

ruling, which the Appeals Council denied. (Tr. at 1-5, 11-12). Upon this denial, the ALJ's decision became the Social Security Commissioner's final ruling and is now ripe for this Court's review under 42 U.S.C. § 405(g).

Ms. Brown has appealed to this Court. (ECF No. 1). Ms. Brown requests relief under sentence four of 42 U.S.C. § 405(g), seeking to reverse and remand the ALJ's decision. (ECF No. 5). She contends that the ALJ's decision contains errors of law and its factual findings are not supported by substantial evidence in the record. (*Id.* at 1). Carolyn W. Colvin, Acting Commissioner of Social Security has moved for an affirmance of the ALJ's decision "because substantial evidence supports the Commissioner's finding that [Ms. Brown] was not disabled during the relevant time period." (ECF No. 6 at 1).

I. LEGAL STANDARD OF REVIEW

A district court's role in reviewing the Commissioner's decision is limited. Although questions of law are reviewed *de novo*, "[t]he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive[.]" 42 U.S.C. § 405(g). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229 (1938)).

The determination of substantiality must be made upon an evaluation of the record as a whole. The Court "must uphold the Secretary's findings ... if a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion." *Rodriguez v. Sec'y of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981); *see also Ortiz v. Sec'y of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991). In reviewing the record, the Court must avoid reinterpreting the evidence or otherwise substituting its own judgment for

that of the Secretary. *See Colon v. Sec'y of Health & Human Servs.*, 877 F.2d 148, 153 (1st Cir. 1989). The resolution of conflicts in the evidence is for the Commissioner, not the courts. *Rodriguez*, 647 F.2d at 222.

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). 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 ALJ must follow five well-known steps in evaluating a claim of disability. *See* 20 C.F.R. §§ 404.1520, 416.920.¹ Significantly, the claimant bears the burden of proof at steps one through four, but the Commissioner bears the burden of proving step five, that a claimant's impairments do not prevent her from doing other work that exists in the national economy. *Ortiz v. Sec'y of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989) (per curiam).

The ALJ's decision in Ms. Brown's case hinged on the step two severity requirement. In considering whether a claimant's physical and mental impairments are severe enough to qualify for disability, the ALJ must consider the combined effect of all of the claimant's impairments,

¹ 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 RFC, 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).

and must consider any medically severe combination of impairments throughout the disability determination process. 42 U.S.C. § 423(d)(2)(B).

II. THE ALJ'S FINDINGS

In Ms. Brown's case, the ALJ found that she had not engaged in substantial gainful activity since the alleged onset of her disability; and that she had medically determinable impairments, i.e. migraines; gall bladder surgery; kidney stones. (Tr. at 18). However, the ALJ ultimately concluded that she did not have a severe impairment or combination of impairments because that combination of impairments did not substantially limit her ability to perform basic work-related activities. (Tr. at 19). As a result, the ALJ concluded, without going past step two, that Ms. Brown was not under a disability from June 13, 2004 through March 31, 2005. (Tr. at 22).

III. THE MEDICAL EVIDENCE IN THE RECORD

Ms. Brown's medical record begins in May of 2003, when she was seen at Rhode Island Hospital and ultimately admitted for gall bladder surgery, following over a year of complaints of "right upper quadrant pain intermittently associated with nausea and vomiting. The pain was worse with oral intake and she was originally seen in the ER for this pain on 05/02/03, where a right upper quadrant ultrasound was obtained which revealed no gallstones." (Tr. at 144). She had the surgery on May 13, 2003 and was discharged the next day without complications. (Tr. at 145). Ms. Brown sought treatment post-surgery at Kent Hospital Emergency Room (Kent ER) on May 22, 2003 and May 26, 2003, both times complaining of abdominal pain and vomiting. (Tr. at 262, 255). She went to Kent ER again for right flank pain and vomiting again on August 3, 2003. (Tr. at 250). A CT scan was done, revealing abnormalities in her right kidney. (Tr. at 249).

Ms. Brown reported to the Kent ER on June 24, 2004 with right flank pain, had another CT scan the next day, which noted ongoing kidney problems and suspected uterine fibroids. (Tr. at 231). She went back to Kent County on March 19, 2005 for right flank pain, vomiting, nausea, and a loss of appetite. (Tr. at 288-289). A CT scan done that day revealed, “severe cortical thinning” and other kidney issues. (Tr. at 226). She was back in the Kent ER a few months later in August of 2005 with the same complaints. (Tr. at 222, 284). A CT revealed scarring on her right kidney, which was noted to be “unchanged” from the August 2003 CT scan, and a cyst. (Tr. at 222). After another ER visit in March of 2006, a CT scan noted that her right kidney was deformed. (Tr. at 220).

