UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

THOMAS K. L., Plaintiff,	:	
v.	:	C.A. No. 17-351WES
NANCY A. BERRYHILL, ACTING COMMISSIONER OF SOCIAL SECURITY, Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

Plaintiff Thomas L. has moved for reversal of the decision of the Commissioner of Social Security (the "Commissioner") denying Disability Insurance Benefits ("DIB") under 42 U.S.C. § 405(g) of the Social Security Act (the "Act") for a seven-month period from his alleged onset of disability on August 30, 2012, until his date last insured on March 31, 2013. Plaintiff contends that the Administrative Law Judge ("ALJ")'s residual functional capacity ("RFC")[1] findings lack the support of substantial evidence because (1) he relied on State Agency ("SA") expert physicians whose evaluations failed to focus on a pre-onset MRI of Plaintiff's spine; (2) for less than sufficient "good reasons," he afforded less probative weight to the treating general practitioner, Dr. Patricia Song (who never saw Plaintiff during the period in issue); and (3) he made an improper lay judgment about 2009 I.Q. scores. Plaintiff argues vociferously that the ALJ improperly acted to defend his own prior unfavorable decision; as a result, he did not apply the correct burden of proof and failed properly to consider the medical evidence that predated

[1] Residual functional capacity is "the most you can still do despite your limitations," taking into account "[y]our impairment(s), and any related symptoms, such as pain, [that] may cause physical and mental limitations that affect what you can do in a work setting." 20 C.F.R. § 404.1545(a)(1).

onset. 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 did not fail in his duty appropriately to consider Plaintiff's application on the merits and that his findings are untainted by material error and are sufficiently supported by substantial evidence. Accordingly, I recommend that Plaintiff's Motion for Reversal of the Disability Determination of the Commissioner of Social Security (ECF No. 9) be DENIED and Commissioner's Motion to Affirm Her Decision (ECF No. 11) be GRANTED.

I. Background

A. Procedural Background

Plaintiff injured his back and right knee in 2008 when he fell at the marina at which he was employed as a maintenance worker; he stopped working and filed a worker's compensation claim, which, together with his savings, sustained him for some time but also made him ineligible (for a time) for Supplemental Security Income ("SSI").

In October 2008, with the assistance of counsel, Plaintiff filed a DIB application, which was denied following an ALJ hearing in October 2010. In the 2010 decision, that ALJ referenced medical evidence establishing the Plaintiff had "fully recuperated from the back and knee injury." Tr. 425. In reliance on the opinions of SA non-examining psychologists who interpreted I.Q. scores from a test administered in 2009 ("2009 I.Q. scores") and opined that Plaintiff was impaired by borderline intellectual functioning, the 2010 ALJ rejected the interpretation of the 2009 I.Q. scores by an examining psychologist who opined that the scores reflected "mild mental retardation." Tr. 425-26. The 2010 decision found that Plaintiff "had

borderline intellectual functioning" and concluded that he would be able to perform light work with postural limitations and limitations based on impairments in understanding, concentration, persistence and pace. Tr. 422. Plaintiff did not appeal from this adverse decision nor has he sought to reopen it; as a result, it has become final. Instead, in March 2011, he filed a second DIB application.

After the second application was administratively denied, it was referred for hearing to a different ALJ from the one who issued the 2010 decision. Again, Plaintiff was represented by counsel. By the second application, obesity had been added to Plaintiff's list of severe impairments. Nevertheless, the decision, issued in 2012, still found Plaintiff able to perform light work with similar limitations to those imposed in the 2010 decision, as well as new limits, including a sit/stand limit of four hours, no reading, writing, math or handling money and no interaction with the public in light of his borderline intellectual level of functioning and other mental health impairments. Tr. 437. Pertinent to the current application is the 2012 ALJ's receipt, well after reconsideration was denied, of a diagnostic MRI dated April 27, 2012 ("2012 MRI"). Tr. 717. This MRI was not seen by the SA non-examining experts on whom the 2012 decision was based. Nevertheless, no appeal was taken from the 2012 decision and it became final. Instead, two years later, again represented by counsel, Plaintiff filed his third DIB application, alleging an onset date of August 30, 2012. Tr. 24. This is the application now under review.

