UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS SAN ANTONIO DIVISION

AMINEH ZAHRAEI, *Plaintiff,* v. CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY, *Defendant.*	§ § § § § § § § § § § §	Civil Action No. SA-16-CV-396-XR

ORDER ON MAGISTRATE JUDGE'S REPORT & RECOMMENDATION

On this date, the Court considered the Report and Recommendation filed by the Magistrate Judge (Docket Entry No. 18), and Plaintiff's objections thereto (Docket Entry No. 19), concerning Plaintiff's appeal of the Commissioner's decision to deny her Social Security disability benefits. After careful consideration, the Court ACCEPTS the Magistrate Judge's recommendation to affirm the Commissioner's denial of benefits.

Introduction

Plaintiff Amineh Zahraei seeks review and reversal of the determination by the Commission that Zahraei is not disabled and thus not entitled to receive disability and supplemental security income ("SSI") benefits. Zahraei contends that the Administrative Law Judge ("ALJ") erred by 1) failing to properly execute step three of the sequential-evaluation process regarding Plaintiff's mental impairments, and 2) by finding that there was substantial evidence in the record to conclude that the Plaintiff's residual functional capacity ("RFC") allowed her to work, especially after the ALJ improperly relied on the medical opinions of non-

treating, non-examining consultative experts in his RFC determination. Zahraei asks the Court to reverse and remand the decision for further proceedings on the issues presented.

Jurisdiction

This Court has jurisdiction to review the Commissioner's final decision as provided by 42 U.S.C. § 405(g).

Background

Plaintiff Amineh Zahraei filed her application for SSI on December 19, 2012, alleging that her disability began on October 29, 2012. Tr. 152-53, 163. Plaintiff is a 52-year-old Iranian refugee who came to the United States approximately four or five years ago to escape religious persecution. Tr. 30, 69. Plaintiff speaks Farsi and is unable to speak, write, or read English. Tr. 30, 69. Plaintiff obtained the equivalent of a 10th grade education while living in Iran. Tr. 30, 43, 69. Plaintiff has never previously worked outside of the home. Tr. 30. Plaintiff's impairments include degenerative disc disease of the lumbar spine, bilateral degenerative joint disease of the knees, obesity, depression anxiety disorder, posttraumatic stress disorder, and psychosis. Tr. 20. Plaintiff's application for SSI was denied initially on March 8, 2013, and denied again on reconsideration on June 12, 2013. Tr. 18.

After the denial of her claim, Plaintiff requested an administrative hearing. Tr. 18. Plaintiff and her attorney attended the administrative hearing before ALJ Robert M. McPhail on October 16, 2014. Tr. 18. Plaintiff testified at the hearing through a Farsi interpreter. Tr. 18. A vocational expert ("VE"), Donald R. Marth, Ph.D., also testified. Tr. 18.

The ALJ issued an unfavorable decision on December 16, 2014. Tr. 18-32. The ALJ applied the five-step sequential analysis required by SSA regulations. Tr. 18-32. At step one, the ALJ found Plaintiff had not engaged in any substantial gainful activity since December 19, 2012,

the date of her application. Tr. 20. At step two, the ALJ found Plaintiff had severe impairments, including degenerative disc disease of the lumbar spine, bilateral degenerative joint disease of the knees, obesity, depression, anxiety disorder, posttraumatic stress disorder, and psychosis. Tr. 20. At step three, the ALJ found that none of Plaintiff's impairments or combination of impairments met or equaled the severity of one of the listed impairments in the Social Security regulations, specifically Listings 1.02 (major dysfunction of a joint), 1.04 (disorders of the spine), 12.04 (affective disorders), and 12.06 (anxiety disorders). Tr. 20-23.

Before reaching the fourth step of the analysis, the ALJ found Plaintiff had the RFC to perform light work. Tr. 23-30. Specifically, the ALJ found Plaintiff could lift 20 pounds occasionally and 10 pounds frequently; stand or walk for 6 hours in a 8-hour workday; sit for a total of 6 hours in a 8-hour workday; never work around ropes, ladders, or scaffolds; occasionally climb, stoop, kneel, crouch, and crawl; understand, remember, and carryout simple instructions; use her judgment; respond to supervision, coworkers, and usual work situations; deal with changes in a simple routine work setting; have occasional contract with the public; and should have no forced-pace work, such as an assembly line. Tr. 23-24.

