UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

SABRINA PEREZ	:	
	:	
v.	:	C.A. No. 17-0187-JJM
	:	
NANCY A. BERRYHILL, Acting Commissioner of the Social Security Administration	:	

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

This matter is before the Court for judicial review of a final decision of the Commissioner of the Social Security Administration ("Commissioner") denying Supplemental Security Income ("SSI") and Child's Insurance Benefits ("CIB") under the Social Security Act (the "Act"), 42 U.S.C. § 405(g). Plaintiff filed her Complaint on May 5, 2017 seeking to reverse the Decision of the Commissioner. On December 13, 2017, Plaintiff filed a Motion to Reverse the Decision of the Commissioner. (ECF Doc. No. 11). On December 21, 2017, the Commissioner filed a Motion for an Order Affirming the Decision of the Commissioner. (ECF Doc. No. 12). Plaintiff filed a Reply Brief on January 4, 2018. (ECF Doc. No. 13).

This matter has been referred to me for preliminary review, findings and recommended disposition. 28 U.S.C. § 636(b)(1)(B); LR Cv 72. Based upon my review of the record, the parties' submissions and independent research, I find that there is substantial evidence in this record to support the Commissioner's decision and findings that Plaintiff is not disabled within the meaning of the Act. Consequently, I recommend that Plaintiff's Motion to Reverse (ECF

Doc. No. 11) be DENIED and that the Commissioner's Motion to Affirm (ECF Doc. No. 12) be GRANTED.

I. PROCEDURAL HISTORY

Plaintiff filed applications on May 27, 2014 for SSI (Tr. 138-146) and CIB (Tr. 147-148) alleging disability since October 1, 2010. The applications were denied initially on September 17, 2014 (Tr. 50-56, 57-63) and on reconsideration. (Tr. 66-74, 75-83). Plaintiff requested an Administrative Hearing. On January 15, 2016, a hearing was held before Administrative Law Judge Jason Mastrangelo (the "ALJ") at which time Plaintiff, represented by counsel, and a Vocational Expert ("VE") appeared and testified. (Tr. 25-49). The ALJ issued an unfavorable decision to Plaintiff on March 17, 2016. (Tr. 8-24). The Appeals Council denied Plaintiff's request for review on March 10, 2017. (Tr. 1-3). Therefore, the ALJ's decision became final. A timely appeal was then filed with this Court.

II. THE PARTIES' POSITIONS

Plaintiff argues that the ALJ erred at Step 2 by finding that she did not have any severe impairments. Additionally, Plaintiff argues that the ALJ's alternative Step 5 finding of no disability is infected by reversible error.

The Commissioner disputes Plaintiff's claims and contends that the ALJ's Step 2 finding is supported by substantial evidence and must be affirmed.

III. THE 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 – i.e., 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 and Human Servs., 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec'y of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1981).

Where the Commissioner's decision is supported by substantial evidence, the court must affirm, even if the court would have reached a contrary result as finder of fact. Rodriguez Pagan v. Sec'y of Health and Human Servs., 819 F.2d 1, 3 (1st Cir. 1987); Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991). The court must view the evidence as a whole, taking into account evidence favorable as well as unfavorable to the decision. Frustaglia v. Sec'y of Health and Human Servs., 829 F.2d 192, 195 (1st Cir. 1987); Parker v. Bowen, 793 F.2d 1177 (11th Cir. 1986) (court also must consider evidence detracting from evidence on which Commissioner relied).

The court must reverse the ALJ's decision on plenary review, however, if the ALJ applies incorrect law, or if the ALJ fails to provide the court with sufficient reasoning to determine that he or she properly applied the law. Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) (per curiam); accord Cornelius v. Sullivan, 936 F.2d 1143, 1145 (11th Cir. 1991). Remand is unnecessary where all of the essential evidence was before the Appeals Council when it denied review, and the evidence establishes without any doubt that the claimant was disabled. Seavey v. Barnhart, 276 F.3d 1, 11 (1st Cir. 2001) citing, Mowery v. Heckler, 771 F.2d 966, 973 (6th Cir. 1985).

