total of 30 minutes, occasionally lift/carry 1 to 10 pounds with his right arm, frequently lift/carry 11 to 20 pounds with his left arm, never bend at the waist, never kneel or crouch, and occasionally drive. Dr. Llinas recommended that Carbo avoid repetitive lumbar bending and twisting. In his opinion, Carbo's physical progress remained unchanged and it was unknown how long his limitations would last. Dr. Llinas did not observe any psychiatric/cognitive impairment and found him to be competent to endorse checks and direct the use of the proceeds. Tr. 764, 766. On June 4, Dr. Llinas added that Carbo could reach below the waist and finger or handle with both arms. With his right arm, Carbo could occasionally reach above the shoulder and at the waist or desk level. He had no restrictions using his left arm. In Dr. Llinas's opinion that day, Carbo's restrictions were expected to last one year. Tr. 762.

On September 25, 2013, Carbo went to the Bella Vista Hospital emergency room because he had low back muscle spasm and pain for the past three days after exerting himself, which he claimed had not improved, with self-reported limitation of movement. He was prescribed Norflex. The attending doctor additionally found mild osteopenia and minimal narrowing of disc space L5-S1. Tr. 342-350.

Procedural History

On June 30, 2011, Carbo filed a Title II application for disability and disability insurance benefits, alleging disability starting May 6, 2010.[5] Tr. 15, 447-448. On July 6, Carbo also filed a disability report claiming that lumbar degenerative disc disease and

[5] The ALJ stated in her decision that the application was filed on June 29. Tr. 15.

radiculopathy limited his ability to work and that he had stopped working because of his conditions. Tr, 78.

On August 4, Carbo filed a function report in which he reported living at home with his wife and daughter. His daily routine involved waking up, taking his medications, walking around the house, resting, and eating. His hobbies included watching TV, listening to the radio, reading, and going to church if his conditions so allowed. He would also go to medical appointments. He did not go out alone, cook, or do household or yard chores because his back hurt and his movements were limited, nor did he drive because of his prescription medicines' secondary effects. He switched positions from sitting, standing and walking because he'd feel a lot of pain if he remained doing one of the three activities for long. The pain would also wake him because he could not stay in one position for long. He could walk for 15 minutes before having to stop and rest, and had to rest for 10-15 minutes before resuming walking. He was prescribed a cane, which he used when he woke up (because his lumbar area would swell) and when he got out of a car. As to personal care, he claimed having problems bending and lifting his arms while getting dressed, having difficulty bathing and shaving because of his arm pain, and feeling pain in his lumbar area when getting up from going to the bathroom. He also claimed that his lumbar pain and inability to provide for his family depressed him, gave him anxiety, and affected his self-esteem. He was constantly abhorrent because of the pain and did not like being asked how he was doing. He could not concentrate or pay attention for long, had lost interest in everything, and needed to be reminded to take his medications. He could follow written instructions if he reviewed them a couple of times and had to have spoken instructions repeated to him multiple times. He avoided talking to authority figures and only did so when necessary. He could somewhat handle changes in routine. His wife took care of their finances. Tr. 102-109, 460-467.

The case was referred for consultative evaluations and RFC assessments. Dr. Alberto Rodriguez-Robles ("Dr. Rodriguez-Robles") conducted a consultative psychiatrist evaluation on November 14. Carbo stated that he felt depressed since 2010 due to his health, work, and financial problems. He had no desire to do anything, could not concentrate, did not sleep well, fatigued easily, and had pessimistic thoughts. Stress

caused him to itch, and he bit his fingernails to the point of bleeding. He had not sought psychiatric treatment because he did not feel comfortable with the idea and believed that he would be given medications to keep him asleep. His daily activities included taking care of his personal hygiene, getting dressed, and staying home. He was socially distant, withdrawn, and did not like interacting with people. He had no history of alcohol or drug use, psychiatric hospitalizations, or mental illness in the family Tr. 150-154, 356, 532-536.

