

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

CRYSTAL HULL-PEREIRA, :
Plaintiff, :
 :
v. : C.A. No. 13-209PAS
 :
 :
CAROLYN W. COLVIN, ACTING :
COMMISSIONER OF SOCIAL SECURITY, :
Defendant. :

MEMORANDUM AND ORDER

This matter is before the Court on the motion of *pro se* Plaintiff Crystal Hull-Pereira for reversal of the decision of the Commissioner of Social Security, denying Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under §§ 205(g) and 1631(c)(3) of the Social Security Act, 42 U.S.C. §§ 405(g), 1383(c)(3) (the “Act”). Plaintiff was represented by counsel throughout the administrative proceeding below, but is proceeding *pro se* before this Court. She contends that the Appeals Council erred by failing to make a determination consistent with the decision of Rhode Island Department of Human Services finding her disabled for purposes of the Medical Assistance program. She also argues that the Administrative Law Judge (“ALJ”) rendered a decision contrary to substantial evidence establishing her disabling symptoms and pain and improperly considered her non-compliance with medical recommendations. She submitted new evidence both to the Appeals Council and to this Court to buttress her arguments. Based on these arguments, she seeks to reverse the decision of the Commissioner. The Acting Commissioner, Carolyn W. Colvin, has filed a motion for an order affirming her decision.

With the parties’ consent, this case has been referred to me for all further proceedings and

the entry of judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. Because I find that the decision of the Commissioner that Plaintiff is not disabled is legally correct and well supported by substantial evidence, I order that Plaintiff's motion (ECF Nos. 13-14) be DENIED and the Commissioner's motion (ECF No. 16) be GRANTED.

I. Background Facts

Plaintiff alleges that her disability commenced on March 20, 2007, when she was forty-nine years old. The record is vague as to what triggered the onset. There are oblique references to a motor vehicle accident; however, her application states that, "I stopped working because i [sic] was fired. i [sic] think it was due to my disability." Tr. 163, 184. As a high school graduate with an associate's degree in applied science, and certification in interior design and customer service, prior to onset, Plaintiff worked as a respiratory therapist, retail sales clerk and furniture design consultant, telephone interviewer and telephone sales representative. Tr. 46, 198. For unspecified periods of time in 2008 through 2010, while she claims she was disabled, Plaintiff worked as a grocery store cashier at Shaw's Supermarket for fifteen hours a week, standing for five-hour shifts and taking pain medication before, during and after each shift.¹ Tr. 47-48, 280. The job ended when the store closed, and Plaintiff found it too difficult to travel to the Shaw's store to which she was transferred. Tr. 47. In 2011, Plaintiff worked briefly as a cashier, but was fired for not learning the time clock system. Id. She collected unemployment benefits for two quarters in 2011, and had just taken the Civil Service examination for a position as a state eligibility technician prior to the hearing.

Plaintiff's first disability applications, filed on October 5, 2007, were denied initially in February 2008 and on reconsideration in August 2008. Because Plaintiff did not seek further

¹ In her brief, Plaintiff states that she worked at Shaw's from September 2008 to January 2011, though her earnings were below the level that would constitute substantial gainful activity. ECF No. 14 at 1.

administrative review of those claims, only her condition after August 2008 is at issue now, despite her claim of onset as of March 2007.² In her April 2010 application, Plaintiff claimed disability based on back injury, carpal tunnel and bursitis, asthma, bronchitis, knee injury (torn meniscus), arthritis in the knees, heel spurs and shortness of breath; her morbid obesity is also pertinent to her claims. Tr. 247. On appeal, she seeks to add a post-hearing diagnosis of mild obstructive sleep apnea. Further, in her brief, she refers to a “non-adjustment disorder,” though no diagnosis from a psychologist is in the record.

A. Medical History Presented to ALJ

Plaintiff’s medical history from alleged onset in March 2007, through the end of 2008 is extensive but not relevant to this appeal, except for the March 5, 2007, diagnosis of medial meniscus tear in her left knee for which she declined arthroscopic surgery, the December 21, 2007, opinion of Dr. Antoinette Sutherland finding no evidence of carpal tunnel syndrome but noting she was “extremely anxious,” and the December 18, 2007, MRI assessing her degenerative disc disease as “mild.” Tr. 303, 320-22.