The court may remand a case to the Commissioner for a rehearing under sentence four of 42 U.S.C. § 405(g); under sentence six of 42 U.S.C. § 405(g); or under both sentences. Seavey, 276 F.3d at 8. To remand under sentence four, the court must either find that the

Commissioner's decision is not supported by substantial evidence, or that the Commissioner incorrectly applied the law relevant to the disability claim. Id.; accord Brenem v. Harris, 621 F.2d 688, 690 (5th Cir. 1980) (remand appropriate where record was insufficient to affirm, but also was insufficient for district court to find claimant disabled).

Where the court cannot discern the basis for the Commissioner's decision, a sentence-four remand may be appropriate to allow her to explain the basis for her decision. Freeman v. Barnhart, 274 F.3d 606, 609-610 (1st Cir. 2001). On remand under sentence four, the ALJ should review the case on a complete record, including any new material evidence. Diorio v. Heckler, 721 F.2d 726, 729 (11th Cir. 1983) (necessary for ALJ on remand to consider psychiatric report tendered to Appeals Council). After a sentence four remand, the court enters a final and appealable judgment immediately, and thus loses jurisdiction. Freeman, 274 F.3d at 610.

In contrast, sentence six of 42 U.S.C. § 405(g) provides:

> The court...may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding;

42 U.S.C. § 405(g). To remand under sentence six, the claimant must establish: (1) that there is new, non-cumulative evidence; (2) that the evidence is material, relevant and probative so that there is a reasonable possibility that it would change the administrative result; and (3) there is good cause for failure to submit the evidence at the administrative level. See Jackson v. Chater, 99 F.3d 1086, 1090-1092 (11th Cir. 1996).

A sentence six remand may be warranted, even in the absence of an error by the Commissioner, if new, material evidence becomes available to the claimant. Id. With a sentence

six remand, the parties must return to the court after remand to file modified findings of fact. Id. The court retains jurisdiction pending remand, and does not enter a final judgment until after the completion of remand proceedings. Id.

IV. THE LAW

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), 423(d)(1); 20 C.F.R. § 404.1505. The impairment must be severe, making the claimant unable to do her 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. §§ 404.1505-404.1511.

A. Treating Physicians

Substantial weight should be given to the opinion, diagnosis and medical evidence of a treating physician unless there is good cause to do otherwise. See Rohrberg v. Apfel, 26 F. Supp. 2d 303, 311 (D. Mass. 1998); 20 C.F.R. § 404.1527(d). 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. 20 C.F.R. § 404.1527(d)(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 and Human Servs., 848 F.2d 271, 275-276 (1st Cir. 1988).

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). 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) the nature and extent of the treatment relationship; (3) the 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©. However, 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).

The ALJ is required to review all of the medical findings and other evidence that support a medical source's statement that a claimant is disabled. However, the ALJ is responsible for making the ultimate determination about whether a claimant meets the statutory definition of disability. 20 C.F.R. § 404.1527(e). The ALJ is not required to give any special significance to the status of a physician as treating or non-treating in weighing an opinion on whether the claimant meets a listed impairment, a claimant's residual functional capacity (see 20 C.F.R. §§ 404.1545 and 404.1546), or the application of vocational factors because that ultimate determination is the province of the Commissioner. 20 C.F.R. § 404.1527(e). See also Dudley v. Sec'y of Health and Human Servs., 816 F.2d 792, 794 (1st Cir. 1987).

B. Developing the Record

The ALJ has a duty to fully and fairly develop the record. Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir. 1991). The Commissioner also has a duty to notify a claimant of the statutory right to retained counsel at the social security hearing, and to solicit a knowing and voluntary waiver of that right if counsel is not retained. See 42 U.S.C. § 406; Evangelista v. Sec'y of Health and Human Servs., 826 F.2d 136, 142 (1st Cir. 1987). The obligation to fully and fairly develop the record exists if a claimant has waived the right to retained counsel, and even if the claimant is represented by counsel. Id. However, where an unrepresented claimant has not waived the right to retained counsel, the ALJ's obligation to develop a full and fair record rises to a special duty. See Heggarty, 947 F.2d at 997, citing Currier v. Sec'y of Health Educ. and Welfare, 612 F.2d 594, 598 (1st Cir. 1980).