Ms. Brown also suffers from migraine headaches. She was seen at the Kent ER on August 3, 2003 for a migraine as well as for the right flank pain noted above. (Tr. at 244, 250). She also reported a migraine on March, 11, 2004, and March 31, 2004 at the Kent ER. (Tr. at 240, 242). She was also seen at the ER on November 30, 2005 for a moderate to severe migraine, nausea, and vomiting. (Tr. at 280). She testified at her hearing that she gets migraines a couple of times a week and a couple times a month she gets a migraine “so bad that it will last two or three days.” (Tr. at 38).

Ms. Brown also has neck, back, and shoulder pain that was first noted in the record on August 4, 2003 as “a scoliosis and degenerative changes in the lumbar spine.” (Tr. at 249). Her primary care physician, Dr. J. Mark Ryan, ordered an MRI on July 30, 2004 that revealed a small disc herniation. (Tr. at 348). Dr. Ryan ordered another MRI on April 20, 2006 in response to her continuing complaints of pain, which did not reveal any significant changes from the July 2004 MRI. (Tr. at 347).

Ms. Brown testified at her hearing that she vomits and has diarrhea every day throughout the day. (Tr. at 37-38). The vomiting has caused her to lose a tooth. (*Id.* at 38). She testified that she has “very severe” migraines approximately twice a week and approximately twice a month, her migraines are “so bad that [they] will last two or three days.” (*Id.* at 38-39). Ms. Brown also testified about fatigue due to hypothyroidism, causing her to take two to three hour naps every day in the afternoon. (*Id.* at 40). She reported that she is unable to attend to any household duties at all. (*Id.* at 40-41).

IV. ANALYSIS

A closer look at step two of the evaluation process is in order as the ALJ’s decision at that step was ultimately fatal to Ms. Brown’s claim. The regulations indicate that an impairment or combination thereof is severe if it “significantly limits [claimant’s] physical or mental ability to do basic work activities.” 20 C.F.R. § 404.1520(c). “Under Social Security Ruling 85-28, a claim may be denied at step 2 for lack of a severe impairment only where ‘medical evidence establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual’s ability to work even if the individual’s age, education or work experience were specifically considered’” *Barrientos v. Sec’y of Health & Human Servs.*, 820 F.2d 1, 2 (1st Cir. 1987) (per curiam). The First Circuit has dictated that the step two regulation “constitutes no more than such a *de minimis* screening policy.” *McDonald v. Sec’y of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986).

On appeal, Ms. Brown argues that the ALJ’s conclusion that her conditions are not severe is not supported by substantial evidence in the record. Ms. Brown also argues that the ALJ did not afford proper weight to her treating physician’s opinion, relied exclusively on consulting physicians, impermissibly interpreted medical data, and incorrectly cited medical evidence. The

Commissioner disputes Ms. Brown's claims and argues that the ALJ properly evaluated the medical evidence, even if he misquoted some, and that his findings are supported by substantial evidence. While this is a close case, the Court agrees with Ms. Brown that the ALJ should consider steps three through five, and therefore vacates the Commissioner's final decision and remands for further proceedings.

A. TREATING PHYSICIAN'S OPINION

Relevant to this case, medical opinions from treating sources generally are given "more weight" "since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s) and may bring a unique perspective to the medical evidence that cannot be obtained from the objective medical findings alone or from reports of individual examinations, such as consultative examinations or brief hospitalizations." 20 C.F.R. § 404.1527(c)(2). When "a treating source's opinion on the issue(s) of the nature and severity of [the claimant's] impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record," the regulations state that it is given "controlling weight." *Id.*; *see also Polanco-Quinones v. Astrue*, 477 F. App'x. 745, 746 (1st Cir. 2012). In addition, section 404.1527(d)(2) also provides that an ALJ must give "good reasons" for the weight accorded to a treating source's opinion. Conversely, if "a treating doctor's opinion is inconsistent with other substantial evidence in the record, the requirement of 'controlling weight' does not apply. All things being equal, however, a treating doctor's report may be entitled to "greater" weight than an inconsistent non-treating source." *Shaw v. Sec'y of Health & Human Servs.*, No. 93-2173, 1994 WL 251000, at *3 (1st Cir. June 9, 1994).

In addition, the Commissioner's regulations set forth a variety of factors to be utilized in evaluating the degree of weight of a treating provider's opinion. 20 C.F.R. §§ 404.1527(c), 416.927. Those factors are: (1) the "[l]ength of the treatment relationship and the frequency of examination," 20 C.F.R. § 404.1527(c)(2)(i); (2) the "[n]ature and extent of the treatment relationship," 20 C.F.R. § 404.1527(c)(2)(ii); (3) the supportability of the opinion, 20 C.F.R. § 404.1527(c)(3); (4) the consistency of the opinion "with the record as a whole," 20 C.F.R. § 404.1527(c)(4); (5) the specialization of the source, 20 C.F.R. § 404.1527(c)(5); and (6) "[o]ther factors." 20 C.F.R. § 404.1527(c)(6). "Other factors" include "the amount of understanding of our disability programs and their evidentiary requirements that an acceptable medical source has, regardless of the source of that understanding, and the extent to which an acceptable medical source is familiar with the other information in your case record." *Id.*