By the time of the third DIB application, Plaintiff had almost exhausted the disability insurance he had built up during his years of working – his date-last-insured is March 31, 2013 – leaving him with only seven months for a potential DIB recovery, although the assembled record spans the period from 2009 through 2016. After the third application was denied

administratively, it was referred for hearing to the same ALJ who had issued the 2012 decision (Gerald Resnick).

At the hearing on the third application, the ALJ asked if Plaintiff wished to reopen and revise the 2012 decision. Tr. 41. Through counsel, he declined,[2] although he did ask the ALJ to review files from the pre-onset period. Tr. 41-42. The ALJ complied: at the hearing and in the ALJ's decision issued on June 14, 2016, the analysis is targeted not only on the extremely limited period in issue, but also considers the pre- and post-onset record. Tr. 24-30. Based on the evidence of record regarding Plaintiff's intellectual limitations, including the opinion of the SA expert psychologist at the initial level, treating notes from East Bay Center, Dr. Song and other treating sources, and the finding of borderline intellectual functioning in the 2010 decision, the ALJ found Plaintiff to be learning disordered and limited to borderline intellectual functioning. Tr. 22, 24, 26-27 & nn.2, 4, 5, 7, 8. Otherwise, in reliance on the SA examining physicians and the examining psychologist at the initial level, as well as his own review of the longitudinal record and other evidence, the ALJ assessed an RFC substantially the same as the one assessed in the 2012 decision. Tr. 27. The Appeals Council denied review on June 14, 2017, despite the submission of almost 500 pages of post-date-last-insured medical records. The appeal to this Court followed.

Meanwhile, on July 14, 2017, Plaintiff applied (for the first time) for SSI. By October 2017, he was found to be disabled and is now receiving benefits, albeit, he contends, at a level lower than what his disability insurance would have entitled him to receive. ECF No. 9-3.

[2] Nor did he request reopening and review of the 2010 decision.

B. Medical Background

Despite a file filled with hundreds of pages reflecting Plaintiff's pre- and post-date-last-insured treating history, for the period prior to and during the period in issue, there is precious little. During that time, Plaintiff's physical complaints of back pain were followed by Nurse Practitioner Susan Place and Dr. Medhat Kader of the Rhode Island Free Clinic. For example, prior to onset, in October 2011, Dr. Marina Rodriguez noted a positive straight leg raise on the right and pain in paraspinal area but also found "normal strength and reflexes in lower ext," while in early 2012, Dr. Kader recorded observations of tenderness on palpation and positive bilateral straight leg raising. Tr. 658, 681. Naprosyn and Flexeril were prescribed and no other treatment was recommended. Tr. 656. Dr. Kader ordered an MRI, which was performed on April 27, 2012; at the next appointment, on June 20, 2012, Dr. Kader reviewed the results of the MRI and decided that they did not require any changes in treatment – he wrote, "No action at this time. We re-evaluate the situation after the conclusion of his physiotherapy." Tr. 677, 681.

No further treatment was provided; the only other record mentioning back pain during the period in issue was generated in connection with an appointment more than six months later. Dated January 7, 2013, it is a note signed by Dr. Rachel Fowler, who examined Plaintiff's back and found tenderness, but straight leg raising was negative, no spasm was observed and the neurological exam was normal. Tr. 645 ("normal strength/sensation/DTR's"). Through the date-last-insured, except for references to Plaintiff's medical history of back pain, the back is not mentioned again. After the date-last-insured, in June 2013, Plaintiff complained about his back to Dr. Richard Lim, who noted tenderness but "no motor weakness," prescribed Tylenol and referred Plaintiff back to Dr. Kader. Tr. 641-42. And in August 2013, Plaintiff's back was examined by Dr. Neha Alang, who noted "straight leg raising test normal bilaterally." Tr. 640.

In 2015, a treating source observed that "most recent imaging no evidence of nerve root compression," Tr. 818, while in 2016, a medical update describes Plaintiff's back issue as "mild degenerative disease at L5/S1." Tr. 189. During the 2012 and 2013, no treating provider recorded any observation of weakness of the lower extremities and, to the extent that strength observations are recorded, they are uniformly normal. Likewise, after April 2012, through the end of 2013, all straight leg raise testing was negative.

