UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

BILLY A.,	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 20-536WES
	:	
KILOLO KIJAKAZI,	:	
Acting Commissioner of Social Security,	:	
Defendant.	:	

REPORT AND RECOMMENDATION

PATRICIA A. SULLIVAN, United States Magistrate Judge.

Plaintiff Billy A. completed eighth or ninth grade and worked for four years assembling jewelry. As pertinent to this case, he suffers from psoriasis, depression, social anxiety and obesity. On February 11, 2019, Plaintiff applied for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under the Social Security Act. On May 26, 2020, in reliance on what she found to be the persuasive opinions of Dr. David Pomerantz (Plaintiff's dermatologist), Dr. Louis Turchetta (the consulting examining psychologist), and Drs. Michelle Olson and Jeffrey Hughes (the non-examining expert psychologists), the administrative law judge ("ALJ") made the Step Two finding that obesity is not a severe impairment, the Step Three finding that psoriasis does not equal or meet the criteria in Listing 8.05[1] and the RFC[2] findings

[1] The Listing that applies to the impairment of psoriasis is set out in Listing 8.00 (Skin Disorders). 20 C.F.R. Part 404, Subpart P, App. 1, § 8.00. "Extensive skin lesions" are defined as those that involve multiple body sites or critical body areas and result in a very serious limitation. Id. at § (C)(1). The concept is illustrated, for example, by: lesions that interfere with joint motion and very seriously limit use of more than one extremity; hand lesions that very seriously limit the ability to do fine and gross motor movements; and lesions on the soles of both feet or in other areas that very seriously limit the ability to ambulate. Id. at § (C)(1)(a)-(c). For psoriasis, the Listing is met or equaled if such "extensive skin lesions" persist for at least three months despite continuing treatment as prescribed. Listing 8.05 (Dermatitis).

[2] "RFC" or "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); 416.945(a)(1).

that psoriasis limits Plaintiff's ability to work only to the extent that it prevents work in the presence of certain environmental irritants and that, despite his mental health impairments, he retains the ability to follow simple instructions and perform simple tasks with minimal superficial contact with coworkers, supervisors and the public. Based on the ALJ's decision, the Acting Commissioner of Social Security ("Commissioner") denied Plaintiff's applications.

Now pending before the Court is Plaintiff's motion for reversal of the decision of the Commissioner. ECF No. 12. Defendant Kilolo Kijakazi ("Defendant") argues that the ALJ properly applied the law to the substantial evidence of record; he has filed a counter motion to affirm the Commissioner's decision. ECF No. 14. The motions have been referred to me for preliminary review, findings and recommended disposition pursuant to 28 U.S.C. § 636(b)(1)(B).

I. Background

Plaintiff ended his education in eighth or ninth grade. Tr. 61, 338. Afterwards, during a four-year period from 2007 through 2010, he worked as a jewelry assembler with his mother, earning between $15,581 and $30,896 per year. Tr. 38-39, 211. He has not worked since January 1, 2011. Tr. 39-40, 57. Based on this employment, Plaintiff's date last insured is June 30, 2014. Tr. 12, 134. In February 2019, Plaintiff applied for SSI/DIB, alleging onset on January 1, 2011. Tr. 12. The earliest medical records submitted in connection with his applications are from 2016; based on this deficiency, the non-examining experts found no documented impairment during the closed DIB period. Tr. 60, 87-88. At the ALJ hearing, Plaintiff's attorney acknowledged the problem and stated that she was not asking to amend the onset date only because it would mean withdrawing his DIB claim and she was "not comfortable at this time that the claimant fully understood the consequences of that." Tr. 35-36. Plaintiff has not presented any argument challenging the ALJ's denial of his DIB claim.

Plaintiff's treating medical record may be briefly summarized.