C. Medical Tests and Examinations

The ALJ is required to order additional medical tests and exams only when a claimant's medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled. 20 C.F.R. § 416.917; see also Conley v. Bowen, 781 F.2d 143, 146 (8th Cir. 1986). In fulfilling his duty to conduct a full and fair inquiry, the ALJ is not required to order a consultative examination unless the record establishes that such an examination is necessary to enable the ALJ to render an informed decision. Carrillo Marin v. Sec'y of Health and Human Servs., 758 F.2d 14, 17 (1st Cir. 1985).

D. The Five-step Evaluation

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. §§ 404.1520, 416.920. First, if a claimant is working at a substantial gainful activity, she is not

disabled. 20 C.F.R. § 404.1520(b). Second, if a claimant does not have any impairment or combination of impairments which significantly limit her physical or mental ability to do basic work activities, then she does not have a severe impairment and is not disabled. 20 C.F.R. § 404.1520(c). Third, if a claimant's impairments meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, she is disabled. 20 C.F.R. § 404.1520(d). Fourth, if a claimant's impairments do not prevent her from doing past relevant work, she is not disabled. 20 C.F.R. § 404.1520(e). Fifth, if a claimant's impairments (considering her residual functional capacity, age, education, and past work) prevent her from doing other work that exists in the national economy, then she is disabled. 20 C.F.R. § 404.1520(f). 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 SSDI and SSI claims).

In determining whether a claimant's physical and mental impairments are sufficiently severe, the ALJ must consider the combined effect of all of the claimant's impairments, and must consider any medically severe combination of impairments throughout the disability determination process. 42 U.S.C. § 423(d)(2)(B). Accordingly, the ALJ must make specific and well-articulated findings as to the effect of a combination of impairments when determining whether an individual is disabled. Davis v. Shalala, 985 F.2d 528, 534 (11th Cir. 1993).

The claimant bears the ultimate burden of proving the existence of a disability as defined by the Social Security Act. Seavey, 276 F.3d at 5. The claimant must prove disability on or before the last day of her insured status for the purposes of disability benefits. Deblois v. Sec'y of Health and Human Servs., 686 F.2d 76 (1st Cir. 1982), 42 U.S.C. §§ 416(i)(3), 423(a), (c). If a

claimant becomes disabled after she has lost insured status, her claim for disability benefits must be denied despite her disability. Id.

E. Other Work

Once the ALJ finds that a claimant cannot return to her prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the national economy. Seavey, 276 F.3d at 5. In determining whether the Commissioner has met 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). This burden may sometimes be met through exclusive reliance on the Medical-Vocational Guidelines (the "grids"). Seavey, 276 F.3d at 5. Exclusive reliance on the "grids" is appropriate where the claimant suffers primarily from an exertional impairment, without significant non-exertional factors. Id.; see also Heckler v. Campbell, 461 U.S. 458, 103 S. Ct. 1952, 76 L.Ed.2d 66 (1983) (exclusive reliance on the grids is appropriate in cases involving only exertional impairments, impairments which place limits on an individual's ability to meet job strength requirements).

Exclusive reliance is not appropriate when a claimant is unable to perform a full range of work at a given residual functional level or when a claimant has a non-exertional impairment that significantly limits basic work skills. Nguyen, 172 F.3d at 36. In almost all of such cases, the Commissioner's burden can be met only through the use of a vocational expert. Heggarty, 947 F.2d at 996. It is only when the claimant can clearly do unlimited types of work at a given residual functional level that it is unnecessary to call a vocational expert to establish whether the claimant can perform work which exists in the national economy. See Ferguson v. Schweiker, 641 F.2d 243, 248 (5th Cir. 1981). In any event, the ALJ must make a specific finding as to

whether the non-exertional limitations are severe enough to preclude a wide range of employment at the given work capacity level indicated by the exertional limitations.