At step four, the ALJ found Plaintiff had no past relevant work and, therefore, could not apply the RFC to her past work. Tr. 30. Finally, after considering Plaintiff's age, education, work experience, and RFC, and the testimony of the VE, the ALJ found that plaintiff was capable of performing three jobs that are abundant in the national economy: 1) Assembler of Small Products; 2) Folder in Laundry; and 3) Mexican Food Maker by Hand. Tr. 30-31. Furthermore, the ALJ found, based on the VE's testimony, that Plaintiff's inability to speak, read, or write English reduced the number of available jobs by two-thirds. Tr. 30-31. The ALJ found this still left a significant number of jobs available in the three job categories. Tr. 30-31. Consequently,

the ALJ determined Plaintiff was not disabled for purposes of the Act and not entitled to receive SSI. Tr. 31.

Plaintiff requested a review of the ALJ's decision, but her request was denied by the Appeals Council on March 29, 2016. Tr. 1-5. On April 26, 2016, Plaintiff filed the instant case, seeking review of the administrative determination. The case was referred to Magistrate Judge Elizabeth Chestney, who filed her Report and Recommendation on May 8, 2017. Magistrate Judge Chestney found that substantial evidence supported the Commissioner's decision to deny Plaintiff SSI. Report and Recommendation of the U.S. Magistrate Judge, May 8, 2017 (Docket Entry No. 18), page 1. Plaintiff filed her objection to the report on May 22, 2017. This Court will now conduct a review of Judge Chestney's Report and Recommendations.

Governing Legal Standards

I. Magistrate Judge Review

Where a party has objected to the Magistrate Judge's Memorandum and Recommendation, the Court conducts a *de novo* review. *See* 28 U.S.C. § 636(b)(1) (West 2009); *United States v. Wilson*, 864 F.2d 1219, 1221 (5th Cir. 1989). Petitioner has objected to the recommendation, so the Court will conduct a *de novo* review.

II. Standard of Review

"Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party . . . may obtain a review of such decision by a civil action" in a district court of the United States. 42 U.S.C. § 405(g) (West 2015). Review of the Commissioner's decision to deny benefits

> is limited to determining whether that decision is supported by substantial evidence and whether the proper legal standards are applied. Substantial evidence is such relevant evidence as a responsible mind might accept to support a conclusion. It is more than a mere scintilla and less than a preponderance. A

> finding of no substantial evidence is appropriate only if no credible evidentiary choices or medical findings support the decision. In applying this standard, we may not re-weigh the evidence or substitute our judgment for that of the Commissioner.

Harris v. Apfel, 209 F.3d 413, 417 (5th Cir. 2000) (quoting *Ripley v. Chater*, 67 F.3d 552, 555 (5th Cir. 1995) and citing *Johnson v. Bowen*, 864 F.2d 340, 343–44 (5th Cir. 1988)) (footnotes and quotation marks omitted).

Consequently, this Court must affirm the Commissioner's determination unless it finds that 1) the ALJ applied an incorrect legal standard, or 2) that the ALJ's determination is not supported by substantial evidence. *Boyd v. Apfel*, 239 F.3d 698, 704 (5th Cir. 2001). The Court weighs four elements of proof in determining if substantial evidence supports the Commissioner's determination: 1) the objective medical facts; 2) the diagnoses and opinions of treating and examining physicians; 3) the claimant's subjective evidence of pain and disability; and 4) the claimant's age, education, and work experience. *Martinez v. Chater*, 64 F.3d 172, 174 (5th Cir. 1995). Conflicts in the evidence and credibility assessments are for the Commissioner to resolve. *Newton v. Apfel*, 209 F.3d 448, 452 (5th Cir. 2000).