Almost two years later, after a gap during which the record reflects almost no medical treatment, on September 30, 2009, Plaintiff consulted with Dr. Robert A. Achindiba, who diagnosed benign hypertension that was not controlled because she was not compliant with the medication protocol (she claimed due to lack of medical coverage); to address her obesity, he counseled her on her diet and referred her to a dietician but noted that she did not exercise because of back and leg pain. Tr. 354. After several visits with Dr. Achindiba, during which he found little wrong, he saw her on October 14, 2009. Tr. 346-47. She complained of bilateral

² The ALJ found no basis to justify reopening Plaintiff’s prior applications. Tr. 23. Judicial review of this determination is precluded except for constitutional violations, which are not alleged here. Califano v. Sanders, 430 U.S. 99, 109 (1977).

knee pain and asked for a note excusing her from work for a week (presumably from Shaw's), as well as for a prior day she had already taken off, in addition to pain medication for chronic knee pain. Dr. Achindiba refused all of these requests as either inappropriate (the medical note excusing her for a day she had already taken) or not indicated in that the condition of her knee from the 2007 meniscal injury justified neither the time off work nor the medication she wanted. Id. As a result, Plaintiff demanded a new physician. Tr. 347.

During 2010, Plaintiff again sought care for her left knee. A January 2010 MRI confirmed the medial meniscus tear and degenerative arthritis that had been identified in 2007. Tr. 355-56. Plaintiff told Dr. Louis Corvese that her left knee pain began in 2007, and had resolved, but resumed in October 2009, with no specific incident of trauma. Tr. 31, 362. She reported that she had trouble going up and down stairs and that she used a cane. Id. Dr. Corvese recommended physical therapy, to which Plaintiff responded "very well." Tr. 373.

Plaintiff's medical treatment during the same period for hypertension and shortness of breath evidences that both appear to be relatively well controlled. In December 2009, the results of Plaintiff's echocardiogram were within normal limits. Tr. 387. In April 2010, Plaintiff's pulmonary function showed normal baseline spirometry with evidence of mild air trapping, but otherwise normal. Tr. 398. In 2010 and 2011, Plaintiff saw Dr. Barbara H. Roberts complaining of shortness of breath, high blood pressure and knee pain. Tr. 466-70. Plaintiff weighed over 270 pounds but her EKG was normal; Dr. Roberts repeatedly urged her to exercise and diet. Tr. 469, 470. By August 2011, Plaintiff reported that she was comfortably climbing one flight of stairs with no shortness of breath and her hypertension was well controlled. Tr. 469. On October 17, 2011, Plaintiff was examined for her annual physical by Dr. Katherine McCleary at Tri-Town Community Action Agency, complaining only of hypertension and asthma. Tr. 452.

On examination, there was no evidence of bone or joint symptoms or weakness. Tr. 453.

Overall, the treatment notes state that Plaintiff was “[d]oing well.” Tr. 454.

In the record presented to the ALJ, no treating source opined regarding Plaintiff’s functional limitations. Further, apart from the single reference to anxiety in 2007, no treating source referred to potential mental health issues and none recommended mental health treatment.

B. Agency Medical Review

A state agency medical consultant reviewed Plaintiff’s entire medical record on September 21, 2010, and opined that she could lift and carry up to twenty pounds (ten pounds frequently), stand and walk at least three to four hours as tolerated and sit about six hours in a work day; that her ability to use her legs to operate foot controls was limited; that she was unable to climb ladders or scaffolding; and that she needed to avoid any exposure to respiratory irritants, work hazards and concentrated exposure to humidity and extreme cold. Tr. 409-12. On January 25, 2011, Dr. Joseph Callaghan, an agency medical consultant, reviewed Plaintiff’s entire medical record again, and concurred with the assessment. Tr. 416. Notably, these assessments are fairly consistent with the opinions of the physician agency consultants from 2008 in connection with the earlier applications.³ See Tr. 324-31, 343, 344.

C. New Evidence Presented to Appeals Council

While Plaintiff presented no treating source opinion regarding the functional limitations caused by her impairments to the ALJ, she did present two to the Appeals Council, both of which had been prepared well before the ALJ hearing. Specifically, in April 2010, Dr. Walter Hollinger of St. Joseph’s Hospital opined that Plaintiff could perform sedentary work. He found

³ The only material difference between the 2008 assessments and those performed in 2010 is that, in 2008, there was a case analysis performed by a psychologist. Tr. 342. Writing in January 2008, Dr. Coyle did a file review and suggested psychological follow-up based on Dr. Sutherland’s 2007 reference to an observation of anxiety. There is no evidence of any follow-up or of any mental health treatment.

that she was able to lift and carry up to five pounds, could sit for six hours, stand for four hours and walk for three hours in each workday, but could do no over-the-shoulder work. Tr. 502-04. In July 2011, Dr. Hollinger opined that Plaintiff could stand or walk for at least two hours and sit for four hours in each work day, could lift and carry up to five pounds, and could bend, stoop, push and pull occasionally, and that she had no mental functioning limitations. Tr. 500. Dr. Hollinger was a treating source during 2010 and 2011; in all, it appears that Plaintiff saw him five times in connection with treatment for asthma; his indecipherable notes were also submitted to the Appeals Council. Tr. 507-14. Some of his notes had been part of the record before the ALJ. Tr. 393-99.

