UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

VICKI K.	:	
	:	
v.	:	C.A. No. 20-00035-WES
	:	
ANDREW M. SAUL, Commissioner 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 Disability Insurance Benefits ("DIB") under the Social Security Act (the "Act"), 42 U.S.C. § 405(g). Plaintiff filed her Complaint on January 24, 2020 seeking to reverse the Decision of the Commissioner. On June 17, 2020, Plaintiff filed a Motion to Reverse, Without or, Alternatively, With a Remand for Rehearing of the Commissioner's Final Decision. (ECF No. 12). On July 17, 2020, Defendant filed a Motion for an Order Affirming the Decision of the Commissioner. (ECF No. 14). On August 29, 2020, Plaintiff filed a Reply. (ECF No. 16).

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 No. 12) be DENIED and that the Commissioner's Motion to Affirm (ECF No. 14) be GRANTED.

I. PROCEDURAL HISTORY

Plaintiff filed an application for DIB on March 8, 2018 (Tr. 306-307) alleging disability since September 1, 2016. Plaintiff was not eligible for benefits before March 2017 because she was working.

(Tr. 18). The applications were denied initially on March 7, 2018 (Tr. 60-78, 79-97) and on reconsideration on June 26, 2018. (Tr. 132-151, 152-171). Plaintiff requested an Administrative Hearing. On January 3, 2019, a hearing was held before Administrative Law Judge Martha Bower (the "ALJ") at which time Plaintiff, represented by counsel, and a Vocational Expert ("VE") appeared and testified. (Tr. 35-59). The ALJ issued an unfavorable decision to Plaintiff on February 12, 2019. (Tr. 12-28). The Appeals Council denied Plaintiff's request for review on November 26, 2019. (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 committed reversible error by failing to consider whether arachnoiditis met and/or equaled Listing 1.04.

The Commissioner disputes Plaintiff's claims and contends that the ALJ's decision 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 HHS, 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec'y of HHS, 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 HHS, 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 HHS, 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.

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. Opinion Evidence

For applications like this one, filed on or after March 27, 2017, the Administration has fundamentally changed how adjudicators assess opinion evidence. The requirements that adjudicators assign "controlling weight" to a well-supported treating source's medical opinion that is consistent with other evidence, and, if controlling weight is not given, must state the specific weight that is

assigned – are gone. See Shaw v. Saul, No. 19-cv-730-LM, 2020 WL 3072072, *4-5 (D.N.H. June 10, 2020) citing Nicole C. v. Saul, Case No. cv 19-127JJM, 2020 WL 57727, at *4 (D.R.I. Jan. 6, 2020) (citing 20 C.F.R. § 404.1520c(a)). Under the newly applicable regulations, an ALJ does not assign specific evidentiary weight to any medical opinion and does not defer to the opinion of any medical source (including the claimant's treating providers). 20 C.F.R. §§ 404.1520c(a), 416.920c(a). Instead, the ALJ evaluates the relative persuasiveness of the medical evidence in terms of five specified factors. Id.

The five factors the ALJ considers in evaluating the persuasiveness of a medical opinion are supportability (the relevance of the opinion's cited objective medical evidence), consistency (how consistent the opinion is with all of the evidence from medical and non-medical sources), treatment/examining relationship (including length of treatment relationship, frequency of examinations, purpose of treatment relationship, and existence and extent of treatment/examining relationship), specialization (the relevance of the source's specialized education or training to the claimant's condition), and what the Administration refers to as "other factors" (the medical source's familiarity with the claimant's medical record as a whole and/or with the Administration's policies or evidentiary requirements). Shaw, 2020 WL 3072072 at *4 citing 20 C.F.R. §§ 404.1520c(c)(1)-(5), 416.920c(c)(1)-(5) (emphasis supplied). Of the five factors, the "most important" are supportability and consistency. Id. §§ 404.1520c(a), 404.1520c(b)(2), 416.920c(a), 416.920c(b)(2).