III. Social Security Administration Evaluation Process

The Social Security Administration requires that disability claims be evaluated according to a five-step process. *See* 20 C.F.R. §§ 404.1520, 416.920 (West 2012). In the first step, the ALJ evaluates whether the claimant is engaged in substantial gainful activity. *Id.* "Substantial gainful activity" means the performance of "work activity involving significant physical or mental abilities for pay or profit." *Newton*, 209 F.3d at 452-53 (citing 20 C.F.R. § 404.1572(a)-(b)) (West 2012). A claimant who is working and engaging in substantial gainful activity will not be found to be disabled regardless of her medical condition, or her age, education, and work experience. 20 C.F.R. § 404.1520(b) (West 2012).

In the second step, the ALJ evaluates whether the claimant has a medically determinable physical or mental impairment that is severe, or a combination of impairments that is severe. 20 C.F.R. § 404.1520(a)(4)(ii) (West 2012); *Stone v. Heckler*, 752 F.2d 1099, 1100-01 (5th Cir. 1985). An impairment can be considered as not severe only if it is a slight abnormality having such minimal effect on the individual that it would not be expected to interfere with the individual's ability to work, irrespective of age, education, or work experience. *See Stone*, 752 F.2d at 1101. An individual who does not have a severe impairment will not be found to be disabled. 20 C.F.R. § 404.1520(c) (West 2012).

In the third step, the ALJ evaluates whether the claimant has an impairment that meets or is medically equal to the criteria of the listed impairments in Appendix 1 ("the Listings") of the regulations. 20 C.F.R. § 404.1520(a)(4)(iii) (West 2012). If the ALJ finds claimant's impairment meets or is equal to the criteria, she will be considered disabled without consideration of her age, education, or work experience. 20 C.F.R. § 404.1520(d) (West 2012). The evaluation continues to the fourth step if the claimant does not qualify under the Listings. 20 C.F.R. § 404.1520(e) (West 2012). However, before going on to the fourth step, the ALJ evaluates the claimant's residual functional capacity. *Perez v. Barnhart*, 415 F.3d 457, 461-62 (5th Cir. 2005). The RFC is a multidimensional description of the work-related abilities that the claimant still has despite any medical impairment. 20 C.F.R. § 404.1545(a)(1) (West 2012); *Perez*, 415 F.3d at 461-62.

Under the fourth step, the ALJ applies the RFC assessment to the claimant's past relevant work. 20 C.F.R. § 404.1520(f) (West 2012). If the claimant is able to perform the work she has done in the past, then a finding of "not disabled" will be made. 20 C.F.R. § 404.1520(a)(4)(iv) (West 2012). However, if the claimant's impairment prevents her from performing her past work, the ALJ goes on to the fifth step to determine whether the impairment prevents her from

performing other work. 20 C.F.R. § 404.1520(g)(1) (West 2012). The ALJ looks to the claimant's age, education, and work experience to determine whether she is able to perform other work. 20 C.F.R. § 404.1520(a)(4)(v) (West 2012). If the claimant is unable to perform other work, she will be found to be disabled. *Id.*

Analysis

Plaintiff argues the ALJ committed two errors in her case: 1) failing to properly execute step three of the sequential-evaluation process regarding Plaintiff's mental impairments; and 2) finding that there was substantial evidence in the record to conclude that the Plaintiff's RFC allowed her to work, especially after the ALJ improperly relied on the medical opinions of non-treating, non-examining consultative experts in his RFC determination. Pl.'s Objection to Report and Recommendation of the U.S. Magistrate Judge, May 22, 2017 (Docket Entry No. 19), page 2. Magistrate Judge Chestney found: 1) the ALJ did not commit a procedural error during the step-three analysis that affected Plaintiff's substantial rights; and 2) the ALJ's RFC determination was properly supported by substantial evidence. This Court agrees.

A. Step Three Analysis

Plaintiff claims the ALJ failed to properly execute step three of the evaluation process. Specifically, plaintiff argues the ALJ ignored both Listing 12.03 and the side effects of Plaintiff's medication; the ALJ did not have a health expert testify at the hearing; and the ALJ improperly weighed the mental health experts' opinions in the Paragraph B analysis.