Dr. Rodriguez-Robles observed Carbo using a cane during the interview. Carbo seemed apprehensive, depressed, and with psychomotor retardation. He was oriented, with appropriate judgment and fair insight. His affect was restricted. His thought flow was slow, logical, coherent and relevant. Dr. Rodriguez-Robles was concerned with Carbo's thought content as Carbo expressed ideas of self-deprecation, despair and hopelessness, although no suicidal ideas. Carbo had no perceptual disorders at the time of the interview. Dr. Rodriguez-Robles also noted that Carbo's attention and concentration were diminished. He was easily distracted and could not complete the month sequence backwards. His remote, past, recent and immediate memories were appropriate. He was able to remember three objects after five minutes (immediate memory), remembered how he arrived to the office and what he did the day prior (recent memory), and remembered events that occurred years ago (remote memory). Dr. Rodriguez-Robles diagnosed major depressive disorder, single episode, severe, with a guarded prognosis, and no capacity to manage his funds. Tr. 152-153, 490.

On December 7, the case was referred to Dr. Jeanette Maldonado ("Dr. Maldonado"), psychiatrist, for a review of the record and an assessment of severity, but the record does not contain a copy of her medical evaluation. Tr. 547-549.

On December 23, Dr. Barbara Hernandez ("Dr. Hernandez") also reviewed Carbo's file, including evidence from Dr. Rodriguez-Robles and Dr. Llinas for the time period of May 6, 2010 until December 23, 2011, and filled out a Psychiatric Review Technique form stating that Carbo had major depressive disorder, single episode, with no psychiatric treatment and finding that his conditions were not severe and that his allegations were not credible. His conditions imposed mild restrictions on daily living, mild difficulties in maintaining social functioning, mild difficulties in maintaining

concentration, persistence, or pace, and no episodes of decompensation. In Dr. Hernandez's opinion, the evidence suggested that Carbo could adjust to routine work demands, relate with others, sustain concentration, and complete a normal workday and workweek. Tr. 560-564. Dr. Hernandez again assessed on March 6, 2012 that Carbo's affective disorders were non-severe, along with no record of psychiatric treatment, that he had mild restrictions of activities on daily living, mild difficulties in maintaining social functioning, mild difficulties in maintaining concentration, persistence or pace, and no repeated episodes of decompensation. Dr. Hernandez assessed that Carbo could adjust to routine work demands, relate with others, sustain concentration, and complete a normal workday and work-week. Tr. 358-359.

Dr. Alfredo Perez-Canabal ("Dr. Perez"), neurologist, performed a consultative evaluation on February 9, 2012. Carbo complained of right elbow pain and low back pain radiating to the legs. Carbo added that he had a poor response to medications, infiltrations, and blocks. Dr. Perez noted low back pain (tenderness) and right elbow epicondylitis. Dr. Perez found a limitation in the shoulder internal and external rotation. Other than that, Carbo had adequate gait and motor tone and did not require assistance to walk. He had full strength. His hand function was normal and he could pinch, handle and carry. Tr. 352, 569-579.

The case was then referred to Dr. Magda Rodriguez ("Dr. Rodriguez"), who found on February 27 that the medical evidence supported the presence of lumbar bulging disc without radiculopathy, right elbow arthritic changes, chronic epicondylitis with partial tear of the common extensor tendon, right chronic lateral epicondylitis and peritendinitis calcarea in the right shoulder, but no significant neurological deficits. The impairments were severe and could reasonably be expected to produce the pain or symptoms but not to the extent claimed by Carbo in terms of intensity, persistence, and functional limitations. They did not meet or equal any listed severity, either.

Dr. Rodriguez assessed that Carbo could occasionally (cumulatively 1/3 or less of an 8-hour day) lift and/or carry (including upward pulling) 20 pounds, frequently (cumulatively 1/3 to 2/3 of an 8-hour day) lift and/or carry 10 pounds, stand and/or walk with normal breaks about 6 hours in an 8-hour workday, sit with normal breaks about 6 hours in an 8-hour workday, with limited pushing and/or pulling (including operation of

hand and/or foot controls) in the right upper extremities. Carbo could also occasionally perform the following: climb ramps/stairs, balance, stoop (bend at the waist), kneel, crouch (bend at the knees), and crawl. Carbo had full hands function (handling, fingering, and feeling) but was limited in reaching in front, laterally, and overhead. He had no visual or communicative limitations, and no environmental limitations except to avoid even moderate exposure to hazards such as unprotected heights and commercial driving. Tr. 357, 359-362, 580, 582.

