UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

CHARISSA S. o/b/o A.S.	:	
	:	
v.	:	C.A. No. 17-000442-JJM
	:	
CAROLYN W. COLVIN, 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 Social Security Insurance ("SSI") under the Social Security Act (the "Act"), 42 U.S.C. § 405(g). Plaintiff filed her Complaint on behalf of her minor child on September 26, 2017 seeking to reverse the decision of the Commissioner. On March 10, 2018, Plaintiff filed a Motion to Reverse the Decision of the Commissioner. (Document No. 8). On May 14, 2018, the Commissioner filed a Motion for an Order Affirming the Decision of the Commissioner. (Document No. 11).

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 (Document No. 8) be DENIED and that the Commissioner's Motion (Document No. 11) be GRANTED.

I. PROCEDURAL HISTORY

Plaintiff filed an application for SSI on behalf of her then eight year old daughter, A.S., on May 22, 2014 alleging disability since September 1, 2010. (Tr. 186-194). The application was denied initially on August 6, 2014 (Tr. 101-108) and on reconsideration on November 20, 2014. (Tr. 111-120, 130-136).

Plaintiff requested an Administrative Hearing. On June 16, 2016, a hearing was held before Administrative Law Judge Jason Mastrangelo (the "ALJ") at which time Ms. Stathakis and her daughter, represented by counsel, appeared and testified. (Tr. 50-100). The ALJ issued an unfavorable decision to Plaintiff on August 19, 2016. (Tr. 23-49). The Appeals Council denied Plaintiff's request for review on July 17, 2017. (Tr. 5-9, 11). Therefore the ALJ's decision became final. A timely appeal was then filed with this Court.

II. THE PARTIES' POSITIONS

Plaintiff claims that the ALJ erred in finding that the child has less than marked limitations in the domains of acquiring and using information, interacting and relating with others, and caring for yourself.

The Commissioner disputes Plaintiff's claims and contends that the ALJ's finding of non-disability is supported by substantial evidence, and thus 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. CHILDHOOD DISABILITY DETERMINATION

A child under age eighteen is considered disabled, and is entitled to SSI benefits, if he or she "has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 1382c(a)(3)(c). The Social Security regulations include a three-step test for the purpose of adjudicating children's disability claims under this standard. 20 C.F.R. § 416.924(b)-(d) (2004). That test, known as the Children's Benefit Analysis, requires the ALJ to determine: (1) whether the child is engaged in "substantial gainful activity," (2) whether the child has "a medically determinable impairment[ ] that is severe," and (3) whether the child's "impairment(s)...meet, medically equal, or functionally equal [a] list[ed impairment]." Id. A negative answer at any step precludes a finding of disability. 20 C.F.R. § 416.924a. "The claimant seeking [childhood] benefits bears the burden of proving that his or her impairment meets or equals a listed impairment." Hall o/b/o Lee v. Apfel, 122 F. Supp. 2d 959, 964 (N.D. Ill. 2000) (citing Maggard v. Apfel, 167 F.3d 376, 380 (7th Cir. 1999)).

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(c). 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 Three-step Evaluation

The ALJ must follow three steps in evaluating a claim of childhood disability. See 20 C.F.R. § 416.924. In particular, the ALJ must determine whether: (1) the child is engaged in substantial gainful activity; (2) the child has an impairment or combination of impairments that is severe; and (3) the child's impairment meets or equals an impairment listed in Appendix 1, Subpart P of the regulations. 20 C.F.R. §§ 416.924(b)-(d). If, at the third step of the analysis, the ALJ determines that the child's impairment does not meet or equal a listed impairment, the ALJ must then consider whether the child's impairment is equivalent in severity to that of a listed impairment (i.e., whether it "results in limitations that functionally equal the listings"). 20 C.F.R. § 416.926a(a). Provisions for functional equivalence are established in 20 C.F.R. § 416.926a. Stated generally, to functionally equal a listed impairment, a child must demonstrate an "extreme" limitation in one area of functioning, or show "marked" limitation in two areas of functioning. 20 C.F.R. § 416.926a(a). The ALJ must review the following six areas or "domains" of functioning: acquiring and using information; attending and completing tasks; interacting with others; moving about and manipulating objects; caring for yourself; and health and physical well-being. 20 C.F.R. § 416.926a(b)(1), (g-1).