While the ALJ must consider all five of the factors in evaluating the persuasiveness of medical evidence, when preparing the written decision the ALJ is, in most cases, only required to discuss application of the supportability and consistency factors. Id. §§ 404.1520c(b)(2), 416.920c(b)(2). Only where contrary medical opinions are equally persuasive in terms of both supportability and consistency is the ALJ required to discuss their relative persuasiveness in terms of the treatment/examining relationship, specialization, and other factors. Id. §§ 404.1520c(b)(3),

416.920c(b)(3). In addition, where a single medical source offers multiple opinions, the ALJ is not required to discuss each opinion individually, but instead may address all of the source's opinions "together in a single analysis." Id. §§ 404.1520c(b)(1), 416.920c(b)(1).

Moreover, while the ALJ must consider all of the relevant evidence in the record, id. §§ 404.1520b(a)-(b), 416.920b(a)-(b), the ALJ need not discuss evidence from nonmedical sources, including, e.g., the claimant, the claimant's friends and family, educational personnel, and social welfare agency personnel. Id. §§ 404.1502(e), 404.1520c(d), 416.902(j), 416.920c(d). And while the regulations require the ALJ to discuss the relative persuasiveness of all medical source evidence, id. §§ 404.1520c(b), 416.920c(b), the claimant's impairments must be established specifically by evidence from an acceptable medical source, id. §§ 404.1521, 416.921.

"Acceptable medical sources" are limited to physicians and psychologists, and (within their areas of specialization or practice) to optometrists, podiatrists, audiologists, advanced practice registered nurses, physician assistants, and speech pathologists. Id. §§ 404.1502(a), 416.902(a). Evidence from other medical sources, such as licensed social workers or chiropractors, is insufficient to establish the existence or severity of a claimant's impairments. Id. Finally, the ALJ need not discuss evidence that is "inherently neither valuable nor persuasive," including decisions by other governmental agencies or nongovernmental entities, findings made by state disability examiners at any previous level of adjudication, and statements by medical sources as to any issue reserved to the Commissioner. Id. §§ 404.1520b(c), 416.920b(c).

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 HHS, 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 HHS, 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 HHS, 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 (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. SSR 16-3p, 2017 WL 4790249, at *49462; 20 C.F.R. § 404.1529(c)(3). 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 HHS, 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). However, the individual's statements about the intensity, persistence, and limited effects of symptoms may not be disregarded "solely because the objective medical evidence does not substantiate the degree of impairment-related symptoms." SSR 16-3p, 2017 WL 4790249, at *49465.

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)).

Guidance in evaluating the claimant's statements regarding the intensity, persistence, and limiting effects of subjective symptoms is provided by SSR 16-3p, 2017 WL 4790249, at *49462 (Oct. 25, 2017). It directs the ALJ to consider the entire case record, including the objective medical evidence; an individual's statements about the intensity, persistence, and limiting effects of symptoms; statements and other information provided by medical sources and other persons; any other relevant evidence; and whether statements about the intensity, persistence, and limiting effects of symptoms are consistent with the medical signs and laboratory findings. SSR 16-3p, 2017 WL 4790249, at *49465.

V. APPLICATION AND ANALYSIS

A. The ALJ's Decision

The ALJ rendered her decision on Plaintiff's DIB application under the familiar five-step sequential evaluation process, see 20 C.F.R. § 404.1520, finding that Plaintiff engaged in substantial gainful activity from September 2016 through March 2017. (Tr. 18). At Step 2 and 3, the ALJ found that Plaintiff's degenerative disc disease of the lumbar and cervical spine, diabetes, depressive disorder, personality disorder, and history of substance abuse disorder were severe, but that they did not meet or medically equal any listed impairment. (Tr. 18-19). The ALJ determined that Plaintiff had the RFC to perform light work as defined in 20 CFR §404.1567(b) and 416.967(b), except she can occasionally climb ramps and stairs, balance, stoop, kneel, crouch and crawl; she can never climb ropes, ladder or scaffolds; she should not be exposed to hazards, such as unprotected heights or dangerous equipment; she is limited in concentration, persistence or pace to the ability to understand, remember and carry out simple, repetitive tasks of a non-pressured nature and is limited to object-oriented tasks, with only occasional work-related interactions with coworkers, supervisors and the general public. (Tr. 20). At Step 4, the ALJ found that Plaintiff could not return to her past relevant work. (Tr. 26). Finally, at Step 5, the ALJ relied on the vocational expert's testimony to find that

Plaintiff could perform other work as an office cleaner, price marker, sub-assembler/electronics, addresser/address clerk, table work and touch up screener, all jobs existing in significant numbers in the national economy. (Tr. 27-28). Accordingly, the ALJ concluded that Plaintiff was not disabled under the Act. (Tr. 28).