On March 21, Carbo was notified that his claim for disability due to lumbar degenerative disc disease and radiculopathy was denied at the initial level. The SSA determined that Carbo lacked the physical capability to perform previous jobs but was able to perform light unskilled work, and was thus not disabled. Tr. 15, 87, 362-364, 367-370.

As part of his request for reconsideration, Carbo filed another disability report on April 27 indicating that he had new physical limitations as a result of his conditions since his last disability report, occurring approximately around March 22, 2012. He had a lot of difficulty bending over, and he couldn't crouch, exert force or spend much time standing, sitting or walking. He also claimed that he had to keep his legs raised as much as possible. Tr. 468.

On June 20, 2012, Carbo filed a function report describing the same daily routine and mental health effects that he had already described in the August 4, 2011 function report. He added that he could walk for 10 to 15 minutes before having to stop and rest, and rest for 20 minutes before resuming walking. He could pay attention for very little time, did not finish what he started, had to review written instructions multiple times before being able to follow them, and had to ask several times in order to follow spoken instructions. He did not handle changes in routine well. Tr. 60-75.

The case was referred to Dr. G. Minola ("Dr. Minola"), who reviewed Carbo's psychiatric evidence in file and affirmed Dr. Hernandez's mental RFC assessment as written. Tr. 598-599.

Carbo's request for reconsideration of denial of disability benefits was denied for the same reasons and considering the same evidence as in the initial denial. Tr. 91, 366, 371-374. Carbo requested an administrative hearing on August 13 (Tr. 375-383) and filed

another disability report on August 15, claiming that his conditions worsened approximately around July 12. He couldn't bend over or crouch down, exert force or perform repetitive movements, or spend too much time standing, sitting or walking. Tr. 476-483.

An administrative hearing was held on June 20, 2013 before ALJ Emily Ruth Statum. Tr. 15, 31-58, 395, 407. Carbo and Ms. Alina Kurtanich, a vocational expert ("VE") (Tr. 393-394), testified. Carbo's attorney had filed a brief arguing that Carbo's RFC should be restricted to less than sedentary work with multiple non-exertional limitations, including postural, manipulative, and emotional limitations, and an inability to perform work on a sustained basis without significant interruptions or unscheduled breaks. Tr. 488-490.

Carbo testified that he suffered from stabbing pain in his shoulder and that he had reported it to his treating sources but was not treated for it. He was operated in his right arm because it would dislocate as a result of his elbow and his therapist told him that his shoulder had suffered injury. The operation only reduced the inflammation but now he had less strength than before the operation, impeding basic tasks, like writing, lifting, or holding something heavy. His left arm is fine, but his back did not allow him to squeeze or hold. He further testified that he suffered from spasm, cramps and stabbing pain that radiated to the back, groin area, legs, and feet, with pain that increased the longer he sat. His left ankle was constantly inflamed, and his right foot also hurt when he walked. His conditions forced him to constantly shift positions to ease the pain. He could sit, stand, or walk without interruption for ten to fifteen minutes. He could not sleep properly and would wake every fifteen or thirty minutes because the pain would not allow him to remain in a specific position. He could not lift weight because he would experience a sharp stabbing pain in his right arm and shoulder that would radiate to his neck. Tr. 42-46, 49-52. He would drive only if his wife or daughter could not take him. Tr. 39. He added that the medications he was prescribed at the SIF gave him side effects like dry mouth and a burning sensation in his joints without giving relief, so he preferred to live with the pain. Tr. 43. He felt depressed because of his physical situation and how it affected his family but had not sought treatment because he did not have the economic resources to do so. He also testified that his condition affected his memory and

concentration. Tr. 44-46. He was able to engage in some activities, such as reading the Bible for five to fifteen minutes, and went to church when he was emotionally and physically able. He did not prepare meals, help with the dishes, sweep, or mop. He had no hobbies and did not do sports. Tr. 47.