1. Failure to Assess Medication Side Effects

Plaintiff claims the ALJ's failure to consider Plaintiff's medication side effects was a procedural error that requires remand. Specifically, Plaintiff argues the ALJ was required to consider the "type, dosage, effectiveness, and side effects of any medication the individual takes

or has taken to alleviate pain or other symptoms." Pl.'s Objection at 3. Magistrate Judge Elizabeth Chestney found the ALJ was not required to elaborate on the side effects. This Court agrees with Judge Chestney.

Social Security Ruling (SSR) 96-7p (which was still in effect at the time of the ALJ's decision) states the ALJ must consider the "type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms" when evaluating a claimant's credibility. A review of the medical records in this case reveals one instance in which any side effect of Plaintiff's medication is mentioned. The medical records in this case contain "Follow-Up Notes" from Plaintiff's visits with her treating psychiatrist to evaluate whether her psychiatric medication needed to be changed. Tr. 321-26, 341-45, 430-32, 442-50. The only recorded evidence of side effects that Plaintiff has identified is a note by Dr. Troiano from Plaintiff's June 2, 2014 visit, which states that the sertraline prescribed to Plaintiff originally gave her nightmares and increased her sleep talking, but despite an increased dosage, the side effects decreased. Tr. 448. Plaintiff may have also been on imipramine, trifluroperazine, klonopin and clonozepambut, but nothing in the record indicates what kind of side effects (if any) these medications had on Plaintiff. Tr. 321-26, 341-45, 430-32, 442-50. And, nothing in the record indicates what side effects were listed on each medication's label. *Id.*

Although the ALJ did not elaborate on or even mention medication side effects, this omission does not render the opinion procedurally improper such that remand is warranted. *See Stanton v. Astrue,* No. 1:07-cv-215, 2008 WL 2186434, at *2 (D. Vt. May 23, 2008). In *Stanton*, the Court found that the ALJ's failure to consider medication side effects was not reversible error, because there was no evidence that the side effects prevented the claimant from working. *Id.* Similarly, there is no evidence in the record in this case to suggest that the actual or potential

medication side effects prevented Plaintiff from working. *See id.* Plaintiff only mentioned adverse side effects from medication once and even these side effects subsided after the dosage was increased. Tr. 448. And, there is nothing in the record that indicates that the other medications Plaintiff was on could cause any potential side effects that would prevent Plaintiff from working. Tr. 321-26, 341-45, 430-32, 442-50. Consequently, the ALJ did not err in failing to assess the impact of Plaintiff's medication on her ability to work, and alternatively any error has not been shown to be prejudicial.

2. Failure to Have a Medical Expert Present at Administrative Hearing

Plaintiff claims that the ALJ committed reversible error by failing to have a medical expert present at her administrative hearing. Specifically, Plaintiff argues that the ALJ's failure to have a medical expert present at the hearing resulted in the ALJ having to rely on his own interpretation of psychiatrist Robert Toriano's notes, without any expert input as to the severity of Plaintiff's mental problems. Pl.'s Objection at 3-4. Judge Chestney found that the ALJ was not required to have a medical expert present to testify at the hearing. This Court agrees.

Dr. Toriano was Plaintiff's treating physician for mental health, and had diagnosed Plaintiff with psychosis in April 2013. Pl.'s Objection at 2. In *Kneeland v. Berryhill*, 850 F.3d 749 (5th Cir. 2017), the Fifth Circuit affirmed that medical opinions from treating physicians must be considered by the ALJ, and these medical opinions are generally entitled to significant weight. The Court in *Kneeland* ultimately remanded the case for further proceedings, based on the ALJ's failure to address, or even mention, the opinion of the treating doctor in his written decision. *Id.* at 761-62. As Judge Chestney notes, Dr. Deutsch's assessment of Plaintiff occurred after Plaintiff received her psychosis diagnosis from Dr. Toriano. Tr. 14. Either way, the ALJ was not required to have a medical expert present at the hearing. While *Kneeland* does require

the ALJ to consider and give significant weight to the treating physician's medical opinion, it does not require an ALJ to call upon expert testimony to explain or give insight into that opinion. *See* 850 F.3d at 751-62. As Plaintiff notes here, the ALJ has the discretion to call or not call upon a medical expert at the administrative hearing. *Haywood v. Sullivan*, 888 F.2d 1463, 1467-68 (5th Cir. 1989). The facts in *Haywood* are slightly different than those in the present case, but this does not diminish the ALJ's discretion to disallow the use of medical expert testimony at the hearing. The use and consideration of medical expert testimony is solely within the discretion of the ALJ. *Dominguez v. Astrue*, 286 F. App'x 182, 186 (5th Cir. 2008).

