UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

VIRGEN CARABALLO, Plaintiff,	:	
v.	:	C.A. No. 16-480WES
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

Based on applications filed on February 6, 2014, Plaintiff Virgen Caraballo claims that she was disabled from July 3, 2013, until June 2, 2015, due to pain in her hips and knees, carpal tunnel syndrome in both hands, as well as depression and anxiety.[1] The matter is before the Court on her motion to reverse the Commissioner's decision denying Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under §§ 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. §§ 405(g), 1383(c)(3) (the "Act"). Plaintiff claims that the Administrative Law Judge ("ALJ") erred in failing properly to credit the opinions of her primary care physician (Dr. Laura Ofstead) and her therapist (Mr. Walter Orellana); in affording inappropriate weight to the opinions of the state agency reviewing expert physicians (Drs. Stephanie Green and Donn Quinn) and psychologist (Dr. Clifford Gordon), as well as to that of the board-certified orthopedic surgeon (Dr. Louis Fuchs) who testified as a medical expert at the hearing; in failing to find "severe" at Step Two Plaintiff's knee, hand and mental impairments;

[1] The date ending Plaintiff's alleged period of disability is based on a subsequent disability application, which resulted in the finding that Plaintiff was disabled beginning on the day following the unfavorable decision in this case (June 3, 2015). As to the alleged impairments, the list in the text includes only those still in issue. In her application, Plaintiff claimed several others, including congestive heart failure and mini-stroke, both of which the ALJ found were not medically established. See also n.2, *infra*. Because Plaintiff has not challenged these findings, they will not be discussed in this report and recommendation.

and in failing properly to develop the vocational evidence at Step Five. Defendant Nancy A. Berryhill ("Defendant") has filed a motion for an order affirming the Commissioner's decision.

The matter has been referred to me for preliminary review, findings and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B). Having reviewed the entire record, I find that the ALJ's findings are sufficiently supported by substantial evidence and that any error is harmless. Accordingly, I recommend that Plaintiff's Motion for Reversal of the Disability Determination of the Commissioner of Social Security (ECF No. 11) be DENIED and Defendant's Motion for an Order Affirming the Decision of the Commissioner (ECF No. 15) be GRANTED.

I. BACKGROUND

Plaintiff is a "younger person" who had worked for many years with mentally impaired children in various facilities before filing a prior application for disability in June 2011 based on a hip disorder, bipolar disorder and anemia. Tr. 207. Despite her claim that she had been told she needed a total hip replacement and diagnoses of depression and panic disorder (but not bipolar disorder), this application was denied on November 18, 2011. Tr. 108. After the denial, Plaintiff did not have a hip replacement but returned to work as a picker/packer filling orders for T-shirts and jewelry. In July 2013, she stopped working when she was laid off. Tr. 42, 256. Plaintiff claims that she lost her job because she had to take time off for a hospitalization and doctors' appointments. Tr. 42.

After she stopped working in July 2013, Plaintiff treated briefly in Pennsylvania with a nurse practitioner but otherwise had no treatment until the week following the filing of the current disability application (in February 2014), when she saw her long-time primary care physician, Dr. Ofstead. In her treating record, Dr. Ofstead noted that it was Plaintiff's first

appointment since July 2013 and that she came to the appointment with a "paper for filing for disability," Tr. 590, as well as that Plaintiff "feels that she is disabled from working because of the hip pain," Tr. 591. Dr. Ofstead also wrote: "she hasn't pursued employment since last July related to this, but also didn't follow through with further evaluation and treatment for her hip arthritis." Id. Dr. Ofstead referred Plaintiff to the Rhode Island Hospital orthopedic clinic, which diagnosed "mild bilateral hip osteoarthropathy, left greater than right," sent her for physical therapy and prescribed NSAIDS for the hip complaint; testing revealed no impairment of the hands. Tr. 423-37, 607-21. During the same period, a consultative examination report, prepared by a physician, Dr. William Palumbo, on April 7, 2014, reflects subjective complaints of left hip pain and a slightly labored gait but makes no clinical findings. Dr. Palumbo observed Plaintiff's ability to walk without a cane, to get on and off the examination table and to dress and undress without assistance; on examination, he noted no muscle atrophy and full rotation of both the right and left hip. Tr. 422.

This record was reviewed by two state agency expert physicians, Drs. Green and Quinn, and a psychologist, Dr. Gordon. Based on their findings, the claim was denied initially on April 11, 2014, and on reconsideration on August 4, 2014. Tr. 64-81, 84-105. Shortly before denial on reconsideration, Plaintiff initiated mental health treatment, for the first time as far as the record reveals, with a psychiatrist, Dr. Jocelyn Lahaye at Angell Street Psychiatry, Ltd. Because the initiation of mental health treatment came so late in the alleged period of disability, no records reflecting this treatment were in the record reviewed by Dr. Gordon.