The ALJ asked the VE if a person with Carbo's age, academic background, and previous job with the ability to do light and unskilled (simple and routine) work could perform Carbo's previous job. The ALJ specified that light work as defined in 20 C.F.R. § 404.1567 requires the following: lift and/or carry 20 pounds occasionally and 10 pounds frequently; sit about six hours in an eight-hour workday; stand and/or walk about six hours in an eight-hour workday; no limitations pushing and/or pulling; occasionally reach overhead in all other directions with the right dominant arm; occasionally climb ramps, stairs, ladders, ropes, scaffolds; occasionally balance, stoop, kneel, crouch, crawl; avoid moderate exposure to hazards, machinery, heights; and avoid commercial driving. The VE answered that such a person could not perform Carbo's previous job but could perform other light unskilled jobs in the national economy, such as marker, inspector/hand packager, and electronic worker. Tr. 53-54.

Carbo's attorney asked the VE if such a person as described in the ALJ's hypothetical question, but that additionally could not perform fine or gross manipulation for up to one-third of a workday with his dominant hand and could only stand or sit a maximum of two hours each in an eight-hour workday, could work. The VE answered that there would be no jobs in the national economy for such a person. Counsel also added if such a person who needed to change positions between sitting, standing and walking every fifteen minutes and who needed unscheduled breaks during a normal workday could work. The VE answered that a person who needed unscheduled breaks could not work because jobs have scheduled breaks. Tr. 56-57.

On November 19, 2013, the ALJ found that Carbo was not disabled under sections 216(i) and 223(d) of the Act since he could perform other work. Tr. 9-30. The ALJ sequentially found that Carbo:

(1) had not engaged in substantial gainful activity since May 6, 2010 (Tr. 16);

(2) had severe impairments: lumbar radiculopathy, sacroilitis, degenerative disc disease of the lumber spine with bulging, right hip osteoarthritis, lumbar joint

osteoarthritis, bursitis olecranon, partial tear of extensor tendon on the right elbow with right elbow epicondylitis, calcaneal spur, and a severe depression since November 14, 2011 (Tr. 18);

(3) did not have an impairment or combination of impairments that met or medically equaled the severity of an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1 (20 CFR 404.1520(d), 404.1525, 404.1526 (Tr. 18);

(4) could not perform past relevant work but retained the RFC to perform light work (frequently lift and carry ten pounds and twenty pounds occasionally; sit six hours in an eight-hour workday; stand and/or walk six hours in an eight hour workday; no limitations pushing and/or pulling; occasional reaching overhead and in all other directions with the right (dominant) arm; occasionally climbing ramps, stairs, ladders, ropes, or scaffolds; occasional balancing, stooping, kneeling, crouching, or crawling) but avoiding even a moderate exposure to hazards (machinery or heights) and commercial driving, and with the ability to perform unskilled work that is simple and routine (Tr. 20-23); and

(5) could perform jobs in the national economy as per his age, education, work experience, and RFC, such as marker, inspector and hand packager, and electronic worker. Tr. 24.

The ALJ found that Carbo's medically determinable impairments could reasonably be expected to cause his symptoms, but that his pain complaints regarding intensity, persistence and limiting effects of his symptoms were not entirely credible when placed in context with the medical evidence. Tr. 22. The ALJ gave great weight to the clinical signs found by Dr. Alberto Rodriguez in his consultative psychiatrist evaluation, but little weight to his assessment that Carbo could not manage funds. Tr. 22. The ALJ also gave weight to the State agency staff's assessments (Dr. Rodriguez, Dr. Hernandez, and Dr. Minola). The ALJ gave no weight to Dr. Llinas's and Dr. Vigo's assessments because they were inconsistent with clinical signs found in the SIF record and other treating sources. As to Dr. Llinas, the ALJ also stated that she found his assessment to be conclusory, unexplained, unsupported, and inconsistent with the medical evidence in the record, including his own clinical signs. Tr. 23.

On November 13, 2014, the Appeals Council denied Carbo's request for review of the ALJ's decision, and rendered the ALJ's decision the final decision of the Commissioner. Tr. 1-8. The present complaint followed. Docket No. 1.