1. Pain

"Pain can constitute a significant non-exertional impairment." Nguyen, 172 F.3d at 36. Congress has determined that a claimant will not be considered disabled unless he furnishes medical and other evidence (e.g., medical signs and laboratory findings) showing the existence of a medical impairment which could reasonably be expected to produce the pain or symptoms alleged. 42 U.S.C. § 423(d)(5)(A). The ALJ must consider all of a claimant's statements about his symptoms, including pain, and determine the extent to which the symptoms can reasonably be accepted as consistent with the objective medical evidence. 20 C.F.R. § 404.1528. In determining whether the medical signs and laboratory findings show medical impairments which reasonably could be expected to produce the pain alleged, the ALJ must apply the First Circuit's six-part pain analysis and consider the following factors:

> (1) The nature, location, onset, duration, frequency, radiation, and intensity of any pain;
>
> (2) Precipitating and aggravating factors (e.g., movement, activity, environmental conditions);
>
> (3) Type, dosage, effectiveness, and adverse side-effects of any pain medication;
>
> (4) Treatment, other than medication, for relief of pain;
>
> (5) Functional restrictions; and
>
> (6) The claimant's daily activities.

Avery v. Sec'y of Health and Human Servs., 797 F.2d 19, 29 (1st Cir. 1986). An individual's statement as to pain is not, by itself, conclusive of disability. 42 U.S.C. § 423(d)(5)(A).

2. Credibility

Where an ALJ decides not to credit a claimant's testimony about pain, the ALJ must articulate specific and adequate reasons for doing so, or the record must be obvious as to the credibility finding. Rohrberg, 26 F. Supp. 2d at 309. A reviewing court will not disturb a clearly articulated credibility finding with substantial supporting evidence in the record. See Frustaglia, 829 F.2d at 195. The failure to articulate the reasons for discrediting subjective pain testimony requires that the testimony be accepted as true. See DaRosa v. Sec'y of Health and Human Servs., 803 F.2d 24 (1st Cir. 1986).

A lack of a sufficiently explicit credibility finding becomes a ground for remand when credibility is critical to the outcome of the case. See Smallwood v. Schweiker, 681 F.2d 1349, 1352 (11th Cir. 1982). If proof of disability is based on subjective evidence and a credibility determination is, therefore, critical to the decision, "the ALJ must either explicitly discredit such testimony or the implication must be so clear as to amount to a specific credibility finding." Foote v. Chater, 67 F.3d 1553, 1562 (11th Cir. 1995) (quoting Tieniber v. Heckler, 720 F.2d 1251, 1255 (11th Cir. 1983)).

V. APPLICATION AND ANALYSIS

A. The ALJ's Decision

The ALJ decided this case adverse to Plaintiff at Step 2 and, alternatively, at Step 5. At Step 2, the ALJ acknowledged that Plaintiff's scoliosis, liver disease and anxiety were medically determinable impairments. (Tr. 13). However, he did not find that any of these impairments either singly or in combination were "severe" impairments within the meaning of the applicable regulations. (Tr. 14). Alternatively, the ALJ found that, even assuming that Plaintiff's mental

impairments were "severe" with moderate restrictions, a non-disability finding would be reached at Step 5. (Tr. 18-19 at n.2).

B. The ALJ's Step 2 Determination

I will initially address the scope of this review. At Step 2, the ALJ acknowledged Plaintiff's scoliosis, liver disease and anxiety as medically determinable impairments but concluded that they were not "severe" within the meaning of the regulations. (Tr. 13-14). Because Plaintiff's memoranda deals almost exclusively with the ALJ's treatment and evaluation of the evidence as it relates to her mental impairment, I will consider whether or not the ALJ's Step 2 determination regarding her anxiety is supported by substantial evidence. Additionally, I will not evaluate whether or not the ALJ's alternative Step 5 finding is supported by substantial evidence because the Commissioner makes clear that "she is not arguing any type of harmless error based on the ALJ's alternative analysis." (ECF Doc. No. 12-1 at p. 23).[1]