After reconsideration was denied,[2] Plaintiff continued mental health treatment with Dr. Lahaye, whose intake record reflects diagnoses of depression and anxiety, resulting in prescriptions for medication and a referral for therapy. Tr. 471-72, 487. By the fourth appointment, Dr. Lahaye concluded that depression and anxiety were "both in partial remission." Tr. 478. By October 2014, Dr. Lahaye found that Plaintiff was "[d]oing well"; in December 2014, she recorded that the "[m]eds are working" despite increased stress over family issues; in January and February 2015, she found Plaintiff to be "stable." Tr. 483, 485-86, 490, 498. In March 2015, Dr. Lahaye recorded Plaintiff's report that her sister was very ill and noted that Plaintiff was sad and depressed; the recorded assessment was "remains partially treated." Tr. 502-03. Other than occasional findings of depressed, sad or tearful mood and affect, Dr. Lahaye's mental status examinations reflect largely normal findings. E.g., Tr. 472, 479, 485, 502. During the same period, three times (once in August 2014, once in September 2014, and once in December 2014), Plaintiff saw a social worker for therapy, also at Angell Street Psychiatry, Ltd. In contrast to Dr. Lahaye, whose mental status examinations consistently note no hallucinations or delusions, e.g., Tr. 572, Mr. Orellana recorded psychotic symptoms; relatedly, his notes reflecting depression, anxiety, tearfulness and fearfulness clash with Dr. Lahaye's contemporaneous findings of "doing well and feeling well," "stable mood," "able to enjoy things." Compare Tr. 488, 492-95, with Tr. 477, 481-86.

Also after reconsideration, Plaintiff began to see Blackstone Orthopedics & Sports Medicine ("Blackstone") about her hands, knees and hips. Her hand pain was diagnosed as "mild bilat carpal tunnel syndrome." Tr. 508. In November 2014, she underwent surgical

[2] Also after reconsideration, Plaintiff was hospitalized at the end of 2014 for abdominal pain, resulting in diagnoses of pancreatitis and untreated diabetes. Tr. 446-60, 592-99. By April 2015, Dr. Ofstead noted "much better" control of glucose levels. Tr. 571. Plaintiff has not placed either of these conditions in issue.

release of the left hand, which yielded good results. Tr. 515, 552. In April 2015, the right hand was surgically released. Tr. 563. At a follow-up appointment in May, her treating physician noted that both hands were doing well. Tr. 637-38. Providers at Blackstone also performed repeated injections of both of Plaintiff's hips and knees based on her complaints, which helped "somewhat." Tr. 510, 528, 527, 535. While the Blackstone record states that the hip diagnosis was osteoarthritis in the hips, Tr. 510, 646, there is no evidence of more recent imaging since the 2014 image reflecting "mild" osteoarthritis. See Tr. 617. Blackstone did procure imaging of the knees, resulting in the diagnosis of patellar tilt and subluxation and mild arthritis of the left knee, but no significant abnormalities in the right knee. Tr. 547. Apart from injections, the recommended treatment was weight loss and strengthening. E.g., Tr. 528, 548. The possibility of surgical options for the knee in the future was noted, but the file does not reflect a surgical recommendation for either the hips or knees. See Tr. 548.

Dr. Ofstead's treating notes from her late 2014 and 2015 encounters with Plaintiff contain nothing about the hip/hand/knee pain and little about the mental health concerns at issue in this case. Tr. 571-85. Dr. Ofstead's last reference to an examination of the musculoskeletal system appears in the record of an examination on December 23, 2014: "[n]o joint tenderness, no muscle tenderness"; the last reference to the mental health issues appears in the same record: "[d]enies psych symptoms." Tr. 580; see Tr. 584 (September 2014, note: "She is following with psychiatry and is now on new meds as noted. Feels calmer and more in control . . ."). In April 2015, Dr. Ofstead recorded that "[Plaintiff] is trying to walk daily as well for exercise"; there is no reference to any issues with the hips or knees. Tr. 571.

Throughout the period from onset to the ALJ's denial of disability, Plaintiff's weight ranged from 221 to 248 pounds, based on which she has been diagnosed with obesity. Tr. 407,

572. At the hearing before the ALJ, Plaintiff testified that the main reason she cannot work is the pain in her hips and knees, which makes her unsteady on her feet, as well as because of her hands. Tr. 60.

II. STANDARD OF REVIEW

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla – that is, the evidence must do more than merely create a suspicion of the existence of a fact, and must include such relevant evidence as a reasonable person would accept as adequate to support the conclusion. Ortiz v. Sec'y of Health & Human Servs., 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec'y of Health & Human Servs., 647 F.2d 218, 222 (1st Cir. 1981); Brown v. Apfel, 71 F. Supp. 2d 28, 30 (D.R.I. 1999). Once the Court concludes that the decision is supported by substantial evidence, the Commissioner must be affirmed, even if the Court would have reached a contrary result as finder of fact. Rodriguez Pagan v. Sec'y of Health & Human Servs., 819 F.2d 1, 3 (1st Cir. 1987); see also Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991); Lizotte v. Sec'y of Health & Human Servs., 654 F.2d 127, 128 (1st Cir. 1981).