B. The ALJ's Findings are Fully Supported by the Record

Plaintiff contends that the ALJ committed reversible error by failing to consider whether her arachnoiditis met and/or medically equaled Listing 1.04B. Plaintiff asserts that the lack of findings regarding Listing 1.04B is not based on substantial evidence because the record raised a "substantial question" as to whether she qualified as disabled under that listing, including diagnostic evidence supporting arachnoiditis, and the "boilerplate" statement rejecting the Listing contained in the ALJ's Decision was insufficient. Listing 1.04 addresses "Disorders of the spine." To meet Listing 1.04B, a claimant must show: "Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours." 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 1.04B. Plaintiff argues that all the criteria for Listing 1.04 are met in this case and that the ALJ's adverse Step 3 finding is not supported by substantial evidence.

In attacking the ALJ's ruling, Plaintiff first contends that a "substantial question" was raised as to the applicability of Listing 1.04B and that the ALJ's "boilerplate statement" regarding her failure to meet the Listing was insufficient.[1] Next, Plaintiff attacks the ALJ's reliance on the opinions of the experts, noting that the "medical examiner was not privy to an updated MRI which confirmed

[1] The Court rejects this argument. As noted in Magistrate Judge Sullivan's 2016 Report and Recommendation, the failure to specifically name a listing is "far from error requiring remand." Coley v. Colvin, No. CV 16-03ML, 2016 WL 8309020, at *7 (D.R.I. Dec. 12, 2016), report and recommendation adopted sub nom. Coley v. Berryhill, No. CV 16-003 ML, 2017 WL 706188 (D.R.I. Feb. 22, 2017) ("courts consistently hold that the relevant inquiry is not whether the ALJ mentioned a particular listing, but whether substantial evidence supports the ALJ's finding – whether tacit or overt – that the listing was not satisfied.")

arachnoiditis." (ECF No. 12-1 at p. 9). Finally, Plaintiff broadly contends that the ALJ had a "flawed understanding of arachnoiditis itself and therefore applied faulty logic when analyzing the claimant's impairments." Id. at p. 12.

At Step 3, the claimant bears the burden of proving that her impairment(s) meet or equal one of the Listed impairments. See Wells v. Barnhart, 267 F. Supp. 2d 138, 144 (D. Mass. 2003). "Because the burden at Step Three, both for meeting and medically equaling a listing, falls on the claimant, the ALJ's analysis at this step must always be viewed in light of the evidence presented by the claimant. Thus, the ALJ's analysis does not need to be extensive if the claimant fails to produce evidence that he or she meets the Listing." Ford v. Comm'r of Soc. Sec., No. 13-CV-14478, 2015 WL 1119962, at *17 (E.D. Mich. Mar. 11, 2015).

In the present case, Plaintiff accurately notes that "the medical examiner was not privy to an updated MRI which confirmed arachnoiditis." (ECF No. 12-1 at p. 9). Viewing the entire record, however, this additional MRI, standing alone, is immaterial and would not alter the ALJ's Decision. First, the record as a whole (excluding this additional MRI) documents Plaintiff's arachnoiditis diagnosis, and her arachnoiditis was addressed by Plaintiff at the hearing and noted by the ALJ in the Decision. (Tr. 21, 22 noting "suggested arachnoiditis" and "patent arachnoiditis"). Even assuming, arguendo, that the MRI established a "new" diagnosis, the remaining aspects of Listing 1.04B were still not met. The Listing requires that the arachnoiditis be "manifested by severe burning or painful dysesthesia." In this case, Drs. Patricia Blair (Tr. 70-74), Maria Lorenzo (Tr. 109-112) and Youssef Georgy (Tr. 144-147) all evaluated the relevant medical records and did not find that Plaintiff met Listing 1.04. Drs. Lorenzo and Georgy specifically indicated "no findings of burning or painful dysesthesias related to lumbar arachnoiditis." (Tr. 111, 147). In her Decision, the ALJ noted that Dr. Georgy "had the benefit of examining a significant portion of the treatment record" and that the ALJ concurred with his assessment. Plaintiff has shown no error in the ALJ's consideration of the reports, and the ALJ did not consider those reports in a vacuum. The ALJ specifically noted that the