Plaintiff argues that the ALJ's Step 2 analysis is flawed in several respects and is contrary to the evidence in the record. The ALJ determined at Step 2 that Plaintiff's impairments were "non-severe" within the meaning of 20 C.F.R. § 404.1520(c). An impairment is not "severe" when it does not significantly limit a claimant's physical or mental ability to do basic work activities. 20 C.F.R. § 404.1522(c). Plaintiff bears the burden of proof at Step 2 and must present medical evidence supporting a finding that a claimant suffers from a "severe medically determinable physical or mental impairment" which "significantly limits" her physical or mental ability to do basic work activities. 20 C.F.R. § 404.1522(c). (emphasis added). See also Teves

[1] As a practical matter, the ALJ's alternative Step 5 finding is made in a brief footnote and is not particularly well-developed. (Tr. 18-19, n.2). In addition, the Commissioner does not fully address Plaintiff's challenge to the alternate finding. (See ECF Doc. No. 12-1 at p. 23). Accordingly, there is not a sufficient record in any event to fully evaluate the issue of harmless error.

v. Astrue, No. 08-246-B-W, 2009 WL 961231 (D.Me. April 7, 2009) ("[A] claimant's testimony about symptoms is insufficient to establish a severe impairment at Step 2 in the absence of medical evidence."). The Commissioner has adopted a "slight abnormality" standard which provides that an impairment is "non-severe" when the medical evidence establishes only a slight abnormality that has "no more than a minimal effect on an individual's ability to work." Social Security Ruling ("SSR") 85-28. "The step two inquiry is a de minimis screening device used to dispose of ground-less or frivolous claims." Orellana v. Astrue, 547 F. Supp. 2d 1169, 1172 (E.D. Wash. 2008) (citing Bowen v. Yuckert, 482 U.S. 137, 153-154 (1987)); see also List v. Apfel, 111 F. Supp. 2d 103, 110 (D.R.I. 2000).

While the evidence in this case is mixed, this record plainly supports the ALJ's Step 2 finding that Plaintiff's anxiety is not a "severe" impairment as defined in 20 C.F.R. § 1520(c). Initially, the ALJ based his decision, in part, on his finding that Plaintiff's statements regarding the intensity, persistence and limiting effects of her symptoms was not entirely credible based largely on the wide range of daily activities she was able to perform. (Tr. 15). The ALJ accurately observed that Plaintiff is able to independently care for her daughter, clean her apartment, run some errands, prepare meals, drive and follow instructions "pretty well." Id. (citing Exh. 7E). Plaintiff also indicated that she did not have any problems getting along with others and had experienced no changes in social activity. (Tr. 204). She stated that she was "never really a social person" and reported no limitations in memory, completing tasks, concentration, understanding or following instructions. (Tr. 205). Plaintiff does not challenge either the ALJ's adverse credibility determination or his interpretation of Plaintiff's Statements.

Further, the ALJ relies upon numerous portions of the medical record which support his Step 2 finding that Plaintiff had only mild limitations in mental functioning that did not

significantly impact her ability to perform basic work-related activities. First, both of the state agency consulting psychologists concluded that Plaintiff's mental impairment was not severe. Dr. Hahn reached that conclusion on September 3, 2014 (Tr. 54-55) and Dr. Slavit did so on November 20, 2014. (Tr. 79-81). Plaintiff also faults the ALJ's treatment of Dr. Pittenger's August 26, 2014 psychiatric evaluation. However, the ALJ accurately observes that Dr. Pittenger's report did not evidence any severe functional limitations (Tr. 16), and more to the point, Dr. Slavit reviewed Dr. Pittenger's report (including his GAF assessment) in the context of the record as of late 2014, and he concluded that Plaintiff's mental impairment was not "severe." (Tr. 80). The ALJ also accurately points to a number of other portions of the medical record evidencing only mild limitations. (Tr. 15-20).