The determination of substantiality is based upon an evaluation of the record as a whole. Brown, 71 F. Supp. 2d at 30; see also Frustaglia v. Sec'y of Health & Human Servs., 829 F.2d 192, 195 (1st Cir. 1987); Parker v. Bowen, 793 F.2d 1177, 1180 (11th Cir. 1986) (court also must consider evidence detracting from evidence on which Commissioner relied). Thus, the Court's role in reviewing the Commissioner's decision is limited. Brown, 71 F. Supp. 2d at 30. The Court does not reinterpret the evidence or otherwise substitute its own judgment for that of the Commissioner. Id. at 30-31 (citing Colon v. Sec'y of Health & Human Servs., 877 F.2d 148, 153 (1st Cir. 1989)). "[T]he resolution of conflicts in the evidence is for the Commissioner, not

the courts." Id. at 31 (citing Richardson v. Perales, 402 U.S. 389, 399 (1971)). A claimant's complaints alone cannot provide a basis for entitlement when they are not supported by medical evidence. See Avery v. Sec'y of Health & Human Servs., 797 F.2d 19, 20-21 (1st Cir. 1986); 20 C.F.R. § 404.1529(a).[3]

III. DISABILITY DETERMINATION

The law defines disability as the inability to do 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 twelve months. 42 U.S.C. § 416(I); 20 C.F.R. § 404.1505. The impairment must be severe, making the claimant unable to do previous work, or any other substantial gainful activity which exists in the national economy. 42 U.S.C. § 423(d)(2); 20 C.F.R. §§ 404.1505-1511.

A. Five-Step Analytical Framework

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. § 404.1520. First, if a claimant is working at a substantial gainful activity, the claimant is not disabled. 20 C.F.R. § 404.1520(b). Second, if a claimant does not have any impairment or combination of impairments that significantly limit physical or mental ability to do basic work activities, then the claimant does not have a severe impairment and is not disabled. 20 C.F.R. § 401.1520(c). Third, if a claimant's impairments meet or equal an impairment listed in 20 C.F.R. Part 404, Appendix 1, the claimant is disabled. 20 C.F.R. § 404.1520(d). Fourth, if a claimant's impairments do not prevent doing past relevant work, the claimant is not disabled. 20 C.F.R. § 404.1520(e)-(f). Fifth, if a claimant's impairments (considering RFC, age, education and past

[3] The Social Security Administration has promulgated identical sets of regulations governing eligibility for DIB and SSI. See McDonald v. Sec'y of Health & Human Servs., 795 F.2d 1118, 1120 n.1 (1st Cir. 1986). For simplicity, the Court will cite to one set only. See id.

work) prevent doing other work that exists in the local or national economy, a finding of disabled is warranted. 20 C.F.R. § 404.1520(g). Significantly, the claimant bears the burden of proof at Steps One through Four, but the Commissioner bears the burden at Step Five. Wells v. Barnhart, 267 F. Supp. 2d 138, 144 (D. Mass. 2003) (five step process applies to both DIB and SSI claims). That is, once the ALJ finds that a claimant cannot return to the prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the local or national economy. Seavey v. Barnhart, 276 F.3d 1, 5 (1st Cir. 2001). To meet this burden, the ALJ must develop a full record regarding the vocational opportunities available to a claimant. Allen v. Sullivan, 880 F.2d 1200, 1201 (11th Cir. 1989).

B. Treating Physicians and Other Sources

Substantial weight should be given to the opinion, diagnosis and medical evidence of a treating physician unless there are good reasons to do otherwise. See Rohrberg v. Apfel, 26 F. Supp. 2d 303, 311 (D. Mass. 1998); 20 C.F.R. § 404.1527(c). If a treating physician's opinion on the nature and severity of a claimant's impairments is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and is not inconsistent with the other substantial evidence in the record, the ALJ must give it controlling weight. Konuch v. Astrue, No. 11-193L, 2012 WL 5032667, at *4-5 (D.R.I. Sept. 13, 2012); 20 C.F.R. § 404.1527(c)(2). The ALJ may discount a treating physician's opinion or report regarding an inability to work if it is unsupported by objective medical evidence or is wholly conclusory. See Keating v. Sec'y of Health & Human Servs., 848 F.2d 271, 275-76 (1st Cir. 1988). The ALJ's decision must articulate the weight given, providing "good reasons" for the determination. See Sargent v. Astrue, No. CA 11–220 ML, 2012 WL 5413132, at *7-8, 11-12 (D.R.I. Sept. 20, 2012) (where

ALJ failed to point to evidence to support weight accorded treating source opinion, court will not speculate and try to glean from the record; remand so that ALJ can explicitly set forth findings).