As the Court determined in *Haywood*, an ALJ is not required to consult a medical expert for evaluation of mental RFC evidence, even where new medical evidence is received subsequent to the last professional evaluation. *Haywood*, 888 F.2d at 1467-68. The ALJ need only obtain updated medical equivalency opinion "when additional medical evidence is received which, in the opinion of the ALJ, may change the determination . . . that the impairment(s) does not equal the listing." *Id.* at 1468 (citing SSR 83–29, reprinted in Social Security Reporting Serv. Rulings 93 (West Supp. 1989). Again, this gave the ALJ the discretion to determine whether or not to allow expert medical testimony at Plaintiff's administrative hearing.

And, unlike in *Kneeland*, there is evidence in this case that the ALJ both mentioned and considered Dr. Toriano's medical opinion in his decision. *See* 850 F.3d at 761-62. The record reflects that the ALJ considered all medical evidence in the record. Tr. 20-30. Furthermore, the ALJ specifically mentioned Dr. Toriano's opinion, which stated that Plaintiff's diagnosis was major depressive disorder and psychotic disorder, and that her medications were imipramine, trifluroperazine, and klonopin. Tr. 27. The ALJ then stated that Dr. Toriano's opinion did not indicate that Plaintiff was disabled or even had limitations greater than those determined in the

ALJ's decision. Tr. 30. As a result, the ALJ did not err in failing to have a medical expert present at the administrative hearing.

3. Failure to Consider Listing 12.03

Plaintiff argues the ALJ applied an incorrect legal standard by not considering Plaintiff's psychosis diagnosis under the correct listing. Specially, Plaintiff claims her psychosis should have been evaluated under Listing 12.03. Pl.'s Objection at 2. Magistrate Judge Chestney found that the ALJ's failure to consider whether Plaintiff's impairment met the criteria for Listing 12.03 was a harmless error. This Court agrees.

At step three of the sequential analysis, the ALJ must identify every Listing that could apply to the claimant. *See Bentley v. Comm'r of the Soc. Sec. Admin.*, No. 3:10-CV-0032-L, 2011 WL 903455, at *10 (N.D. Tex. Feb. 24, 2011); s*ee also Audler v. Astrue*, 501 F.3d 446, 448 (5th Cir. 2007) ("The ALJ did not identify the listed impairment for which Audler's symptoms fail to qualify, nor did she provide any explanation as to how she reached the conclusion that Audler's symptoms are insufficiently severe to meet any listed impairment. Such a bare conclusion is beyond meaningful judicial review.") (internal quotation omitted). Consequently, the ALJ erred by failing to consider whether Plaintiff's impairment met the criteria for disability under Listing 12.03.

However, "procedural perfection in administrative proceedings is not required," and the reviewing court "will not vacate a judgment unless the substantial rights of a party have been affected." *Mays v. Bowen,* 837 F.2d 1362, 1364 (5th Cir. 1988). The substantial rights of a claimant have been affected when she is able to meet her burden of demonstrating that her impairments meet the respective Listing requirements. *See Audler*, 501 F.3d at 449. In *Audler*, the Fifth Circuit held that remand to the Commissioner was necessary because the record

contained medical reports with undisputed findings that, if accepted by the ALJ, would have met the criteria for the listing's requirements. *Id.* Judge Chestney found this was not the case here, and this Court agrees.