The second category of new evidence presented to the Appeals Council relates to Plaintiff's Rhode Island disability application. Plaintiff presented a letter dated March 30, 2012, from the Appeals Office of the Rhode Island Department of Health and Human Services, which advised Plaintiff that a *de novo* review of the full record of her hearing had resulted in the determination that she "is disabled as defined in the Social Security Act, and for the purpose of the Medical Assistance Program." Tr. 288-89. The letter simply reports the decision and contains no information regarding the analysis or medical data relied upon by the state agency in reaching that conclusion.

The third category of new material provided to the Appeals Council is the following medical evidence:

- A 1997 letter confirming a diagnosis of carpal tunnel syndrome, but advising that Plaintiff could return to work;
- A 2004 report to an attorney regarding the injuries caused by a 2004 car accident indicating that she had returned to work less than a month after the accident;
- A 2005 orthopedic evaluation of neck and back pain in the aftermath of

the 2004 car accident, opining that she is capable of going back to work with no restrictions; and

- A 2010 record of a knee examination resulting in the recommendation that she take ibuprofen, continue exercises and consider a steroid injection if the pain gets worse.

Tr. 485-98.

The Appeals Council received this additional evidence and made it part of the record in the case. Tr. 5.

D. New Evidence Presented to Court

Along with her motion to reverse the Commissioner's decision, Plaintiff presented new medical records reflecting a diagnosis of mild sleep apnea in November 2012 and oral surgery (dental extraction) in October 2011. ECF No. 14 at 3-6. Second, her reply brief refers to "[a] comunitive disorder brought on from the stress and pain from illness and disorders I have been under, a psychologist has named it as a non-adjustment disorder." ECF No. 17 at 2. No medical record supports any such mental health diagnosis. Finally, Plaintiff seeks to supplement the evidence presented to the Appeals Council regarding Rhode Island's disability determination with what appears to be a partial copy of a decision based on an administrative hearing.

Plaintiff's brief indicates that she intentionally submitted it without either the first page or the page that lays out the reasoning for the decision, so that its date, any discussion of the conclusion (presumably adverse to her) and even what it really is cannot be ascertained. ECF No. 14 at 2. Indeed, while it certainly appears to relate to Plaintiff, without the first page, even that cannot be established conclusively.

II. Travel of the Case

On April 6, 2010, Plaintiff filed her applications for DIB and SSI. The claims initially were denied by the Commissioner on December 18, 2010, and were denied on reconsideration on

March 7, 2011. On March 20, 2011, Plaintiff filed a request for an administrative hearing, which was held before an ALJ on March 14, 2012. Tr. 23, 41-71. At the hearing, Plaintiff was represented by counsel; she and vocational expert Estelle Hutchinson testified. Tr. 61-70. The ALJ issued his decision on March 26, 2012, declining to reopen the prior applications and finding that Plaintiff is not disabled within the meaning of the Act. Tr. 23-34. After the Appeals Council denied Plaintiff's request for review on March 2, 2013, the ALJ's decision became the final decision of the Commissioner. Tr. 1-6. Plaintiff filed her complaint in this Court on March 28, 2013. ECF No. 1.

III. Hearing and Decision

A. Plaintiff's Hearing Testimony

Plaintiff testified that she cannot work because she is "stressed out, along with all my other aches and pains." Tr. 50. Though she described feeling stressed by her various medical conditions, including a recent lung problem that affected her breathing, she also confirmed that the closest she had ever come to mental health treatment was the counselors at a hospital weight loss clinic, that she has no issues with drugs or alcohol and that "I'm not emotional." Tr. 52-53, 61. She said that she takes medication to control her blood pressure, knee pain and carpal tunnel pain, uses an inhaler as needed, needs a cane to walk up or down inclines and wears splints to control carpal tunnel pain. Tr. 52-54, 58. In the testimony about her activities of daily living, Plaintiff explained that she lives alone, performs routine housework, including cooking, cleaning and picking-up, socializes with her family, attends church every week and uses public transportation. Tr. 55. She explained the coping techniques she uses to deal with stress. Tr. 55-57. She sometimes babysits for her five-year-old granddaughter, but is unable to babysit daily.

Id.

Plaintiff does not exercise as recommended by her doctors due to stress because she fears her knee and back. Id. During the day, she typically alternates between sitting, standing and walking and does not lie down, yet she believes that she could not perform a job that primarily involves sitting, even if she could take occasional breaks, because of poor leg circulation. Tr. 57, 60-61. Nevertheless, in the month preceding the hearing, she had taken a civil service examination for a position as a state eligibility technician at the Department of Health and Human Services. Tr. 51.