When a treating physician's opinion does not warrant controlling weight, the ALJ must nevertheless weigh the medical opinion based on the (1) length of the treatment relationship and the frequency of examination; (2) nature and extent of the treatment relationship; (3) medical evidence supporting the opinion; (4) consistency with the record as a whole; (5) specialization in the medical conditions at issue; and (6) other factors which tend to support or contradict the opinion. 20 C.F.R § 404.1527(c). A treating physician's opinion is generally entitled to more weight than a consulting physician's opinion. See 20 C.F.R. § 404.1527(c)(2). If a treating source is not accorded controlling weight, the ALJ must apply the factors listed in 20 C.F.R. § 404.1527(c). As SSR 96-2p provides:

> The notice of the determination or decision must contain 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, 1996 WL 374188 (July 2, 1996). The regulations confirm that, "[w]e will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion." 20 C.F.R. § 404.1527(c)(2). However, where a treating physician has merely made conclusory statements, the ALJ may afford them such weight as is supported by clinical or laboratory findings and other consistent evidence of a claimant's impairments. See Wheeler v. Heckler, 784 F.2d 1073, 1075 (11th Cir. 1986).

A treating source who is not a licensed physician or psychologist is not an "acceptable medical source." 20 C.F.R. § 404.1513; SSR 06-03p, 2006 WL 2263437, at *2 (Aug. 9, 2006). Only an acceptable medical source may provide a medical opinion entitled to controlling weight

to establish the existence of a medically determinable impairment. SSR 06-03p, 2006 WL 2263437, at *2. An "other source," such as a licensed clinical social worker, is not an "acceptable medical source," and cannot establish the existence of a medically determinable impairment, though such a source may provide insight into the severity of an impairment, including its impact on the individual's ability to function. SSR 06-03p, 2006 WL 2263437, at *2-3. In general, an opinion from an "other source" is not entitled to the same deference as an opinion from a treating physician or psychologist. Id. at *5. Nevertheless, the opinions of medical sources who are not "acceptable medical sources" are important and should be evaluated on key issues such as severity and functional effects, along with other relevant evidence in the file. Id. at *4.

IV. ANALYSIS

A. Opinion Evidence

Plaintiff challenges the ALJ's treatment of virtually every opinion submitted in connection with the case. I focus first on the ALJ's rejection of the opinions from the primary care treating physician (Dr. Ofstead) and the treating therapist (Mr. Orellana) and then examine the issues posed by the ALJ's reliance on the testifying medical expert (Dr. Fuchs) and on the state agency reviewing physicians (Drs. Green and Quinn). The ALJ's reliance on the state agency psychologist (Dr. Gordon) is discussed in the next section of this report and recommendation.

Plaintiff contends that the ALJ's decision to afford "less probative weight" to Dr. Ofstead's opinion is flawed because he did not rely on "good reasons" that are grounded in substantial evidence. The argument founders because the ALJ did provide legally-sufficient reasons that are amply buttressed by the evidence: the opinion's inconsistency with Dr. Ofstead's

own treating notes and the absence of medically acceptable clinical techniques to support the opinion, coupled with Dr. Ofstead's status as "just a primary care physician." Tr. 25-26.

For starters, the Ofstead opinion was signed on May 6, 2015, and is based on "(1) severe depression (2) hip osteoarthritis," with extreme limitations including the inability to stand or walk for as long as fifteen minutes. Tr. 654-56. Yet Dr. Ofstead did not see Plaintiff in 2013 and her treating notes for 2014 and 2015[4] make no reference to treatment for depression, other than once noting that psychiatric medication was effective and once noting the absence of psychiatric symptoms. Tr. 580, 584. As to physical issues, after recording complaints of chronic hip and hand pain and making referrals in February and March 2014, Dr. Ofstead noted only that testing for carpal tunnel syndrome was negative, that her own examination of the musculoskeletal system reflected "[n]o joint tenderness, no muscle tenderness," and that Plaintiff was trying to walk daily for exercise. Tr. 571, 580, 586, 654-56. Also pertinent is that Dr. Ofstead's opinion adverts to a 2013 MRI and states that Plaintiff would "likely . . . benefit from hip replacement," yet the only imaging of the hip is from March 2014, which shows only "mild bilateral hip osteoarthropathy," and the record does not reflect that any qualified professional has ever recommended a hip replacement. Tr. 617, 654. Dr. Ofstead's opinion emphasizes "severe depression," yet the psychiatrist responsible for treating depression found that it responded so well to medication that, within a month of initiating treatment, Plaintiff had a "stable mood" and was "able to enjoy things." Tr. 477, 483. Finally, as interpreted by Dr. Fuchs, the expert

[4] While not mentioned by the ALJ, one other inconsistency between the record and the Ofstead opinion bears comment. Dr. Ofstead claimed in her opinion that she had seen Plaintiff "every 3-4 months" for ten years. Tr. 654. However, her treating notes tell a different story – from the onset of disability in July 2013 until February 14, 2014, Plaintiff did not see Dr. Ofstead at all. Tr. 590. In the immediate aftermath of filing for disability, Plaintiff saw Dr. Ofstead twice in February and once in March 2014, followed by another six-month gap with no treatment. Dr. Ofstead's only period of regular treatment is from September 2014 through April 2015, when she focused on medical matters not in issue in this case, diabetes and an infection. Tr. 571-84.

orthopedic surgeon who testified at the hearing, the clinical examinations that Dr. Ofstead did perform do not reflect "significant problems with the hips or knees." Tr. 52.