Over the period from November 2016 through April 2020, Plaintiff saw Dr. Pomerantz, his treating dermatologist, approximately every three to four months, except for an unexplained (fifteen month) gap from January 2018 to April 2019 and, after the October 2019 appointment, Dr. Pomerantz stretched the time between appointments to six-months. Tr. 319-37, 342-45, 356-64. At the initial appointment, Plaintiff reported that his condition had been severe for three years but that he had not had any treatment in more than a year. Tr. 320. Dr. Pomerantz prescribed creams and noted at the next appointment that "his condition is improving." Tr. 320, 324. In May 2017, Dr. Pomerantz noted that the psoriasis "comes and goes" and that Plaintiff had been "flaring" in the past two months with his back most involved. Tr. 325. However, over the next three appointments, Dr. Pomerantz observed that Plaintiff's skin was "improved" or "improving." Tr. 327, 329, 332. At the April 2019 appointment, Dr. Pomerantz again recorded that the psoriasis had been flaring for four months and Plaintiff was started on Humira; at the June 2019 appointment, he was injected with Tremfya and in September switched to Stelera. Tr. 334, 343, 356. At the October 2019 appointment, Dr. Pomerantz noted that Plaintiff was "better" with Stelera, that he "does not have arthritis" and is experiencing "[n]o joint pain." Tr. 356. At the April 2020 appointment just before the ALJ hearing, Dr. Pomerantz's treating note states, "[n]ow only on back and right lower leg with 6 months of [S]telera." Tr. 361. In December 2019, Dr. Pomerantz signed an opinion titled "Skin Disorders Medical Source Statement" ("December 2019 Statement") that describes Plaintiff's symptoms but does not indicate that those symptoms impacted Plaintiff's ability to function except for the need to avoid environmental irritants. Tr. 352-55. This December 2019 Statement was submitted in support of Plaintiff's application.

Plaintiff's primary care provider was Dr. Soneath Pond of Thundermist. Dr. Pond saw Plaintiff from March 2019 through April 2020 and treated Plaintiff's overall health, including monitoring his mental health and psoriasis. Tr. 307-18, 346-51, 365-74. Dr. Pond's observations of psoriasis confirm it as a significant medical concern, but that it was largely "stable." Tr. 309, 313, 348, 366. Dr. Pond's notes consistently record Plaintiff's report that he "feels good" or "feels very good" and with no joint or muscle pain. Tr. 307, 314, 346, 348, 350, 366, 369-70, 372-73. Regarding Plaintiff's mental health, Dr. Pond's mental status examination observations are consistently benign. E.g., Tr. 309 ("PSYCH good eye contact, oriented x 3, normal speech, judgment intact, no suicidal ideations, appropriate mood and affect"). The only specialized mental health treatment of record is at Qualified Behavioral Health ("QBH"), where Plaintiff was seen twice, once in January and once in April 2018. Tr. 300-06. Plaintiff told QBH that his psoriasis had "been good" and he was "feeling good." Tr. 300, 305. While mental status observations include sadness and anxiety, including social anxiety, QBH notes also record that medication "[h]elps anxiety and depression." Tr. 300, 305. Despite a recommendation for follow-up, Plaintiff never went back to QBH after April 2018. Tr. 232, 300-06.

For her analysis of psoriasis and Plaintiff's physical limitations, the ALJ relied on Dr. Pomerantz's treating notes and his December 2019 Statement to find that psoriasis amounts to a severe impairment that restricts Plaintiff from working in the presence of environmental irritants, but that it has not caused exertional or manipulative limits affecting Plaintiff's ability to sit, walk and stand or use his hands.[3] Tr. 14-17. The ALJ also considered Plaintiff's description of his activities in his Function Report. Tr. 18 (referencing Tr. 256-27 (able to "clean his home, do laundry and mow his yard" and able to go out by walking and to shop for food and clothes)).

[3] The ALJ did not rely on the non-examining physicians who found Plaintiff's psoriasis to be non-severe. Tr. 19.

Because of their inconsistency with the treating and opinion evidence, as well as with Plaintiff's self-reported activities in his Function Report, the ALJ discounted Plaintiff's subjective statements that psoriasis causes difficulties with sitting, standing or walking more than ten minutes, and kneeling and lifting. Tr. 17-19; see Tr. 46-47, 259. The ALJ's RFC analysis does not mention obesity, which was found to be non-severe at Step Two. The record contains no medical opinions supporting the proposition that psoriasis (or obesity) limited Plaintiff's ability to function to a degree that exceeds the ALJ's RFC at any time during the period in issue.