DISCUSSION

This court must determine whether there is substantial evidence to support the ALJ's determination at step five in the sequential evaluation process contained in 20 C.F.R. § 404.1520 that based on Carbo's age, education, work experience, and RFC, there was work in the national economy that he could perform, thus rendering him not disabled within the meaning of the Act. In this case, the ALJ used a VE to determine whether substantial gainful activity existed in the national economy that Carbo could performed.

Carbo argues that the ALJ did not deploy the correct legal standards because the ALJ posed a hypothetical question to the VE that did not include all of his physical and mental limitations, thus not complying with SSR 96-8p and the standard set out in *Arocho v. Sec'y of Health and Human Services*, 670 F.2d 374 (1st Cir. 1982). The Commissioner argues that there is substantial evidence in the record to support the ALJ's decision that Carbo was not entitled to disability benefits and requests that the ALJ's decision be affirmed.

SSR 96-8p requires the ALJ to express a claimant's impairment in terms of work-related functions or mental activities, and a VE's testimony is relevant to the inquiry insofar as the hypothetical questions posed by the ALJ to the VE accurately reflect the claimant's functional work capacity. *Arocho*, 670 F.2d at 375. "The ALJ [is] entitled to credit the vocational expert's testimony as long as there [is] substantial evidence in the record to support the description of [the] impairments given in the . . . hypothetical." *Berrios Lopez v. Sec'y of Health & Human Servs.*, 951 F.2d 427, 429 (1st Cir. 1991). In other words, a VE's testimony must be predicated on a supportable RFC assessment. *See* 20 C.F.R. § 404.1520(g)(1). Additionally, ALJs "must consider findings and other opinions of State agency medical and psychological consultants and other program physicians, psychologists, and other medical specialists as opinion evidence," except for the ultimate determination about disability. 20 C.F.R. § 404.1527(e)(2)(1).

Physical RFC Assessment

Carbo suffered from physical conditions that produced lower back, right leg, and right arm pain and limited his ability to perform certain physical activities. The ALJ found that, despite his conditions, Carbo had the physical RFC to perform light work, that is, he could frequently lift and carry ten pounds and twenty pounds occasionally; sit six hours in an eight-hour workday; stand and/or walk six hours in an eight hour workday; no limitations pushing and/or pulling; occasional reaching overhead and in all other directions with the right (dominant) arm; occasionally climbing ramps, stairs, ladders, ropes, or scaffolds; occasional balancing, stooping, kneeling, crouching, or crawling, but avoiding moderate exposure to hazards (machinery or heights) and commercial driving. Carbo argues that the ALJ failed to consider his physical limitations as reported by his treating physiatrist, Dr. Llinas.

Light work involves lifting no more than twenty pounds at a time with frequent lifting or carrying of up to ten pounds, walking or standing up to six hours of an eight-hour workday, and some pushing or pulling. Light work includes sedentary work, or work that requires lifting no more than ten pounds at a time, sitting for at least six hours out of an eight-hour work day, occasional walking and standing for no more than about two hours a day, and good use of the hands and fingers for repetitive hand-finger actions. 20 C.F.R. § 404.1567(a) & (b); SSR 83-10. In arguing that the ALJ erred by disregarding Dr. Llinas's opinion, Carbo cites Dr. Llinas's June 2011 RFC assessment that Carbo could not lift or carry 10 pounds; could sit, stand, or walk for two hours in an eight-hour workday and needed to shift positions at will; needed unscheduled breaks every 15 minutes for 5 to 10 minutes; could not twist, stoop, bend, crouch, squat, or climb stairs or ladders; and was limited to using his right hand and arm 30 minutes at a time. Tr. 506-509. Some of Dr. Llinas's assessment fits the requirements of sedentary work. However, those portions that do not are contradicted by Dr. Llinas's other RFC assessments, his own treatment notes, and other medical evidence.

In 2010, Dr. Llinas found Carbo's gait to be normal and, in spite of the presence of pain (with lumbar spine extension, side bending and rotation) he detected no abnormalities in Carbo's range of motion in general. Dr. Llinas assessed in 2012 and in 2013 that Carbo could sit and stand for a total of two hours each, walk for 30 minutes

(less than the requirements of sedentary work), and frequently lift up to 20 pounds with his left arm with no other restrictions, and could never bend, kneel, or crouch. In 2013, Dr. Llinas assessed that Carbo could occasionally lift up to 10 pounds with his right arm, occasionally reach overhead with his right arm, and occasionally drive. Carbo could also finger or handle with both hands and reach below the waist. In spite of opining along with his 2013 assessment that Carbo's physical progress remained unchanged, it appears from the 2013 assessment when compared to the 2011 assessment that Carbo had achieved some improvement.