A "marked" limitation is found where a claimant's impairment(s):

> interferes seriously with your ability to independently initiate, sustain, or complete activities. Your day-to-day functioning may be seriously limited when your impairment(s) limits only one activity or when the interactive and cumulative effects of your impairment(s) limit several activities. "Marked" limitation also means a limitation that is "more than moderate" but "less than extreme." It is the equivalent of the functioning we would expect to find on standardized testing with scores that are at least two, but less than three, standard deviations below the mean.

20 C.F.R. § 416.926a(e)(2)(i). While an "extreme" limitation is found where a claimant's impairment(s):

> interferes very seriously with your ability to independently initiate, sustain, or complete activities. Your day-to-day functioning may be very seriously limited when your impairment(s) limits only one activity or when the interactive and cumulative effects of your impairment(s) limit several activities. "Extreme" limitation also means a limitation that is "more than marked." "Extreme" limitation is the rating we give to the worst limitations. However, "extreme limitation" does not necessarily mean a total lack or loss of ability to function. It is the equivalent of the functioning we would expect to find on standardized testing with scores that are at least three standard deviations below the mean.

20 C.F.R. § 416.926a(e)(3)(i).

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 followed the three-step child disability evaluation process. See 20 C.F.R. §§ 416.924(a)-(d). At Step 2, the ALJ found that A.S. had the severe impairments of attention deficit disorder, anxiety-related disorder, ODD and borderline intellectual functioning. (Tr. 29). At Step 3, the ALJ found that A.S.'s impairments did not meet or medically equal any impairment in the regulatory Listing of Impairments found in 20 C.F.R. Part 404, Subpart P, Appendix 1, including Listing 112.02 for organic mental disorders, Listing 112.06 for anxiety disorders, Listing 112.08 for personality disorders or Listing 112.11 for ADHD. (Tr. 30).

Next, in considering whether A.S. had an impairment or combination of impairments that functionally equaled the severity of a Listing, the ALJ considered the six functional equivalence domains set forth in the regulations. (Tr. 30-45); 20 C.F.R. §§ 416.924(d), 416.926a(g)-(1). The ALJ found that A.S. had a "marked" limitation in the domain of "attending and completing tasks." (Tr. 39-41). The ALJ found that A.S. had "less than marked" limitations in the domains of "acquiring and using information," "interacting and relating with others," and "caring for yourself." (Tr. 37-39, 41-42, 43-44). The ALJ also found A.S. had no limitations in the domains of "moving about and manipulating objects" and "health and physical well-being." (Tr. 42-43, 44-45). Because the ALJ did not find "marked" limitations at least two of the domains, or an "extreme" limitation in at least one domain, the ALJ found that A.S. did not have an impairment or combination of impairments that functionally equaled the severity of a Listed impairment. Therefore, the ALJ found that A.S. was not disabled from May 22, 2014, the date of the application, through the date of the decision, August 19, 2016 (Tr. 45); see 20 C.F.R. § 416.926a(d).

B. Plaintiff Has Shown No Error in the ALJ's Evaluation of A.S.'s Functionality

The ALJ's decision is based on the assessments of the state agency psychological consultants, Dr. Kleinman and Dr. Killenberg (Exh. 4A), and the report of the examining psychologist, Dr. Parsons (Exh. 4F). (Tr. 35-37). The ALJ gave "great weight" to the opinions of Dr. Kleinman and Dr. Killenberg, and "considerable probative weight" to the opinions of Dr. Parsons. Id. The ALJ also reviewed the treatment records of A.S.'s treating psychiatrist, Dr. Smith, and found them to contain generally unremarkable mental status exam findings and indications that A.S. was generally doing well and treatment was adequate as to medication targets. (Tr. 35). The record does not contain any treating source opinions as to A.S.'s functioning in terms of the applicable six domains.