For her analysis of Plaintiff's mental impairments, the ALJ relied on Plaintiff's lack of formal mental health treatment, the benign mental status results in much of the treating record, the consulting examination report from Dr. Turchetta, and the findings of the non-examining psychologists, Drs. Olson and Hughes. Tr. 19. Collectively, this evidence supports moderate limitations, which the ALJ wove into her RFC finding. Tr. 16-17. The only potential exception is Dr. Hughes' finding that Plaintiff's ability to interact with the public is "markedly limited." Tr. 90. However, Dr. Hughes clarified this finding in his narrative explanation as permitting some contact with the public: "The claimant prefers to work on tasks that do not involve frequent direct interaction with customers or coworkers. He can accept supervision." Id. The ALJ incorporated this descriptive explanation into her RFC finding by limiting Plaintiff to "contact [that] is minimal and superficial in nature." Tr. 17. Otherwise, there is no medical opinion supporting the proposition that depression, anxiety or attentional challenges limited Plaintiff's ability to function to a degree that exceeds the ALJ's RFC at any time during the period in issue.

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. Brown v. Apfel, 71 F. Supp. 2d 28, 30 (D.R.I. 1999), aff'd 230 F.3d 1347 (1st Cir. 2000) (per curiam). 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) (per curiam). The determination of substantiality is based upon an evaluation of the record as a whole. Brown, 71 F. Supp. 2d at 30; Parker v. Bowen, 793 F.2d 1177, 1180 (11th Cir. 1986) (court must consider evidence detracting from evidence on which Commissioner relied). The Court's role in reviewing the Commissioner's decision is limited. Brown, 71 F. Supp. 2d at 30. "[T]he resolution of conflicts in the evidence is for the Commissioner, not the courts." Id. at 31.

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.[4] 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

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

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 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). The claimant bears the burden of proof through Step Four; it shifts to the Commissioner at Step Five. Sacilowski v. Saul, 959 F.3d 431, 434 (1st Cir. 2020).

B. Opinion Evidence

To assess opinion evidence, an ALJ must consider the persuasiveness of medical opinions in the case record. See 20 C.F.R. § 404.1520c. The most important factors are supportability and consistency; these are usually the only factors the ALJ is required to articulate. 20 C.F.R. § 404.1520c(b)(2); Gorham v. Saul, Case No. 18-cv-853-SM, 2019 WL 3562689, at *5 (D.N.H. Aug. 6, 2019). Supportability "includes an assessment of the supporting objective medical evidence and other medical evidence, and how consistent the medical opinion or . . . medical finding[] is with other evidence in the claim." Revisions to Rules Regarding the Evaluation of Medical Evidence, 82 Fed. Reg. 5844, 5859 (Jan. 18, 2017). Other factors, weighed in light of the evidence of record, include the medical source's relationship with the claimant and specialization, as well as "other factors" that tend to support or contradict the medical opinion or finding. See 20 C.F.R. § 404.1520c(c)(1)-(5).

C. Pain

"Pain can constitute a significant non-exertional impairment." Nguyen v. Chater, 172 F.3d 31, 36 (1st Cir. 1999). The ALJ must consider a claimant's statements about pain and determine the extent to which it is reasonably consistent with the objective medical evidence. SSR 16-3p: Titles II and XVI: Evaluation of Symptoms in Disability Claims, 2017 WL 4790249, at *49462 (Oct. 25, 2017); 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-factor pain analysis. Avery v. Sec'y of Health & Human Services, 797 F.2d 19, 28-29 (1st Cir. 1986). An individual's statement as to pain is not conclusive of disability. 42 U.S.C. § 423(d)(5)(A).

D. Claimant's Subjective Statements

A reviewing court will not disturb a clearly articulated credibility finding with substantial supporting evidence in the record. See Frustaglia v. Sec'y of Health & Human Services, 829 F.2d 192, 195 (1st Cir. 1987). 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. It directs the ALJ to consider the entire case record, including the objective medical evidence; the individual's statements; statements and other information provided by medical sources and other persons; any other relevant evidence; and whether the subjective statements are consistent with the medical signs and laboratory findings. Id. at *49464-66.

IV. Analysis

Plaintiff makes four principal arguments to support his motion for remand: he challenges the ALJ's handling of the impairment of obesity; the ALJ's reliance on the opinion of the

treating dermatologist, Dr. Pomerantz; the ALJ's failure to preclude all contact with the public in her RFC finding; and the ALJ's failure to credit Plaintiff's subjective statements about the pain of psoriasis, which he claims significantly limits his ability to sit, stand, walk or kneel. ECF No. 12 at 5-12.