Listing 12.03 encompasses "Schizophrenic, Paranoid and Other Psychotic Disorders" and is "[c]haracterized by the onset of psychotic features with deterioration from a previous level of functioning." 20 C.F.R. § Pt. 404, Subpt. P, App. 1 § 12.03. The required level of severity for these disorders is met when the claimant shows that the requirements of both paragraphs A and B of the listing are satisfied, or when the claimant shows that the requirements in paragraph C of the listing are satisfied. *Id.*

Paragraph A requires a showing of a "continuous or intermittent" "[m]edically documented persistence" of one or more of the following: (1) delusions or hallucinations; (2) catatonic or other grossly disorganized behavior; or (3) incoherence, loosening of associations, illogical thinking, or poverty of content of speech if associated with a blunt, flat, or inappropriate affect or emotional withdrawal and/or isolation. *Id.* Paragraph B requires a showing of at least two of the following: (1) marked restriction of activities of daily living; (2) marked difficulties in maintaining social functioning; (3) marked difficulties in maintaining concentration, persistence, or pace; or (4) repeated episodes of decompensation, each of extended duration. *Id.*

Paragraph C requires a showing of the following:

> Medically documented history of a chronic schizophrenic, paranoid, or other psychotic disorder of at least 2 years' duration that has caused more than a minimal limitation of ability to do basic work activities, with symptoms or signs currently attenuated by medication or psychosocial support, and one of the following:
>
> 1. Repeated episodes of decompensation, each of extended duration; or
> 2. A residual disease process that has resulted in such marginal adjustment that even a minimal increase in mental demands or change in the environment would be predicted to cause the individual to decompensate; or

> 3. Current history of 1 or more years' inability to function outside a highly supportive living arrangement, with an indication of continued need for such an arrangement.

Id.

Judge Chestney analyzed each of the three paragraphs to determine if there was sufficient medical evidence in the record for Plaintiff to potentially satisfy Paragraphs A and B, or Paragraph C. Judge Chestney ultimately determined that there was not sufficient evidence, and this Court agrees. As a result, Plaintiff cannot demonstrate that she satisfies the requirements of Listing 12.03, and therefore she is not entitled to remand for consideration of her psychosis under this listing. *See Audler*, 501 F.3d at 448. Any error that may have resulted from the ALJ's failure to analyze Plaintiff's psychosis under Listing 12.03 was merely harmless error. Subsequently, the ALJ did not commit reversible error by failing to consider Plaintiff's psychosis diagnosis under Listing 12.03.

4. Failure to Properly Weigh Medical Opinions in Paragraph B Analysis

Plaintiff argues the ALJ committed reversible error by disregarding and dismissing the medical opinions of Dr. Zumwalt and treating physician Dr. Toriano, and by giving significant weight to the medical determination of state agency physician Susan Posey, and the determination on reconsideration of the state agency examiner Connie Deutsch (both of whom were non-treating and non-examining physicians in this case).

Plaintiff is correct in noting that 20 C.F.R. § 404.1520a(e)(4) requires an ALJ to review a claimant's "significant history, including examination and laboratory findings, and the functional limitations that were considered in reaching a conclusion about the severity of the mental impairment(s)." Plaintiff claims that the ALJ committed reversible error by failing to explain why he dismissed numerous telling notes recorded by mental health workers. Pl.'s Objection at 5. For example, the mental health assessments of Dr. Zumwalt that found that Plaintiff could not

spell a word backwards or count backwards from one hundred by serial sevens or threes, and had memory problems Tr. 26. That Plaintiff had conversations with herself in her head, bad dreams, was depressed and anxious in her mood. Tr. 27. That she had a psychotic disorder, and as noted by Dr. Toriano, would be sleepless and often woke screaming in the night for no apparent reason. Tr. 341. The records of Dr. Zumwalt also revealed that Plaintiff could not repeat three unrelated words five minutes after being told them, did not know her home address, could not remember her mother's or father's birthdays, and was unaware of the content of recent news. Tr. 341. Plaintiff was given a Global Assessment of Functioning (GAF) score of 50 by Dr. Zumwalt; a score of this kind indicates that Plaintiff had significant problems, and there were no contradictory GAF score in the records. Tr. 279-286.