Based on the foregoing, I find that the "good reasons" deployed by the ALJ to support the weight he afforded to the Ofstead opinion are more than sufficient to meet the regulatory requirement that the determination not to afford controlling weight to a treating source must be supported by "good reasons." 20 C.F.R. § 404.1527(c)(2). I find no error in the ALJ's approach.

The ALJ's determination to afford the extreme mental limitations in the Orellana opinion "less probative weight" is equally well supported by substantial evidence. Tr. 23. As the ALJ observed, the opinion is from a social worker, who is not an acceptable medical source; therefore, the "good reason" requirement is not applicable. Taylor v. Astrue, 899 F. Supp. 2d 83, 88 (D. Mass. 2012). More substantively, the ALJ appropriately found that Mr. Orellana's description of profoundly-disabling mental illness contrasts dramatically with the contemporaneous notes of the treating psychiatrist, who found Plaintiff to have symptoms that responded quickly and positively to the initiation of treatment. E.g., Tr. 473 ("mildly depressed"); Tr. 478 ("MDD/GAD, both in partial remission"); Tr. 483 ("Doing well and feeling well"); Tr. 485 ("Meds are working"); see Pelletier v. Colvin, C.A. No. 13-651 ML, 2015 WL 247711, at *14 (D.R.I. Jan. 20, 2015) (no error when ALJ identifies inconsistencies as basis for affording limited weight to opinion). Also material is that Plaintiff saw the psychiatrist thirteen times over the period from June 2014 until March 2015, while she saw Mr. Orellana only three times in the same period.[5] See SSR 06-3p, 2006 WL 2329939, at *4-5 (Aug. 9, 2006) (factors to guide adjudicators in considering nonacceptable source opinions include length of treating relationship and frequency of meetings). I find no error in the ALJ's determination to reject the

[5] Mr. Orellana's notes confirm that there was a three-month hiatus in treatment with him between the second and third appointments, with at least one failure to appear. Tr. 495.

opinion of a social worker with a limited treating relationship based on the inconsistent treating record of an acceptable medical source – the psychiatrist – who had a far more extensive treating relationship.[6] See Rivera-Torres v. Sec'y Health & Human Servs., 837 F.2d 4, 5 (1st Cir. 1988) (ALJ may resolve conflicts between treating opinion and opinion from examining/consulting psychiatrist); Aponte Ortiz v. Berryhill, C.A. No. 16-584JJM, 2017 WL 6001698, at *11 (D.R.I. Nov. 9, 2017), adopted, 2017 WL 5992276 (D.R.I. Dec. 1, 2017) ("ALJ had the discretion to resolve the conflicts between the [opinions]").

There also is no error in the ALJ's reliance on Dr. Fuchs, the orthopedic surgeon who testified at the hearing. The ALJ asked Dr. Fuchs for his opinion regarding whether the medical evidence as of the date of the hearing, analyzed from an orthopedic perspective, reflected any "remarkable" aspects to the musculoskeletal system, including the hips, knees and hands. Dr. Fuchs's response – that apart from some pain with rotation motion in the left hip, "the rest of the musculoskeletal system was okay" – supports the ALJ's reliance on the state agency examiners who did not have access to the subsequent record, including all of the treatment records from Blackstone. That is, Dr. Fuchs's testimony provides substantial evidence that no decline or worsening in Plaintiff's physical condition is established by the record not seen by the state agency examiners. Aponte Ortiz, 2017 WL 6001698, at *11 (no error to rely on state agency experts who did not have access to post-examination record as long as it does not reflect substantial decline in plaintiff's condition); Crow v. Colvin, C.A. No. 13-225PAS, 2014 WL 3966362, at *12 (D.R.I. Aug. 13, 2014) ("With a dearth of medical evidence suggesting any

[6] Also unavailing is Plaintiff's argument that the Orellana opinion should have been afforded more weight because it is consistent with the 2011 consultative examination report of the expert psychologist (Dr. Pittenger) submitted in connection with her prior application. They are not consistent. For example, Dr. Pittenger found her ability to concentrate "grossly intact," while Mr. Orellana opined to "severe" limitations in the ability to concentrate to perform varied or even simple tasks. Compare Tr. 390, with Tr. 506-07. Relatedly, Dr. Pittenger's Global Assessment of Functioning score summarized Plaintiff's mental issues as falling into the moderate realm, while Mr. Orellana's box-checks are almost uniformly reflective of "severe" symptoms. Compare Tr. 391, with Tr. 505-07.

'significant worsening' in Plaintiff's condition, the ALJ committed no error in relying on medical opinions procured over a year prior to making his decision.") (citations omitted). Dr. Fuch's response also provides sufficient support for the ALJ's Step Two finding that only Plaintiff's left hip osteoarthritis amounts to a "severe" physical impairment. Thus, Plaintiff's attack on the Fuchs testimony – that he was not asked to and did not provide an RFC opinion – is beside the point.[7] The ALJ appropriately relied on Dr. Fuchs for the Step Two and Step Three findings with respect to physical impairments. Tr. 21, 23. He also properly referenced Dr. Fuchs's testimony to support his reliance on the state agency examiners as the source of his RFC. Tr. 25.