Plaintiff's mental health treatment prior to the period in issue is also minimal. In the pre-onset period, Plaintiff was seen at East Bay Center on May 14, 2012, by a licensed mental health counsellor, Victoria Hickey, who performed an "assessment update" that reflects diagnoses of obsessive compulsive disorder, dysthymic disorder and learning disorder. Tr. 740. There is a separate GAF[3] score of 50[4] that appears to be related to Ms. Hickey's assessment based on its print date of May 14, 2012. Tr. 736. Next, just prior to onset, dated September 24, 2012, is a treatment plan signed by Plaintiff, which calls for therapy and medication. Tr. 737-39. During the period in issue, there is no evidence of any mental health treatment. The next mental health notation appears long after the period in issue, on June 6, 2014, when PCNS Gina DiGati noted, "has not been seen at the Center since 2012." Tr. 730. At that appointment, Nurse DiGati recorded a GAF of 55, with "estimated best past year 60." Tr. 731. Consistently, Plaintiff's

[3] GAF refers to a Global Assessment of Functioning ("GAF") score. See Diagnostic and Statistical Manual of Mental Disorders, Text Revision 32–34 (4th ed. 2000) ("DSM-IV-TR"). While use of GAF scores was still common in 2012, "[i]t bears noting that a recent [2013] update of the DSM eliminated the GAF scale because of 'its conceptual lack of clarity . . . and questionable psychometrics in routine practice.'" Santiago v. Comm'r of Soc. Sec., No. 1:13-CV-01216, 2014 WL 903115, at *5 n.6 (N.D. Ohio Mar. 7, 2014) (citing Diagnostic and Statistical Manual of Mental Disorders at 16 (5th ed. 2013) ("DSM-V")).

[4] As the ALJ correctly observed, most of the GAF scores in this case range between 50 and 60, indicative of serious to moderate symptoms. The ALJ did not mention a GAF score in a letter to a law firm (not current counsel) dated December 12, 2012, stating that Plaintiff "is currently" assessed with a GAF of 35. Tr. 727. Signed by Ms. Hickey of East Bay Center, the letter does not explain why Ms. Hickey advised the attorneys of a GAF that is so materially different from the one she assessed in treatment in May 2012. Plaintiff has made no attempt to explain how the ALJ should have dealt with this GAF score. Accordingly, any argument based on the ALJ's failure to mention it is waived.

post-date-last-insured mental health examinations are largely normal, including findings of average intelligence and no cognitive deficits, except for occasional findings of dysphoric, dysthymic or depressed mood and relatedly depressed affect. E.g., Tr. 189, 199, 404, 922, 953, 957. One assessment done in September 2016 estimated Plaintiff's intellectual capacity as "borderline." Tr. 258.

Well after the date-last-insured, Plaintiff's situation and medical issues shifted radically. First, venous stasis dermatitis of the lower extremities, which, in 2012 and 2013, resulted in observations of "dermal fibrosis, non-pitting edema," "foot light pink . . . blanch with slightest pressure," and in prescriptions for blood pressure medication, limit salt and water intake, elevate feet, walking and exercise, Tr. 645-48, by 2014 had developed into a persistent and serious medical problem, resulting in observation of "weeping," and repeated hospitalizations for open wounds and cellulitis. E.g., Tr. 156-58, 966-1021. Second, Plaintiff became homeless in October 2015, which made it difficult for him properly to treat the serious issues with his legs. Tr. 83. Third, in 2016, Plaintiff began to experience blackouts that resulted in repeated hospitalizations. E.g., Tr. 92, 112, 337, 1040-41. Fourth, Plaintiff's back and neck pain was exacerbated by his obesity and homelessness; in 2015 treatment shifted to the administration of regular injections and a 2016 MRI indicated that the spine was worse than it had been in 2012. Tr. 81, 818. Fifth, Plaintiff became so limited in his ability to walk that he needed a walker and then a wheelchair. Tr. 119, 213, 290. Sixth, in March 2016, Plaintiff's psychotherapist found that he "has had his condition deteriorate recently. . . . client seems to have given up hope . . . this is a dramatic change for this usually positive." Tr. 206. By the time of the ALJ hearing in March 2016, Plaintiff was homeless, wheelchair bound, and living in a rehabilitation facility from which treating providers were concerned about discharging him because of his inability to

function independently. Tr. 298-99. Based on these post-date-last-insured developments, at the hearing, the ALJ urged Plaintiff to apply for SSI (which he had not yet done): "it is quite obvious to me that at the least since last fall, he's been in very tough shape . . . so if the Decision is adverse, he should certainly try if he has to apply for SSI." Tr. 69.