As Judge Chestney notes, these assessments are significant, and shed light on some of Plaintiff's mental difficulties. However, there is no basis for Plaintiff to argue that these assessments were "dismissed" by the ALJ, or that they were not considered by the ALJ at all. While Plaintiff argues that the ALJ "cherry picked" medical assessments which supported his determination while ignoring those that did not, the record reflects that the ALJ took into consideration all of the psychological evidence in the record. Tr. 20-30. This includes Dr. Toriano's treatment notes, as well as the assessments of Dr. Zumwalt. *Id.* at 26-28. Although the ALJ must consider all of the evidence in the record, he is not required to elaborate on each and every piece of evidence in his written opinion. *See Falco v. Shalala*, 27 F.3d 160, 163 (5th Cir. 1994) (rejecting rule requiring ALJ to specify every rejected and accepted piece of evidence). As a result, Plaintiff cannot argue that the ALJ dismissed or ignored relevant evidence simply because he did not elaborate on that evidence in his written opinion. *See id.*

Judge Chestney notes that the ALJ relied heavily on and gave significant weight to the

opinions of non-treating and non-examining state doctors Susan Posey and Connie Deutsch. Tr. 10. Despite Plaintiff's arguments to the contrary, this does not constitute reversible error. While *Kneeland* does mandate that a treating physician's opinion be given significant weight, the treating physician's medical opinion is not always controlling, and the medical opinions of other non-treating physicians can still be given significant weight. *See* 850 F.3d at 760-61; *Zimmerman v. Astrue*, 288 Fed. Appx. 931, 935-36 (5th Cir. 2008). *Kneeland* cites *Newton v. Apfel*, 209 F.3d 448 (5th Cir. 1995) for the proposition that a treating physician's opinion is controlling under certain circumstances. *See Kneeland*, 209 F.3d at 760. However, in *Zimmerman***,** the Court determined that the *Newton* precedent did not necessarily apply in cases where there is competing first-hand medical evidence. *Zimmerman*, 388 Fed. Appx. at 935-36. More specifically, the *Newton* precedent does not necessarily apply when there are first-hand medical opinions by other examining doctors that are not fully consistent with the medical opinions of the treating physician. *Id*. Like in *Zimmerman* and unlike in *Newton*, there was competing first-hand medical evidence with respect to Plaintiff's diagnosis in this case – the medical opinions of Doctors Posey and Deutsch Tr. 20-30. So, while Dr. Toriano's medical opinion must be considered and given significant weight, it does not have to be treated as controlling in light of competing first-hand medical evidence.

The ALJ could still have given significant weight to Dr. Toriano's and Dr. Zumwalt's opinions while also giving significant weight to the medical determinations of Drs. Posey and Deutsch. *See Kneeland*, 209 F.3d at 760-61. The ALJ's opinion suggests that this is exactly what occurred. Tr. 23-30. Consequently, the ALJ did not commit reversible error in his weighing of the competing medical opinions.

B. RFC Analysis

Plaintiff contends that there was not substantial evidence to support the ALJ's finding that Plaintiff's RFC allowed her to work. Plaintiff also argues once again that the ALJ was not entitled to rely on the opinions of non-treating, non-examining consultative experts in reaching this finding.

The RFC determination is "an assessment of an individual's ability to do sustained work-related physical and mental activities in a work setting on a regular and continuing basis." *Myers v. Apfel*, 238 F.3d 617, 620 (5th Cir. 2001) (citing SSR 96-8p, 1996 WL 374184, at *1) (S.S.A. 1996). A "regular and continuing basis" means "8 hours a day, for 5 days a week, or an equivalent work schedule." *Id.* (citing 1996 WL 374184, at *2). The RFC assessment is a "function-by-function assessment based upon all of the relevant evidence of an individual's ability to do work-related activities." *Id.* (citing 1996 WL 374184, at *3). The RFC assessment must be "based on all relevant evidence in the claimant's record," *Perez v. Barnhart*, 415 F.3d 457, 462 (5th Cir. 2005), and must "include a resolution of any inconsistencies in the evidence." *Myers*, 238 F.3d at 620. Further, the RFC assessment must include a narrative discussion describing how the evidence supports each conclusion. *Id*; SSR 96-8p, 1996 WL 374184, at *7. RFC determinations are "inherently intertwined with matters of credibility," and the ALJ's credibility determinations are generally entitled to great deference. *Acosta v. Astrue*, 865 F. Supp. 2d 767, 790 (W.D. Tex. 2012) (quoting *Outlaw v. Astrue*, 412 Fed. Appx. 894, 897 (7th Cir. 2011), and citing *Newton v. Apfel*, 209 F.3d 448, 459 (5th Cir. 2000) (internal quotation omitted)).