Plaintiff faults the ALJ for relying heavily on the opinions of the consulting psychologists. (ECF Doc. No. 8 at p. 17). She contends that they based their opinions on an incomplete record. Id. She notes that "additional records had been submitted, including the May 2016 opinion of Mr. Deschene, [a teacher], which was clear[ ] enough to indicate marked limitations in attending and competing tasks." Id. While it is true that Mr. Deschene noted that attending and completing tasks was a serious problem for A.S., the ALJ found a marked impairment in that domain. (Tr. 40-41, 278). In fact, Mr. Deschene's overall assessments appear generally consistent with the ALJ's conclusions and the opinions of the consulting psychologists. (Tr. 277-281). Further, Plaintiff does not point to any specific evidence post-dating the consulting psychologist opinions which establish greater limitations than those ultimately adopted by the ALJ.[1]

[1] In her Memorandum, the Commissioner appears to accurately argue that Plaintiff's Memorandum failed to point to any evidence post-dating the reviewing psychologist's assessments that established greater limitations than those adopted by the ALJ. (ECF Doc. No. 11-1 at p. 28). Since Plaintiff elected not to file a reply memorandum,

The ALJ found a less than marked limitation in the domain of caring for yourself. (Tr. 44). Plaintiff argues that the analysis of this domain was "sparse" and failed to adequately consider A.S.'s enuresis, i.e., bed wetting. (ECF Doc. No. 8 at p. 18). While the ALJ does not specifically discuss this issue, he correctly acknowledged that a failure to toilet age-appropriately is a factor for consideration under 20 C.F.R. § 416.926a(k)(3). (Tr. 43-44). In addition, he indicated that his less than marked finding was consistent with the opinions of the state agency consulting psychologists who reviewed the underlying medical records. (Tr. 44). Further, Dr. Killenberg expressly references poor hygiene and noted the presence of enuresis in his summary of the evidence reviewed in finding a less than marked impairment in the domain of caring for yourself. (Tr. 116-117). Dr. Killenberg also had access to and reviewed Dr. Parsons' report (Exh. 4F) which indicates a history of "persistent nocturnal enuresis." (Tr. 320). Plaintiff has shown no reversible error in the ALJ's evaluation of A.S.'s enuresis or his overall evaluation of this domain.

In an effort to get around the ALJ's reliance on the consulting psychologist opinions, Plaintiff takes aim at claimed errors in the ALJ's "initial analysis." In essence, Plaintiff claims that the ALJ's general misinterpretation or mischaracterization of certain aspects of the record undermined his analysis of the specific domains. The ALJ comments that "[t]he record reflects behavioral difficulties and academic delays in the context of conservative pediatric and mental health treatment with lack of involvement in special education services." (Tr. 31). While Plaintiff takes issue with some of the labels used by the ALJ such as "conservative" and "lack of involvement," the ALJ's statement derives from his reasonable assessment of the record and is reasonably supported by the record. Although "conservative" is not a defined term, the record does

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this argument is unrebutted, and the Court can only assume that there is no such evidence in the record.

not reflect any emergency or in-patient mental health treatment for uncontrolled symptoms. Further, as to special education, there is evidence in the record that Plaintiff was seeking such services for A.S. and that she received "resource room assistance" but it is undisputed that A.S. does not participate in special education services. (Tr. 225, 321). Again, Plaintiff has shown no reversible error in the ALJ's "initial analysis."

The issue presented here is not whether this Court would have found A.S.'s impairments to meet a disabling level but rather it is whether the record contains sufficient support for the ALJ's non-disability finding. The medical record is thin with no relevant treating source opinions, and the ALJ exercised his discretion to give "great weight" to the opinions of Dr. Kleinman and Dr. Killenberg. Plaintiff's argument essentially asks this Court to re-weigh the record evidence in a manner more favorable to her and assess greater limitations than those found by the consulting psychologists. However, Plaintiff has not shown that the ALJ committed any error in his evaluation of the evidence or in his decision to follow the consulting psychologist opinions. The ALJ's conclusions are supported by substantial evidence and must be affirmed.

VI. CONCLUSION

For the reasons discussed herein, I recommend that Plaintiff's Motion to Reverse (Document No. 8) be DENIED and that Defendant's Motion to Affirm (Document No. 11) be GRANTED. Further, I 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
June 21, 2018