C. Opinion Evidence

On December 15, 2014, Dr. Marsha Hahn, an SA expert psychologist, reviewed the record and opined that during the relevant period,[5] Plaintiff was moderately limited in the ability to understand, remember, and carry out detailed instructions and to maintain attention and concentration for extended periods. Tr. 463-64. On February 5, 2015, Dr. Youssef Georgy, an SA expert physician, reviewed the record and opined that during the relevant period, Plaintiff had the ability to perform the physical demands of light work. Tr. 462-63. On April 24, 2014, on reconsideration, Dr. Erik Purins, a second SA expert physician, affirmed the Georgy opinion. Tr. 479-80. The ALJ afforded substantial weight to all three of these opinions.[6] Tr. 30.

Plaintiff relies on the opinion of Dr. Patricia Song, his primary care treating physician since July 2014. Dr. Song filled out two RFC opinions, one signed on March 19, 2015, Tr. 887, and the other on February 11, 2016, Tr. 908. The first references diagnoses of low back pain, headaches, obesity, venous stasis dermatitis, lymphedema, depression and learning disorder, while the second lists lumbar and cervical spondylosis, chronic lymphedema, venous stasis dermatitis and depression. Tr. 887, 908. Based on "clinical findings and objective signs" of

[5] The SA examining experts relied on an error in Plaintiff's date-last-insured, which was mistakenly listed as March 1, 2013, rather than March 31, 2013. Tr. 459. The ALJ found that this mistake did not affect the reliability of the opinions. Tr. 24 n.2. I agree. There is no medical evidence for the period from March 1 to March 31, 2013, nor does Plaintiff point to anything specific about this mistake that impacts the integrity of the opinions. This mistake will not be discussed further.

[6] At the reconsideration phase, a second SA mental health expert noted the lack of any evidence of mental health treatment in light of the gap during the period in issue and declined to opine based on insufficient evidence. While finding her conclusion to be "not unreasonable," the ALJ did not rely on this opinion. Tr. 24 n.2.

tenderness in the lumbar region, positive straight leg raising, weakness of the lower extremities, and morbid obesity, Dr. Song opined to limitations that would not permit even sedentary work. Tr. 889, 909-10. With no indication of the source of her opinion for the period prior to the commencement of her own treating relationship with Plaintiff in 2014, Dr. Song indicated that her opinions regarding Plaintiff's symptoms and limitations applied "since 2008." Tr. 889, 910. The ALJ afforded her opinions "far less probative weight" for three "good reasons": (1) as to the period in issue, they are totally unsupported since Dr. Song did not meet Plaintiff until over a year after his date-last-insured; (2) her opinions are inconsistent with medical records from the relevant period; and (3) her opinions are inconsistent with her own treating notes from July 2014. Tr. 29-30.

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).

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. The Five-Step Evaluation

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. § 404.1520(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 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).

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 must prove the existence of a disability on or before the last day of insured status for the purposes of disability benefits. Deblois v. Sec'y of Health & Human Servs., 686 F.2d 76, 79 (1st Cir. 1982); 42 U.S.C. §§ 416(i)(3), 423(a), 423(c). If a claimant becomes disabled after loss of insured status, the claim for disability benefits must be denied despite disability. Cruz Rivera v. Sec'y of Health & Human Servs., 818 F.2d 96, 97 (1st Cir. 1986).

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.[7] 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

[7] The Social Security Administration ("SSA") has issued new regulations regarding the evaluation of opinion evidence for all applications filed on or after March 27, 2017. See 20 C.F.R. § 404.1520c. Under the new regulations, the ALJ "will not defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s) or prior administrative finding(s), including those from [the claimant's] medical sources." 20 C.F.R. § 404.1520c(a). This new regulation does not apply to this case.

weight than a consulting physician's opinion. See 20 C.F.R. § 404.1527(c)(2). 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). 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 ("RFC"), see 20 C.F.R. § 404.1545-46, or the application of vocational factors because that ultimate determination is the province of the Commissioner. 20 C.F.R. § 404.1527(d); see also Dudley v. Sec'y of Health & Human Servs., 816 F.2d 792, 794 (1st Cir. 1987) (per curiam).