Also, throughout the SIF record (which includes assessments from other treating physicians), there is evidence of continuous treatment through physical therapy and pain abatement with medications. Progress notes and physical therapy evaluations from other SIF staff indicate that Carbo was mostly observed walking without difficulty, with a normal movement pattern, and showed no limitation of movement. His balance and postural responses to sitting, standing, and walking were good. His muscle tone was normal. In 2011, Dr. Castro's bilateral straight leg raise test was negative and Dr. Frontera assessed that Carbo could perform light work and climb, bend, squat, and operate pedals occasionally, with no limitations regarding hand use or environmental limitations. In 2012, Carbo indicated during physical therapy evaluations feeling increased mobility and less pain in his right elbow, which his therapist also noted.

In addition, Dr. Perez's 2012 consultative evaluation revealed that Carbo had some limitation in his shoulder internal and external rotation but otherwise had adequate motor tone, full strength, adequate gait, and normal hand function. That same year, Dr. Rodriguez assessed that Carbo could perform light work with limited pushing and/or pulling (including operation of hand and/or foot controls) in the right upper extremities. Carbo could also occasionally perform the following: climb ramps/stairs, balance, stoop (bend at the waist), kneel, crouch (bend at the knees), and crawl. Carbo had full hands function (handling, fingering, and feeling) but was limited in reaching in front, laterally, and overhead.

The above evidence in the record shows that there is substantial evidence from treating, consultative, and non-examining medical opinions to support the ALJ's finding that Carbo could perform light work. Furthermore, even if solely considering Dr.

Llinas's assessments, if Carbo were limited in his ability to perform light work because it requires a good deal of walking, sitting or standing and some pushing or pulling, it appears that he would still able to perform sedentary work. The record shows that he has no hand or finger impairment, and sedentary work does not require that he be seated for six unbroken hours without shifting position during an eight-hour work day. *Halloran v. Barnhart*, 362 F.3d 28, 33 (2d Cir. 2004).

Mental RFC Assessment

The ALJ further found that Carbo could perform unskilled work that is simple and routine. Carbo argues that the ALJ did not deploy the correct legal standards because she made mental RFC findings that did not clearly reflect the severity of his limitations as reported by the examining psychiatric consultant, Dr. Rodriguez-Robles, to whom the ALJ gave great weight to, specifically his difficulty in paying attention and concentrating. Unskilled work involves performing simple duties, which can be done with little or no judgment and that can be learned on the job in a short period of time. 20 C.F.R. 404.1568(a).

A claimant seeking disability benefits based upon mental illness must establish that it impedes him from performing the basic mental demands of competitive remunerative unskilled work on a sustained basis, that is: (1) understand, carry out, and remember simple instructions; (2) respond appropriately to supervision, coworker, and usual work situations; and (3) deal with changes in a routine work setting. *Ortiz*, 890 F.2d at 526 (*quoting* SSR 85-15). For a claimant to understand, carry out, and remember simple instructions in any job, he must have the mental ability to remember very short and simple instructions, and the "ability to maintain concentration and attention for extended periods (the approximately 2-hour segments between arrival and first break, lunch, second break, and departure)." SSA's Program Operations Manual System ("POMS") DI 25020.010(B)(2)(a). "Concentration, persistence, or pace refers to the ability to sustain focused attention and concentration sufficiently long to permit the timely and appropriate completion of tasks commonly found in work settings." 20 C.F.R. Pt. 404, Subpt. P, App. 1 §12.00(C)(3).