Plaintiff claims that the ALJ's review failed to include more than just a summary of the relevant medical evidence which went into his RFC determination. While it is true that Judge

Chestney stated that the ALJ "summarized" Plaintiff's conditions, the ALJ's analysis is far more exhaustive than a mere summary. *See* Tr. 20-31. Ultimately, the ALJ's written opinion contains almost a dozen pages of thorough analysis of the medical evidence and its implications. *Id.* This detailed analysis includes both physical and medical evidence from numerous sources within the record. *Id.*

Furthermore, while the ALJ did label Plaintiff's disc disease in the lumbar spine, bilateral degenerative joint disease of the knees, and obesity as "severe impairments," the ALJ then stated that Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 416.920(d), 416.925 and 416.926). Tr. 20. While the ALJ noted that Plaintiff was not necessarily pain-free, he also noted that "[i]t did not appear that the claimant's pain was of such frequency, intensity, or duration as to be disabling." Tr. 28. The ALJ also noted that "[t]he evidence of record failed to demonstrate the presence of pathological clinical signs, significant medical findings, or neurological abnormalities, which would establish the existence of a pattern of pain of such severity that would contraindicate claimant's engaging in all substantial gainful activity." Tr. 28.

Plaintiff claims that the ALJ failed to point out where in the record it is stated that Plaintiff can stoop, kneel, crouch, and crawl. The ALJ specifically cites to portions of the record which state that Plaintiff was able to get on and off the examination table independently, could bend all the way over and get back up, and could squat and engage in normal range of motion in her knees. Tr. 25. Stooping, kneeling, crouching, crawling, and climbing should probably be considered beyond the basic work activities given as examples by the SSA. *See* 20 C.F.R. § 404.1522(b) (West 2017). However, since there was medical evidence in the record to support

the ALJ's finding that Plaintiff could engage in these activities, it follows that this evidence is enough to support a finding that Plaintiff could engage in more basic work activities.

The ALJ also cited to the RFC determination done by state agency physician Robin Rosenstock. Tr. 21-22. Dr. Rosenstock's assessment found that Plaintiff could lift up to 50 pounds and 25 pounds frequently, could stand and/or walk for a total of about 6 hours in an 8-hour workday, and could sit for about 6 hours in an 8-hour workday. Tr. 90. Again, the ALJ was not required to have medical expert testimony present to interpret Dr. Rosenstock's assessment. *See Dominguez v. Astrue*, 286 F. App'x 182, 186 (5th Cir. 2008) (the use and consideration of medical expert testimony is solely within the discretion of the ALJ).

In addition to her physical capabilities, the ALJ determined that Plaintiff was able to understand, remember and carry out simple instructions, get along with co-workers and supervisors, have interactions with the public, deal with changes and perform simple acts of judgment despite the fact that she had the severe mental impairments of psychosis, depression, anxiety and post-traumatic stress syndrome. Tr. 23. Once again, the ALJ had the discretion to give significant weight to the medical opinions of Drs. Deutsch and Posey, as long as he also gave significant consideration to the opinion of Dr. Toriano. *See Kneeland v. Berryhill*, 850 F.3d 749, 760-61 (5th Cir. 2017). Judge Chestney found that the ALJ did not commit reversible error, and that his RFC determination was supported by substantial evidence. This Court agrees.

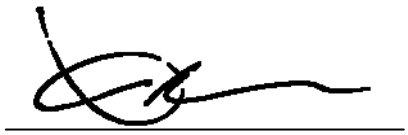
Conclusion

For the foregoing reasons, the recommendation of the Magistrate Judge is ACCEPTED, and the decision of the Commissioner is AFFIRMED.

Plaintiff Amineh Zahraei's petition to have the Commissioner's decision reversed and remanded is DENIED. The Clerk is instructed to enter a judgment on behalf of Defendant and to close this case.

It is so ORDERED.

SIGNED this 17th day of July, 2017.



XAVIER RODRIGUEZ
UNITED STATES DISTRICT JUDGE