IV. Analysis

A. ALJ's Treatment of Opinion Evidence

Plaintiff's principal argument critiques the ALJ's reliance on the three SA experts, while affording far less weight to the opinions from Dr. Song. The highlight of his challenge is the 2012 MRI and particularly its timing – four months before onset for the current application, during the period covered by the 2012 decision, but after the file review by the SA experts who opined in connection with the 2012 decision. In launching this attack, he asks the Court to conclude that the ALJ evinced active resistance to what Plaintiff characterizes as "arguably the most important medical record in support of [Plaintiff]'s claim that he was disabled prior to the expiration of his SSDI coverage." ECF No. 9-1 at 26. Seizing on the ALJ's inquiry during the hearing about other MRIs or "real treatment for the back" as of the date-last-insured, Plaintiff contends that the ALJ's evaluation of the 2012 MRI amounts to an "unguided judgment" because he lacks the medical expertise necessary to distinguish among disc herniations and bulges and

protrusions. See Manso-Pizarro v. Sec'y of Health & Human Servs., 76 F.3d 15, 16-17 (1st Cir. 1986); 20 C.F.R. § 404.1527; SSR 96-6p; SSR 96-7p.

This argument suffers a fatal flaw. While Plaintiff is right that the examining experts who opined for the 2012 decision did not see the 2012 MRI, the examining expert physicians who opined for the pending application did see it. The initial "findings of fact and analysis of evidence" expressly references it. Tr. 460 ("LS spine MRI 4/12."). Further, all such medical evidence was reviewed again at the reconsideration phase. Tr. 476 ("All prior and new MER reviewed . . . at DLI, initial case adjudication is affirmed as written"); Tr. 479 (functional opinion based on "[a]ll prior and new MER reviewed").

The fact that the SA experts' analyses did not expand upon their evaluation of the 2012 MRI, instead emphasizing other spine studies – "mri l spine 5/2009" and "2/15 MRI l spine" – is beside the point. Where it is clear that all of the medical evidence was reviewed and that the 2012 MRI was part of the record, the ALJ did not err in relying on non-examining opinions that provide an amplified evaluation only of the evidence that the physicians found most significant. See Vieira v. Berryhill, No. 1:16-CV-00469, 2017 WL 3671171, at *3 (D.R.I. Aug. 25, 2017) (rejecting claim that non-examining physician failed adequately to explain his opinion where the doctor "identified the specific medical evidence that he deemed relevant to his evaluation of [plaintiff]'s mental RFC"); Rodriguez v. Colvin, No. CA 14-184 ML, 2015 WL 3631697, at *13 (D.R.I. June 10, 2015) (non-examining opinion constituted substantial evidence where "findings of fact and analysis of evidence" section "plainly state[d] that [the doctor] reviewed the medical evidence submitted by" plaintiff's providers). Thus, the ALJ's reference to the 2012 MRI in his decision – "diagnoses of lumbar disc disease/arthritis (confirmed on lumbar MRI study) which

was treated conservatively with medication during this period"[8] – does not amount to an inappropriate lay judgment about the significance of the 2012 MRI. See Tr. 28. Rather, the ALJ appropriately relied on the judgment of well-qualified medical experts, who considered the 2012 MRI along with the balance of the medical evidence in developing opinions about how Plaintiff's disc disease affected his ability to function during the period in issue. No error taints this determination. Relatedly, I do not find that the ALJ should have procured the assistance of a medical expert and do not so recommend.

The corollary to Plaintiff's challenge to the ALJ's treatment of the SA opinion evidence is his argument that the ALJ erred in giving "far less probative weight" to Dr. Song's opinions. Tr. 30. The problem with this argument is that two of the ALJ's three "good reasons" for discounting the opinions are appropriately focused on the relevant time period, "at which point Dr. Song was not even treating the claimant." Id. Thus, the ALJ accurately captured the problem with the Song opinion. While Dr. Song is unambiguously a treating source potentially entitled to controlling weight for the period after she established a treating relationship in July 2014, for the prior period, the record does not reflect that she relied on anything beyond the history[9] she took from Plaintiff himself.