Regarding obesity, Plaintiff challenges the ALJ's Step Two finding that it causes "no more than a minimal limitation on his ability to perform basic work-related activities," Tr. 15, with the utterly undeveloped argument that "obesity should have been considered severe."[5] ECF No. 12 at 7. More substantively, he argues that the ALJ nevertheless erred in failing to consider the limiting impact of obesity in formulating the RFC. ECF No. 12 at 7. Plaintiff's argument rests on the objective medical principle that obesity is a recognized impairment that can worsen psoriasis in some patients. He contends that the ALJ must not have understood this principle and, if she had, she would have considered obesity's impact in light of Plaintiff's subjective testimony that "he has difficulty standing and walking," which he contends might be related to obesity, as well as that obesity might impact "his inflammation and joints." Id.

The problem with this argument is that it is utterly unhinged from the facts of this case and therefore clashes with the requirement of SSR 19-2p: Titles II and XVI: Evaluating Cases Involving Obesity, 2019 WL 2374244 (May 20, 2019),[6] that consideration of obesity requires "an individualized assessment of the effect of obesity on a person's functioning."[7] Id. at *4

[5] Such an undeveloped argument is deemed waived. Vanessa C. v. Kijakazi, C.A. No. 20-363MSM, 2021 WL 3930347, at *4 n.4 (D.R.I. Sept. 2, 2021), adopted, ECF No. 21 (D.R.I. Nov. 2, 2021) (contention that obesity is severe impairment with no supporting argument is deemed waived).

[6] SSR 19-2p applies, *inter alia*, to "claims that are pending on or after the applicable date [May 20, 2019]." 2019 WL 2374244, at *5 n.14. Plaintiff's claims were pending on May 20, 2019, because he filed his applications on February 11, 2019, and the ALJ did not issue her decision until May 26, 2020. Tr. 12, 22.

[7] For the same reason, the Court should not credit Plaintiff's complaint that the ALJ ignored medical literature suggesting that stress may have an aggravating impact on psoriasis. ECF No 12 at 9-10. Like his argument about obesity, Plaintiff fails to anchor the argument in the facts of this case where Dr. Pomerantz explicitly noted the

(emphasis added). As the Commissioner correctly points out, Dr. Pomerantz did not list obesity as a diagnosis; he never focused on obesity as an impairment that needed to be medically addressed. Dr. Pomerantz's notes are particularly pertinent in that each includes the topics on which he "counsel[ed]" Plaintiff (regarding such matters as sun exposure, cleansers, and shampoo), yet these notes make no mention of obesity, exercise, nutrition or weight. E.g., Tr. 329-30. Regarding functional limits, Dr. Pomerantz specifically noted that Plaintiff "does not have arthritis" and is experiencing "[n]o joint pain"; he expressed the opinion that psoriasis was not impacting the Plaintiff's joint motion and that Plaintiff could sit or stand more than two hours at one time. Tr. 352-53, 356. For his part, Dr. Pond consistently recorded Plaintiff's reports that he was feeling well with no joint or muscle pain. E.g., Tr. 307. With not even a scintilla of medical evidence that obesity was impacting Plaintiff's ability to function, the ALJ did not err in in failing to separately analyze obesity in connection with the formulation of the RFC.

Next, Plaintiff attacks the ALJ's reliance on the opinions in Dr. Pomerantz's December 2019 Statement, Tr. 352-55, claiming that its failure to include additional limitations (by leaving certain questions unanswered) means that it is "incomplete" and it was error for the ALJ to rely on it. ECF No. 12 at 7. This argument is troublingly inconsistent with the position taken by Plaintiff's attorney at the ALJ hearing; she not only stated on the record that there was no objection to it being admitted into the record, but specifically directed the ALJ to consider it during her opening statement. Tr. 31-32, 36. As to the merits, there is simply no substance to this argument. It is clear that Dr. Pomerantz went through the entire form and filled in some sections, but not others; for example, he made detailed findings regarding Plaintiff's

applicability of the principle that Plaintiff's emotional issues contributed to the severity of Plaintiff's psoriasis. Tr. 352-55. The ALJ accepted and relied on Dr. Pomerantz's 2019 Statement. Thus, the principle that emotional factors impact psoriasis was not ignored.

environmental restrictions (all of which the ALJ adopted), yet left blank the questions on the same page inquiring about limits on the ability to twist, stoop, crouch or use the hands. Tr. 354. Also material (as the ALJ considered) is that the omitted limitations are entirely consistent with Dr. Pomerantz's treating notes, as well as with those of Dr. Pond. There is no error in the ALJ's reliance on the Pomerantz December 2019 Statement.