Finally, Plaintiff challenges the ALJ's use of the state agency examining physicians' opinions as the foundation for the physical RFC. Citing Padilla v. Barnhart, 186 F. App'x 19, 22-23 (1st Cir. 2006) (per curiam) (unpublished), Plaintiff contends that this was error because these opinions are stale in that the expert file examinations were completed before Plaintiff's treatment of her hips, knees and hands at Blackstone and before Plaintiff's carpal tunnel release surgery. However, Dr. Fuchs's testimony amounts to substantial evidence supporting the conclusion that none of this post-examination evidence establishes a significant worsening in Plaintiff's ability to function. Cruz v. Astrue, C.A. No. 11-638M, 2013 WL 795063, at *13 (D.R.I. Feb. 12, 2013), adopted, 2013 WL 802986 (D.R.I. Mar. 4, 2013) (ALJ may rely on examining experts who reviewed incomplete file if medical expert reviews the entire record and testifies to lack of decline at hearing); Giusti v. Astrue, No. CA 11–360ML, 2012 WL 4034512,

[7] Plaintiff argues that Dr. Fuchs did not discover that Plaintiff had received hip/knee injections while treating at Blackstone until cross examination during the hearing. This argument is contradicted by the hearing transcript; Dr. Fuchs testified that he was aware that "she did receive multiple injections." Tr. 52. Thus, his opinion took that treatment into account. Further, while Plaintiff's cross examination of Dr. Fuchs highlighted the number and type of injections she received, Plaintiff never asked Dr. Fuchs whether these injections affected the opinion he had given on direct examination that, except for the left hip, none of her hip, knee or hand issues were remarkable.

at *10 (D.R.I. Aug. 22, 2012), adopted, 2012 WL 4036120 (D.R.I. Sept. 12, 2012) (ALJ's reliance upon consultants' assessments not error where medical expert reviewed the entire record). In light of Dr. Fuchs's analysis of the post-examination record, the ALJ did not err in basing the physical RFC on the examining physicians' opinions.

Based on the foregoing, I find no error in any aspect of the ALJ's treatment of the opinion evidence discussed above. He appropriately discounted both the Ofstead and Orellana opinions, and properly relied on Dr. Fuchs and the state agency examining experts who reviewed the record from the perspective of the claimed physical impairments. I do not recommend remand on this basis.

B. Step Two Determination

Plaintiff's more substantive challenge to the ALJ's decision is her attack on the opinion of the state agency expert psychologist (Dr. Gordon), on which the ALJ relied for the Step Two determination that Plaintiff's mental health conditions are "nonsevere." Tr. 21. Emphasizing that the standard for finding that an impairment is "severe" at Step Two of the sequential evaluation is *de minimis*, Munoz v. Sec'y of Health & Human Servs, 788 F.2d 822 (1st Cir. 1986), Plaintiff focuses on the ALJ's failure to procure a psychological medical expert opinion to supplement Dr. Gordon's analysis in light of the mental health treatment records of Dr. Lahaye and Mr. Orellana, which Dr. Gordon did not see. Tr. 21. In reliance on Manso-Pizarro, 76 F.3d at 16-17, she contends that the ALJ improperly made medical judgments that require the assistance of a medical expert. See also SSR 96-6p, 1996 WL 374180.

While a close call, I find that the ALJ did not err.

It is well settled that, while an expert is ordinarily required, when the medical evidence shows relatively little impairment, an ALJ may render a commonsense judgment about

functional capacity without a physician's assessment. Castle v. Colvin, 557 F. App'x 849, 854 (11th Cir. 2014) (per curiam) (if no medical treatment for condition during relevant period, review by medical professional not needed; "ALJ did not 'play doctor' in assessing . . . RFC, but instead properly carried out his regulatory role as an adjudicator"); Manso-Pizarro, 76 F.3d at 17-19 ("further evaluation by an expert" is not needed if condition is "so mild as to make it obvious to a layperson that the claimant's ability to perform her particular past work as a cook's helper was unaffected"). That is, if the only medical findings in the record suggest that the claimant has exhibited little in the way of impairments, the ALJ may reach the conclusion regarding the claimant's ability to work himself, without relying on the opinion of a medical professional. Gordils v. Sec'y of Health & Human Servs., 921 F.2d 327, 329 (1st Cir. 1990) (per curiam).