[8] The Court has also considered and rejects Plaintiff's argument that remand is required because the ALJ himself was vague and did not bother to evaluate the 2012 MRI. This critique totally misses the mark. To the contrary, the ALJ's reference to conservative treatment of the spine following the 2012 MRI and continuing into the period in issue is spot-on in that the medical record reflects that the treating physician (Dr. Kader) who ordered the 2012 MRI and evaluated its results for treating purposes noted, "No action at this time. We re-evaluate the situation after the conclusion of his physiotherapy." Tr. 677. Following that notation, Plaintiff appears to have had conservative treatment of the condition revealed by the 2012 MRI until Dr. Song sent him to the Brain and Spine Institute in 2015.

[9] Dr. Song's intake note summarizes what he told her about the back history: "He has had back pain since 2008. He was a janitor and injured himself on the job. Thus much of his care then was through workman's comp. He had an MRI at B & W which showed bulging discs at the time. He then has had trouble getting further evaluation or treatment for this." Tr. 787. The MRI mentioned in this note is from 2009. Tr. 721. The rest of the information Plaintiff provided to Dr. Song about his back is stated in the present tense, thus a summary of his symptoms in July 2014, not from the past. Id.

While conceding that there was no treating relationship, Plaintiff contends that Dr. Song's statement that her opinions apply "since 2008" permits the inference that Dr. Song had access to "all of [Plaintiff]'s medical history," ECF No. 9-1 at 31, effectively putting her opinion at least on a par of those of the SA non-examining experts. Plaintiff does not explain the foundation for this argument. At the hearing, the ALJ posited to Plaintiff's counsel that Dr. Song had "no way of actually knowing" what Plaintiff's condition was during the period in issue. Tr. 66-67. In response, counsel did not disagree with or contradict the proposition that Dr. Song knew nothing about the earlier period. Rather, he argued that "it's reasonable to relate Dr. Song's RFC opinion back to prior to the date last insured even though she did not begin her actual treatment until 2014 because the treatment notes before that, we mentioned the edema is the same, the back pain is the same." Id. However, the SA non-examining experts concluded that Plaintiff's condition was not the same, see Tr. 889, 910, while the medical record reflects a serious worsening of Plaintiff's condition from the period in issue to the period to which Dr. Song's treating relationship applies. To illustrate with just one example, in August 2016, Dr. Song noted that the "MRI of L spine 6/2016 worst in comparison to 2012." Tr. 81; see Tr. 83 ("Saw Dr Rocco who ordered MRI of back at Newport Hosp. Has multilevel disc disease which he said looks worst in comparison to previous."). I find that no error infected the ALJ's first "good reason" – there is more than substantial evidence supporting the finding that, for the relevant period, the Song opinions are not based on a treating relationship and therefore are not supported by medically acceptable clinical and laboratory diagnostic techniques.

The ALJ's second "good reason" – the opinions' inconsistency with the medical evidence from the relevant period – is also well founded. For example, Dr. Song's opinions state, *inter alia*, that the back pain radiated to both legs, required treatment by injection, and caused

numbness, weakness and profound functional limitations. These conclusions are consistent with her treating record – from 2014 and 2015, Plaintiff needed spine injections and had positive straight leg raise tests, while by 2016, Plaintiff had "trouble walking related to his chronic LBP," and, in April 2016, was given a cane and a walker. Tr. 81, 92, 903, 915. However, it is starkly different from Dr. Kader's June 2012 reaction to the 2012 MRI ("No action needed"), from Dr. Fowler's January 2013 observation of negative straight leg raising test results and normal strength, from Dr. Lim's June 2013 observation of no motor weakness and treatment with Tylenol, and from Dr. Alang's normal bilateral straight leg raise test. Tr. 640, 641-42, 645, 677. I find that the ALJ did not err in discounting the Song opinions based on their inconsistency with Plaintiff's far more benign condition as reflected in the 2012 and 2013 treating record as interpreted by the SA experts who had access to all of the relevant material.