Here, although Carbo claimed to suffer from depression, he specifically stated to Dr. Rodriguez-Robles and to the ALJ at the hearing that he never sought a proper

diagnosis and treatment for the symptoms, which he claimed included difficulty in paying attention and concentrating, nor did he provide evidence other than his self-reported statements to support this claim, as is his burden. Dr. Rodriguez-Robles did note that Carbo's attention and concentration were diminished, that he was easily distracted and unable to complete the month sequence backwards, but it appears that Carbo was able to pay attention and concentrate sufficiently long in answering a series of questions to test his memory (remote, past, recent, and immediate), which Dr. Rodriguez-Robles found to be appropriate. Furthermore, evidence from the SIF record shows that Carbo was alert, oriented, and cooperative during his appointments. Dr. Llinas also noted in 2010 and in 2013 that Carbo did not have psychiatric, cognitive, or other mental health concerns, although in 2011 he assessed that Carbo's physical conditions were severe enough to interfere with his ability to pay attention and concentrate. However, there is evidence that Carbo's pain was abated with medications. Also, Carbo reported in 2011 that he could follow written instructions after reviewing them a couple of times and oral instructions after having them repeated to him multiple times, that he could handle changes in routine, and that he avoided talking to authority figures but could do so when necessary. In addition, Dr. Hernandez assessed that the evidence in the record pointed to mild difficulties in social functioning and maintaining concentration, persistence or pace, and that he would be able to sustain concentration, adjust to routine work demands, relate to others, and complete a normal work day. I find that the record contains substantial medical and self-reported evidence to support the ALJ's RFC finding, as described above.

"Good reasons"

Carbo also argues that the ALJ did not offer "good reasons" for disregarding Dr. Llinas's reports and notes. In reviewing the evidence, the ALJ should give "*more* weight to opinions from [a claimant's] treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of [a claimant's] medical impairment(s)." 20 C.F.R. § 404.1527(d)(2). However, controlling weight is given to a medical treating source's opinion if it is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with other substantial evidence in the case record. 20 C.F.R. § 404.1527(d)(2); SSR 96-2p. Once the ALJ decides what weight to give a treating source, under the "good reasons"

requirement, she is required to include in the notice of determination "specific reasons for the weight given to the treating source's medical opinion, supported by the evidence in the case record, and must be sufficiently specific to make clear to any subsequent reviewers the weight the adjudicator gave to the treating source's medical opinion and the reasons for that weight." SSR 96-2p.

Here, the ALJ discussed in the decision why the findings as to the severity of the conditions and the RFC assessments by Dr. Llinas were not given controlling weight. The ALJ found that the restrictions offered by Dr. Llinas were "conclusory, unexplained, unsupported and inconsistent" with other SIF medical evidence. Tr. 23. The portions of an RFC assessment by a treating physician that meet the definition of medical opinion are subject to the "good reasons" requirement, whereas those parts that address capability to perform work are not entitled to significant weight because that issue is reserved to the Commissioner. *See Collins v. Astrue*, 324 Fed. Appx. 516, 520 (7th Cir. 2009). Therefore, the portions of Dr. Llinas's medical evidence that address capability to perform work are not entitled to significant weight because that issue is reserved to the Commissioner. Furthermore, the ALJ may reject a treating physician's opinion when it is not supported by clinical evidence or is inconsistent with other evidence in the record. 20 C.F.R. § 404.1527(d)(2); *Arias v. Comm'r Soc. Sec'y*, 70 F. App'x 595, 598 (1st Cir. 2003). I discussed earlier the inconsistencies in his findings when compared to other evidence in the SIF record and evidence submitted by non-examining physicians. Although written reports submitted by non-examining physicians who merely reviewed the medical evidence are not substantial evidence, they may serve as supplementary evidence for the ALJ to consider in conjunction with the examining physician's reports. *Carrasco v. Comm'r of Soc. Sec.*, 528 F. Supp. 2d 17, 19 (D.P.R. 2007), *citing Irizarry-Sanchez v. Comm'r of Soc. Sec.*, 253 F. Supp. 2d 216, 219 (D.P.R. 2003). I thus find that Carbo's claim that the ALJ disregarded Dr. Llinas's assessment and did not offer good reasons for the weight given is meritless.

CONCLUSION

For the foregoing reasons, the Commissioner's decision is **AFFIRMED**.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 1st day of March, 2017.

S/Bruce J. McGiverin
BRUCE J. MCGIVERIN
United States Magistrate Judge