Plaintiff argues that the ALJ's reliance on the 2014 opinions of Dr. Hahn and Dr. Slavit was error because their assessments were rendered without the benefit of subsequent treatment records and opinions. Plaintiff has shown no error. The ALJ properly found that the consulting psychologists' assessments were consistent with the evidence of record, "including evidence received at the hearing level" and thus, the opinions were entitled to great weight. (Tr. 20). "An ALJ may rely on [a state agency opinion] where the [medical] evidence post-dating the reviewer's assessment does not establish any greater limitations…or where the [medical] reports of claimant's treating providers are arguably consistent with…the reviewer's assessment." Fleetwood v. Colvin, 103 F. Supp. 3d 199, 204 (D.R.I. 2015) (quoting Ferland v. Astrue, No. 11-cv-123, 2011 WL 5199989 at *4 (D.N.H. Oct. 31, 2011)). Here, Plaintiff fails to show that any of the providers' treatment notes establish greater limitations, and, as discussed above, substantial portions of those reports support the ALJ's Step 2 finding. Specifically, Ms. Reuker

determined on October 23, 2015 that Plaintiff's attention was good, her affect was appropriate, her motor activity was calm, she had no hallucinations or delusions, she was fully oriented, she was not experiencing any suicidal ideation, her speech was normal, and her thought processes, memory, judgment and insight were intact. (Tr. 505). Dr. Blackwood also observed on November 9, 2015 that Plaintiff's mood, affect, behavior, judgment and thought content were normal. (Tr. 502). Moreover, the ALJ concluded that Dr. Fuchs' opinion was entitled to little weight because it was inconsistent with evidence of mild limitations of functioning and consistently normal mental status findings (Tr. 18-19); a finding that Plaintiff fails to challenge in any meaningful fashion. (See ECF Doc. No. 12-1 at p. 14).

Finally, Plaintiff contends that the ALJ "misinterpreted" the records in finding that she complained of anxiety and panic attacks in 2012, but refused medication. (Tr. 15). She argues that this can "only" be read as the ALJ arguing that her conditions were not severe because of the refusal of medication. (ECF Doc. No. 11 at p. 13). Plaintiff misreads the ALJ's reasoning. The ALJ concluded that Plaintiff's "mental functioning was not affected by her symptoms" based on the medical records, and not due to her refusal of medication.[2] In her Reply Brief, Plaintiff also attacks this portion of the ALJ's decision as the improper interpretation of raw medical data. See Mango-Pizarro v. Sec'y HHS, 76 F.3d 15, 17 (1st Cir. 1996). Plaintiff argues that the Commissioner "admits" that the ALJ's conclusion is improperly based on his own interpretation of the raw medical data. (ECF Doc. No. 13 at p. 2). Plaintiff bases this argument on the following sentence from the Commissioner's brief: "The ALJ concluded that Plaintiff's mental functioning was not affected by her symptoms (Tr. 15), a determination which was derived from

[2] Plaintiff testified that she is scared to take strong medication because her parents were both addicts. (Tr. 42). However, as noted by the Commissioner, the record contains notations of prescriptions to help Plaintiff with sleep and back pain. (Tr. 252, 531).

the results of her mental status examination and not her refusal to take medication." (ECF Doc. No. 12-1 at p. 17). Plaintiff overstates the significance of this excerpt. It cannot reasonably be read as an admission of legal error as posited by Plaintiff. The ALJ made the statement in question in the context of his review of the medical records which he reasonably concluded did not reflect any significant deterioration in mental functioning, (Tr. 15) – a conclusion also reached by both Dr. Hahn and Dr. Slavit and adopted by the ALJ. (Tr. 20).

CONCLUSION

For the reasons discussed herein, I recommend that Plaintiff's Motion to Reverse (ECF Doc. No. 11) be DENIED and that Defendant's Motion to Affirm (ECF Doc. No. 12) be GRANTED. I further recommend that Final Judgment enter in favor of Defendant.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court's decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
February 2, 2018