That leaves the ALJ's third "good reason" – that Dr. Song's July 2014 medical observations are inconsistent with her 2015/2016 opinions. Plaintiff is right about the straight leg raising test results from July 2014. The ALJ found, "[Dr. Song] does not describe . . . positive straight leg raising." Tr. 787. This is incorrect – in fact, on July 15, 2014, Dr. Song found, "straight leg raising is limited to (30 degrees)." Id. Otherwise, however, Plaintiff's claim that the ALJ misconstrued Dr. Song's July 2014 record is not accurate. For example, Dr. Song did find that Plaintiff "was in no acute distress," Tr. 787, and that the lumbar spine x-ray she ordered showed only "mild degenerative changes at the L5-S1 level." Tr. 794. The ALJ was also correct when he wrote that, in 2014, Dr. Song did not prescribe a cane or walker and did not observe spasm, atrophy, limitation of motion (except straight leg raising) or neurological deficits. And the ALJ correctly acknowledged that, by July 2014, Plaintiff's lymphedema of the legs, was significant. Tr. 29.

At bottom, whether the straight-leg-raise mistake is enough to render this third "reason" unsupported by substantial evidence is not necessary to determine. With two solid "good reasons" for the weight afforded to the Song opinions, I find that any error is harmless and do not recommend remand.

B. ALJ's Treatment of Mental Limitations

Assessing the scope of Plaintiff's mental limitations posed a challenge in this case. Despite pre-onset treating diagnoses of OCD, depression, and learning disorder, Tr. 727, 740, Plaintiff had minimal mental health treatment prior to the period in issue and none during it; the ALJ accurately characterized this as "a large gap in the evidence." Tr. 24 n.2. Further, after the period in issue, as the ALJ correctly noted, mental status observations in 2014 and 2015 are frequently normal or close to normal, Tr. 732, 734, 752, with consistent assessments of "intelligence estimate average," Tr. 189, 195, and "no cognitive deficits." Tr. 743, 754; but see Tr. 258 (2016 note: "intelligence estimate borderline"). Based on this record, the initial phase SA psychologist opined to some limitations, while the reconsideration phase expert found "insufficient evidence," but also opined that depression and anxiety are "severe." Tr. 476-77.

Not mentioned by the SA psychologist, but discussed at some length by the ALJ are the 2009 I.Q. scores, which were found by the 2010 and 2012 decisions to be properly interpreted as reflective of borderline intellectual functioning, not mental retardation. Tr. 425-28. In this case, the ALJ noted that the 2010 and 2012 decisions do not contain a finding of mental retardation or intellectual disability, that the 2010 ALJ "reasonably concluded that borderline intellectual functioning was the only proper mental diagnosis," and that the prior decisions "constitute res judicata through August 21, 2012." Tr. 22. In making his Step Two/Three determination, the ALJ relied on the 2010 decision's finding of borderline functioning, the opinion of the

psychologist from the initial phase, and the mental status examination results and other notes regarding mental health treatment throughout the longitudinal record. He gave Plaintiff "the benefit of the doubt particularly in light of previous cognitive testing" and found borderline intellectual functioning to be severe (in addition to depression and anxiety disorder), but that this deficit did not equal or meet any Listing. He specifically found the proposition that the 2009 I.Q. scores reflect mental retardation to be "invalid (being more consistent with borderline intellectual functioning) given his active daily activities and negative mental status findings as indicated by the State agency consultants at the time." Tr. 24, 27 & n.2.

Plaintiff now attacks these findings, arguing that it was beyond the ALJ's ken to evaluate the 2009 I.Q. scores, to find that they are "invalid" and to find that "borderline intellectual functioning was the only proper diagnosis." Tr. 22, 27. Plaintiff concedes that *res judicata* may preclude him from relitigating the Listing determination from the 2010 decision, but argues that it cannot form a proper foundation for a new findings made in the present case that the 2009 I.Q. scores are "invalid" or that the "only proper mental diagnosis" is borderline functioning.