This principle is applicable to the ALJ's RFC determination, but is particularly true at the Step Two phase. Chretien v. Berryhill, No. 1:16-cv-00549-JAW, 2017 WL 4613196, at *6 (D. Me. Oct. 15, 2017) (expert opinion critical for "assessment at Step 4 of a claimant's RFC, not assessment at Step 2 of whether an impairment is severe"); Small v. Colvin, No. 2:14-cv-042-NT, 2015 WL 860856, at *7 (D. Me. Feb. 27, 2015) (cases like Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999), holding that ALJ cannot rely on his lay judgment, pertain to Step Four; at Step Two, ALJ may base finding of nonseverity on claimant's failure to seek treatment for much of alleged disability period); see Sanabria v. Astrue, Civil Action No. 06cv11380-NG, 2008 WL 2704819, at *5-6 (D. Mass. July 9, 2008) ("assessments made in the [Psychiatric Review Technique Form] are less detailed than those made in evaluating mental RFC," which "generally must be determined by an expert, not by an ALJ working with raw medical data"). For example, in Deforge v. Astrue, C.A. No. 09-cv-30173-MAP, 2010 WL 3522464 (D. Mass. Sept. 9, 2010), the court held that an ALJ may make the Step Two severity determination in reliance on the state

agency reviewers and commonsense without calling a medical expert because the only evidence of a severe impairment was from a nonacceptable source and the record otherwise lacked evidence of a longitudinal history of a severe mental impairment. Id., at *7. Similarly, in Chretien, the court held that an ALJ may "make a commonsense judgment that [claimant's] mental impairment prior to his date last insured was nonsevere on the bases of documentation of only occasional complaints related to that impairment, largely normal findings on mental status examination, conservative treatment and the plaintiff's wide range of activities." 2017 WL 4613196, at *6 n.4.

Making a commonsense judgment is what the ALJ did here. His analysis began with a look-back to the 2009 to 2011 medical record, including the 2011 Pittenger report, which established "vague depressive/anxiety symptoms," albeit at a "moderate" level according to Dr. Pittenger, coupled with a failure to follow-up on treatment recommendations. Tr. 22. The ALJ correctly notes that, following these mental assessments, during 2012 and until July 2013, Plaintiff was able to return to work. Tr. 25. Next the ALJ considered Plaintiff's first year of alleged disability, during which there is no evidence of any mental health issues or treatment.[8] Tr. 22. And when Plaintiff finally did seek treatment (after her application was initially denied), the treating psychiatrist, Dr. Lahaye, found generally "mild" depression and anxiety, which responded well to medication therapy, despite Plaintiff's failure to keep appointments and failure to follow through on referrals. Id. Finally, the ALJ gave substantial weight to Dr. Gordon's finding, based on his expert review of the file, that he saw no evidence to support a "psychiatric determinable impairment." Tr. 89, 100. While Dr. Gordon did not see Dr. Lahaye's treating

[8] Plaintiff argues that the significant gaps with no mental health treatment are due to "a lack of financial wherewithal." ECF No. 11-1 at 26. She points to nothing in the record to support this argument, nor has the Court's review turned up any references suggesting a need for mental health treatment unfulfilled due to financial constraints. I deem the argument waived.

notes (or the inconsistent notes and opinion from Mr. Orellana), he was able to take account of Plaintiff's extensive medical history through the first full year of alleged disability, as well as her statements in support of her application. Confirming the viability of this commonsense review of the evidence is Plaintiff's testimony at the hearing in response to the ALJ's direct question that the main reason why she cannot work is the pain in her hips, knees and hands.[9] Tr. 60.

A lingering concern is that Dr. Gordon's expert opinion focuses on the lack of any "established psychiatric dx's," in addition to the absence of any "discussion of functional strengths/weaknesses due to psychiatric issues," confirming his unawareness of Dr. Lahaye's subsequent diagnosis of depression and anxiety. Tr. 89. While Dr. Lahaye's treating notes clearly establish that Plaintiff responded immediately to the initiation of treatment and that the diagnosed condition was mild, at least one court has held that a medical expert is needed to evaluate whether a diagnosis of a "mild" condition conflates to the standard of "nonsevere" at Step Two. Bernier v. Colvin, No. 2:14-cv-178-JHR, 2015 WL 1780148, at *4-5 (D. Me. Apr. 17, 2015) ("[ALJ] as a layperson, was not qualified to make a commonsense judgment that the plaintiff's mild bilateral CTS imposed no restrictions. . . . the word 'mild' seemingly has a different meaning in the context of a CTS diagnosis than it does in the context of judging whether an impairment is nonsevere for purposes of Step 2"). However, Bernier also acknowledges that such an error may be harmless, holding that it is within the ALJ's province to reject the claimant's subjective statements when they lack credibility and to rely on test results

[9] During other portions of her testimony, Plaintiff made the incredible claim that she hears voices that make her afraid to go in her bathroom. Tr. 48. This testimony is contradicted by the treating record; at every appointment, Dr. Lahaye consistently recorded her observation of no hallucinations or delusions. E.g., Tr. 472, 481. Plaintiff also testified that she cannot concentrate. Tr. 49. The only objective observation of Plaintiff's ability to concentrate is in the 2011 Pittenger report, which found her "[c]oncentration is grossly intact." Tr. 390. Dr. Lahaye's mental status evaluations never mention issues with concentration, nor do the few observations recorded by Mr. Orellana. Notably, the ALJ's well-supported finding that Plaintiff's statements "are not entirely credible" has not been challenged in this case. Tr. 24. At bottom, in response to the ALJ's question, Plaintiff did not link the hearing of voices or her perception that she cannot concentrate to her inability to work.

with unambiguous findings that the condition is benign. Ultimately, Bernier was remanded because the claimant had presented an opinion from a treating physician that the condition was severe and the ALJ failed to provide good reasons for rejecting it. Id.