Additionally, Social Security Ruling 96-2p(6)'s Policy Interpretation reminds adjudicators "that a finding that a treating source medical opinion . . . is inconsistent with the other substantial evidence in the case record means only that the opinion is not entitled to 'controlling weight,' not that the opinion should be rejected." 1996 WL 374188 at *4 (July 2, 1996). It explains that such "[t]reating source medical opinions are still entitled to deference and must be weighed using all of the factors provided in 20 CFR 404.1527 and 416.927." *Id.* And it notes that "[i]n many cases, a treating source's medical opinion will be entitled to the greatest weight and should be adopted, even if it does not meet the test for controlling weight." *Id.*

The ALJ accorded Ms. Brown's treating physician Dr. Ryan's opinion very little weight, choosing to rely entirely on the opinions of Dr. Joseph Callahan and Dr. Youssef Georgy, the

two state agency non-examining medical consultants.² This was error. Specifically, it is clear to the Court that the ALJ's decision to give Dr. Ryan's opinion very little weight was based heavily on his perception that Dr. Ryan saw Ms. Brown only three or four times over a ten year period and that infrequent care did not give him the experience or expertise required to give a medical opinion such that he "merely relied" on Ms. Brown's statements of her limitations for his opinions. (Tr. at 21). That perception was incorrect; in his 2011 assessment, Dr. Ryan indicated, and the records reflect, that he saw Ms. Brown *three to four times a year* since 2002. (Tr. at 513). Therefore, the ALJ failed to give a good reason for the weight he afforded Dr. Ryan's opinion. 20 C.F.R. § 404.1527(d)(2). Moreover, Dr. Ryan also evaluated Ms. Brown in 2010 and the ALJ appears to have ignored that assessment, which was consistent with the one performed a year later. The Government brushes off these errors, arguing that the ALJ "misread" Dr. Ryan's 2011 assessment and "declined to discuss Dr. Ryan's earlier opinion from April 2010." (ECF No. 6 at 14). However, these errors, considering the fact that the ALJ denied Ms. Brown's benefits without proceeding through all five steps of review, are concerning enough for this Court to remand for further consideration.

B. MEDICAL EVIDENCE

The Court agrees with Ms. Brown that the ALJ impermissibly interpreted medical evidence in the record and/or incorrectly stated such evidence without referencing any medical record or the basis for his opinion. For example, the ALJ interpreted a radiology report to find that Ms. Brown's kidney condition was "benign and not severe as of June 2004." (Tr. at 20). The report cited does not use those words, nor does the ALJ have the medical expertise to make

² Dr. Callahan's June 22, 2010 opinion is four sentences long, indicates that the "evidence [is] insufficient to determine severity," generally references "studies" and a C-spine MRI. (Tr. at 349). Dr. Georgy's December 15, 2010 opinion was as follows: "I have reviewed the evidence in file and the asses[s]ment of 6/10 is affirmed." (Tr. at 367).

that assessment. While Dr. Callahan notes in his report that “[s]tudies re kidney stones are benign or (-) and NOT SEVERE,” (tr. at 349), the ALJ never linked his assessment of Ms. Brown’s kidney condition with Dr. Callahan’s assessment of her kidney stones. Moreover, it is unclear where Dr. Callahan got the information to come to his conclusion because he fails to cite any specific medical records that support it. The ALJ also concluded from a March 19, 2005 CT scan that “the claimant’s left kidney was functioning normally,” but neither those words, nor a comparable assessment on functioning, appear in that or any other medical record. (Tr. at 20-21). Specifically, Dr. Callahan, on whose opinion the ALJ solely relied, does not opine at all about Ms. Brown’s left kidney. (Tr. at 349).

While Ms. Brown raises additional points in her opposition, to which the Government ably responds, the Court concludes at this point that, based on the two errors discussed herein, the evidence was at least ambiguous with respect to whether Ms. Brown met her burden at step two to show that her combination of impairments was not slight and had “more than a minimal effect on ... ability to perform basic work activities’ within the meaning of SSR 85-28.” *Fernandez v. Sec’y of Health & Human Servs.*, 826 F.2d 164, 167 (1st Cir. 1987). Therefore, the ALJ erred in finding that she was not under a disability without analyzing her claim through the remaining steps.

V. CONCLUSION

Based on the foregoing, the Court concludes that the Commissioner’s decision was not based on substantial evidence. Therefore, the Commissioner’s decision and judgment is vacated, and the case is remanded to the Commissioner for additional proceedings consistent with this opinion.

IT IS SO ORDERED.

A handwritten signature in black ink, reading "John J. McConnell, Jr.", written in a cursive style. The signature is positioned above a horizontal line.

John J. McConnell, Jr.
United States District Judge

August 29, 2014