This proposition fails because the ALJ did not reinterpret the 2009 I.Q. scores. Rather, based on the *res judicata* effect of the 2010 decision, the ALJ relied on the 2010 finding, which had been made following a hearing by the 2010 ALJ in reliance on opinions from the competing experts who opined in the 2010 case. This is consistent with applicable federal law: administrative *res judicata* precludes collateral attack on post-hearing findings, once the decision of the Commissioner has become final. 42 U.S.C. § 405(h) ("findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such a hearing") (emphasis added). This *res judicata* doctrine precludes relitigation not just of the 2010 decision's Listing determination, but also of its internal findings and

conclusions, including the finding that the 2009 I.Q. scores establish borderline intellectual functioning, not mental retardation. See Prescott v. Astrue, Civil No. 09-23-B-W, 2009 WL 3148731, at *5 (D. Me. Sept. 30, 2009), adopted, No. CIV. 09-23-B-W, 2009 WL 3712609 (D. Me. Nov. 5, 2009) (prior disability decision, including its internal findings and conclusions, are final and binding); 20 C.F.R. § 404.957(c)(1) ("The doctrine of *res judicata* applies in that we have made a previous determination or decision . . . on the same facts and the same issue or issues . . . ."). There is no error because the settled finding that the 2009 I.Q. scores mean that "claimant has borderline intellectual functioning" is what the ALJ marshaled for this case; he did not improperly perform his own lay interpretation. Relatedly, Plaintiff misreads the ALJ's reference to the "only proper mental diagnosis" – a quick look at the decision reveals that this is not a statement of the ALJ's lay fact finding, but rather is simply a reference to the finding in the 2010 decision. Tr. 22 ("Judge Bower . . . concluded that borderline intellectual function was the only proper mental diagnosis."). And the ALJ's less than artful word choice ("invalid") in describing the 2010 finding does not convert otherwise sound reasoning into error.

Plaintiff's argument also fails because, while he is right that only a medical expert can opine as to Plaintiff's level of intellectual functioning,[10] here the ALJ appropriately relied on the expert SA psychologist at the initial phase, as well as on the other evidence in the record; he landed on a more nuanced and limited RFC in reliance on the 2010 decision's finding regarding

[10] Plaintiff appears to make a similar attack on the ALJ's comment that the GAF scores of record fell into the moderate to serious range, but also noting that GAF scale has fallen out of use because of its lack of reliability. Tr. 28-29. This aspect of Plaintiff's argument is difficult to understand. For starters, there does not seem to be any error – other than the inconsistent score in the lawyer letter, see n.4, *supra*, the ALJ correctly summarized the GAF scores from 2012 to 2014, which fall between 50 and 60, Tr. 731, 736, and accurately characterized the limited role that GAF scores play in the adjudicative process. Tr. 28-29. In any event, these GAF scores were considered by the SA non-examining psychologist at the initial review phase, and the ALJ appropriately relied on her expert assessment of their significance. This argument will not be discussed further.

the significance of the 2009 I.Q. scores. Nor is there any evidence contrary to the ALJ's finding of borderline intellectual functioning. Finding no error; I do not recommend remand.

C. Other Issues

Plaintiff's argument that the ALJ applied an "unfairly myopic view" to the medical record does not merit extensive discussion. The ALJ properly considered the medical evidence that predated the 2012 decision and did not focus exclusively on the relatively short relevant period. Similarly, the ALJ did not inappropriately reallocate the burden of proof by focusing exclusively on the lack of objective findings. Tr. 47, 51-53. Nor did the ALJ commit the error found by the First Circuit in Ormon v. Astrue, 497 F. App'x 81, 86-87 (1st Cir. 2012), where the evidence established that the claimant had back surgery and spinal injections and was taking pain drugs prescribed by a pain specialist that made him feel like a zombie, yet the ALJ found a lack of objective evidence and made an unsupported finding of malingering. At bottom, Plaintiff is simply wrong in the basic theme that undergirds his assault on the ALJ's work. Having reviewed the entirety of the record, I did not find that the ALJ's opinion amounts to little more than a defense of his prior decision, nor is it an "effort to simply reissue the prior Decision." ECF No. 9-1 at 34. Rather, it is a thoughtful analysis of the evidence supporting Plaintiff's claim of disability arising prior to his date-last-insured. As noted, the only discernable potential error is harmless if it is error at all. I recommend that that the ALJ's decision be affirmed.

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. 9) be DENIED and Commissioner's Motion to Affirm Her Decision (ECF No. 11) 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
July 11, 2018