Guided by Bernier, I alternatively find that, if the Court concludes that the ALJ's use of commonsense at Step Two went too far, the error is harmless. In Bernier, remand was necessary because the ALJ debunked an acceptable treating source without good reasons. 2015 WL 1780148, at *5. Here, by contrast, the ALJ's rejection of the Orellana opinion is well supported not only because good reasons are not necessary in light of Mr. Orellana's status as a nonacceptable source, but also because of the dramatic inconsistency between the Orellana opinion and Dr. Lahaye's contemporaneous treating notes, the inconsistency with the balance of the record, which establishes no mental health treatment or concerns, and the extremely brief nature of Mr. Orellana's treating relationship. When Mr. Orellana is discounted, what remains is a record devoid of longitudinal evidence of mentally-based limitations, rendering harmless any error arising from the ALJ's reliance on commonsense for the Step Two determination that Plaintiff's mental health issues were nonsevere. See Deforge, 2010 WL 3522464, *7.

Based on the foregoing, I find no material error in the ALJ's approach to the Step Two determination and do not recommend remand on this basis.

C. Reliance on Grids at Step Five

The ALJ's RFC limited Plaintiff to light work, with the available work reduced by her additional limitations in standing and walking, as well as by nonexertional limitations in balancing, kneeling, climbing, crouching and crawling. Tr. 23-24. Rather than relying on a hypothetical, the ALJ had the vocational expert confirm the availability of unskilled sedentary

work, Tr. 61-62, and then used the so-called Grids[10] to find that a claimant with Plaintiff's age, education and exertional limitations is not disabled. Tr. 26-27. To reach this conclusion, the ALJ appropriately concluded that Plaintiff's additional nonexertional limits do not significantly erode the job base. See SSR 83-14, 1983 WL 31254, at *2, 5 (partial limitation on balancing, kneeling and crawling, and limitation on crouching and climbing ropes and scaffolding would not affect the job base); SSR 85-15, 1985 WL 56857, at *6 (some partial limitation in climbing ramps and stairs would generally not reduce the work base); see also Muniz-Hernandez v. Astrue, Civil No. 10-1569 (MEL), 2011 WL 2446597, at *9 (D.P.R. June 15, 2011) ("the Grids are . . . applicable when a claimant has nonexertional limitations, provided those limitations do not significantly erode the exertional base") (citing SSR 85-15). Because there is no error in the ALJ's use of the Grids as a framework for the Step Five determination, Plaintiff's argument that remand is needed because the ALJ failed to ask the vocational expert a proper hypothetical should be rejected. See Castro v. Colvin, Civil Action No. 13-736 S, 2015 WL 339757, at *11 (D.R.I. Jan. 23, 2015) (despite not posing hypothetical to VE, ALJ's finding of "not disabled" was appropriate applying the Grids because plaintiff's nonexertional limitations did not prelude him from meeting basic demands of unskilled work); Hannan v. Astrue, Civil Action No. 08-11480-PBS, 2009 WL 2853578, at *7 (D. Mass. Sept. 3, 2009) (ALJ may rely exclusively on the Grids if nonexertional limitations only marginally reduces occupational base) (citing Ortiz v. Sec'y of Health & Human Servs., 890 F.2d 520, 524 (1st Cir. 1989)).

[10] The Medical Vocational Guidelines, codified at 20 C.F.R. Part 404, Subpart P, Appendix 2, are commonly referred to as "the Grids." The Grids take administrative notice of the fact that a significant number of unskilled jobs exist at the sedentary, light and medium exertional levels. 20 C.F.R. § 404.1566(d); 20 C.F.R. § 404, Subpart P, Appendix 2, § 200.00(b). At Step Five, the Grids may show a significant number of jobs exist for a claimant. Id. If a claimant has nonexertional limitations, the Grids can still be applied, so long as the nonexertional limitations do not significantly erode the unskilled work base. See Rose v. Shalala, 34 F.3d 13, 19 (1st Cir. 1994); Heggarty v. Sullivan, 947 F.2d 990, 996 (1st Cir. 1991). The ALJ may rely on guidance developed by the Commissioner in evaluating the degree to which nonexertional limitations impact reliance on the Grids.

V. CONCLUSION

Based on the foregoing analysis, I recommend that Plaintiff's Motion for Reversal of the Disability Determination of the Commissioner of Social Security (ECF No. 11) be DENIED and Defendant's Motion for an Order Affirming the Decision of the Commissioner (ECF No. 15) be GRANTED. Any objection to this report and recommendation must be specific and must be served and filed with the Clerk of the Court within fourteen (14) days after its service on the objecting party. See Fed. R. Civ. P. 72(b)(2); DRI LR Cv 72(d). Failure to file specific objections in a timely manner constitutes waiver of the right to review by the district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
January 25, 2018