"preponderance of objective evidence, when considered in light of the claimant's demonstrated level of activity, fails to substantiate the dire level of dysfunction that she purports." (Tr. 26).

The ALJ's observation about Plaintiff's subjective reporting of symptoms segues into the next area in dispute – a claimant's need to alternate positions, which is the final aspect of Listing 1.04B. Plaintiff contends that the record documents her "difficulty remaining in a fixed position, observed by both treating physicians and doctors performing one-time assessments." (ECF Doc. No. 12 at p. 11 citing Tr. p.47, 49, 51,730, 900, 933). A review of the record and decision demonstrates that the ALJ considered Plaintiff's reports that she needed to change position but deemed her subjective statements to be inconsistent with other evidence. The ALJ noted that Plaintiff's "statements about the intensity, persistence and limiting effects of her symptoms" were "inconsistent because the objective medical evidence fails to corroborate adequately the dire level of dysfunction that the claimant professes." (Tr. 21).

Defendant argues that there is a "functional element to listing 1.04B, i.e. the burning/dysesthesia has to be 'severe' and it must result in the need to change positions or posture more than once every two hours." (ECF No. 14 at p. 7). Defendant correctly points out that this prong of the Listing is within the province of the ALJ's fact-finding responsibility. In the decision, the ALJ observed "a number of inconsistencies between the claimant's subjective allegations and the objective record." (Tr. 21). For example, the ALJ accurately noted that Plaintiff's testimony about the dates and details of certain automobile accidents was inconsistent with other evidence of record, and that the injuries she reported resulting from the accidents did not match with the treating doctors' observations. (Tr. 21-22). For example, despite reporting that she could not move her legs, doctors observed that Plaintiff "ha[d] been actively using her legs to adjust her body and using her [arms] freely" while she waited to be treated. (Tr. 724). Thus – like the report of Dr. Kogan, a consultative examiner (see Tr. 645-646) – the observations of her treating physician at the Emergency Room suggest that Plaintiff was not entirely forthcoming about her symptoms, and the ALJ properly relied on that.

In short, the record contains no medical opinions whatsoever that Plaintiff met Listing 1.04. Thus, the ALJ's Step 3 finding is supported by substantial evidence. While reasonable minds could differ as to the interpretation of this evidence, the issue presented in this administrative appeal is not whether this Court would have reached the same conclusion as did the ALJ. "The ALJ's resolution of evidentiary conflicts must be upheld if supported by substantial evidence, even if contrary results might have been tenable also." Benetti v. Barnhart, 193 Fed. Appx. 6, 2006 WL 2555972 (1st Cir. Sept. 6, 2006) (per curiam) (citing Rodriguez Pagan v. Sec'y of HHS, 819 F.2d 1 (1st Cir. 1987)). Rather, the narrow issue presented is whether the ALJ's findings have adequate support in the record. Since they do in this case, there is no basis upon which to reject such findings. The ALJ thoroughly weighed the evidence in the context of the record as a whole and adequately explained her reasoning. Plaintiff has simply not shown the existence of reversible error in the ALJ's treatment of the medical evidence.

CONCLUSION

For the reasons discussed herein, I recommend that Plaintiff's Motion to Reverse (ECF No. 12) be DENIED and that the Commissioner's Motion to Affirm (ECF No. 14) be GRANTED. I further recommend that Final Judgment enter in favor of the Commissioner.

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
October 8, 2020