Third, Plaintiff asks the Court to focus on the non-examining psychologist, Dr. Hughes, who found Plaintiff's social limits, overall, to be moderate (Tr. 88), but opined that the limit on the ability to deal with the public is "marked." Tr. 90. The problem with this as a foundation for remand is that the ALJ's RFC is based on Dr. Hughes' narrative explanation of the checked box, which is what should control. See Christine C. v. Saul, No. 2:19-cv-00266-GZS, 2020 WL 3047365, at *4 (D. Me. June 7, 2020), aff'd, 2020 WL 3442312 (D. Me. June 23, 2020) (non-examining consultant's RFC assessment is contained in narrative portion summarizing his sub-findings). The ALJ also appropriately relied on the observations in Dr. Turchetta's report ("cautiously friendly," "rapport was readily established"), Tr. 339, as well as on Plaintiff's self-report of shopping and spending time with friends and family. Tr. 16. I find no error in the ALJ's finding that Plaintiff could sustain minimal and superficial contact with customers in the workplace nor in any other aspect of the ALJ's handling of Plaintiff's mental impairments.[8]

Finally, Plaintiff challenges the ALJ's failure to credit his subjective statements about the pain of psoriasis, which he wrote in his Function Report "stings [his] back," Tr. 255, and which, also according to his Function Report, as well as his testimony at the ALJ hearing, makes it

[8] The ALJ's finding that Plaintiff did not become involved in formal mental health treatment despite two appointments at QBH is not error requiring remand. The QBH records consist of two brief appointments resulting in recommendations of medication and therapy, with mental observations that the non-examining psychologist at the initial phase specifically took into consideration in making her findings. Tr. 58 (referencing Tr. 303, 305). There is no evidence that Plaintiff ever obtained ongoing treatment at QBH beyond those two encounters. By relying on Dr. Olson, the ALJ appropriately incorporated Plaintiff's limited contact with QBH into the RFC.

difficult for him to sit, walk or stand for more than ten minutes and at times makes it impossible for him to kneel. Tr. 17-19, 46, 259. These arguments fail because every aspect of the ALJ's analysis of psoriasis and Plaintiff's subjective statements about its impact on him (which clash materially with the treating record, Dr. Pomerantz's opinion and Plaintiff's self-reports to his physicians) is amply supported by substantial evidence. That is, the medical record reflects that psoriasis was "stable," improving with medical treatment and causing "no joint pain," as well as that Plaintiff reported to treating sources that he was consistently "feeling good" with no joint or muscle pain. The record contains nothing reflecting pain at a level that was impacting functioning; it contains no indication of any treatment for pain; indeed, it includes almost no reference to pain being complained of as a significant symptom.[9] Nor does Plaintiff point to anything to support his argument except for his subjective statements, which the ALJ did not err in discounting. Mindful of this record, I find no error in the ALJ's failure to engage in the empty exercise of an Avery factor-by-factor pain analysis.

V. Conclusion

Based on the foregoing, I recommend that Plaintiff's Motion to Reverse the Decision of the Commissioner (ECF No. 12) be DENIED and Defendant's Motion to Affirm the Commissioner's Decision (ECF No. 14) 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 of its receipt. 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

[9] Apart from Plaintiff's subjective statements in his hearing testimony and Function Report, the only reference to pain is Plaintiff's statement to QBH ("c/o psoriasis arthritis pain"). Tr. 300, 305. However, at the same appointments, Plaintiff also stated that he was "feeling good." Id. Moreover, Dr. Pomerantz contradicts Plaintiff's subjective statement to QBH in his treating note of October 15, 2019: "He does not have arthritis . . . . No joint pain." Tr. 356.

district judge and the right to appeal the Court's decision. See United States v. Lugo Guerrero, 524 F.3d 5, 14 (1st Cir. 2008); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
January 25, 2022