At the beginning of the hearing, Plaintiff's attorney asked the ALJ to consider procuring a consulting examination from a psychologist. Tr. 45. None was obtained.

B. Vocational Expert Testimony

The vocational expert testified in response to a hypothetical posed by the ALJ regarding the work that could be performed by a person of Plaintiff's age, education and work experience with the following limitations:

The hypothetical claimant would be limited to lifting and carrying 20 pounds occasionally, 10 pounds frequently. Could stand and walk three to four hours out of an eight-hour workday. Would be limited to occasional use of lower extremities to operate foot controls. That would be bilaterally. Could never climb ladders, ropes or scaffolds. Could occasionally climb ramps and stairs. Occasionally stoop, kneel, crouch, and crawl. Could frequently balance. Would have to avoid concentrated exposure to extreme cold and to humidity. Would have to avoid even moderate exposure to fumes, dusts, gases and poor ventilation, and would have to avoid all exposure to unprotected heights.

Tr. 63. Based on these limitations, the vocational expert determined that Plaintiff could not perform her past relevant work, but could perform some sedentary and light occupations. Tr. 64.

The ALJ then asked her to consider an additional limitation – that Plaintiff would be limited to standing and walking no more than three to four hours each work day. Noting that Plaintiff's skills from her prior work are transferable, the vocational expert opined that Plaintiff would be

able to perform sedentary jobs like customer service clerk, dispatcher and telephone order clerk. Tr. 67-68. The vocational expert confirmed that all three of these jobs are available in the national and regional economies. Tr. 67-69.

C. ALJ's Decision

In his decision, the ALJ began with the finding that there is no basis to reopen Plaintiff's prior applications, correctly relying on the "good cause" test in 20 C.F.R. §§ 404.989 and 416.1489,⁴ because more than twelve months had passed since the initial adverse determination on February 27, 2008. 20 C.F.R. § 404.988. He then found that Plaintiff met the insured requirements of the Act through June 30, 2015, and proceeded through the familiar five-step inquiry to determine the merits of Plaintiff's claim of disability. After concluding at Step One that Plaintiff had not engaged in substantial gainful activity since March 20, 2007, despite her work at Shaw's Supermarket and her collection of unemployment benefits during the period of alleged disability, he proceeded to Step Two, finding that Plaintiff had the severe impairments of "obesity, asthma, osteoarthritis of both knees," within the meaning of 20 C.F.R. § 404.1520(c). Tr. 11-15. He assiduously considered and found non-severe Plaintiff's hypertension, which the medical record described as "well controlled," carpal tunnel syndrome, of which there was no evidence by 2007, heel spurs, of which there is no evidence at all, and degenerative disc disease of the spine, of which there is no evidence beyond a 2007 diagnostic x-ray assessed as mild. Tr. 26-27. At Step Three, giving sedulous consideration to the impact of Plaintiff's obesity on her other impairments in accordance with the directive of SSR 02-1p, 2000 WL 628049, the ALJ found that none of them, alone or in combination, met or medically equaled any "listed" impairments. Tr. 27-28.

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 to one set only. See id.

The ALJ determined Plaintiff's residual functional capacity ("RFC")⁵ at Step Four. He concluded that Plaintiff could perform light work as defined by 20 C.F.R. § 404.1567(a), with the following limitations:

The claimant can lift and/carry 20 pounds occasionally and 10 pounds frequently, stand and/or walk 3 to 4 hours in an 8-hour workday, occasionally use the lower extremities to operate foot controls bilaterally, never climb ladders, ropes or scaffolds but can occasionally climb ramps and stairs, occasionally stoop, kneel, crouch, crawl and frequently balance. The claimant would have to avoid concentrated exposure to extreme cold and humidity and avoid even moderate exposure to fumes, odors, dusts, gases, and poor ventilations, and would have to avoid all exposure to unprotected heights.

Tr. 28. In making this determination, the ALJ painstakingly sifted the medical evidence, considered the effects of Plaintiff's obesity, gave substantial evidentiary weight to the findings of the non-examining state agency physicians and noted that no treating source had contradicted their findings. Tr. 32. He found that, while Plaintiff has experienced pain, other symptoms and functional limitations, her medically determinable physical impairments could not reasonably be expected to cause the alleged symptoms to the degree alleged and her statements concerning the intensity, persistence and limiting effects of the symptoms were not credible. Tr. 30. In making this adverse credibility finding, the ALJ examined the medical evidence, Plaintiff's activities of daily living, her work at Shaw's, the collection of unemployment benefits during the period of disability and her noncompliance with medical advice that she diet and exercise. Tr. 30-32. For example, Plaintiff testified that she took medication and wore splints because of carpal tunnel syndrome, yet the medical record reflected only a 2007 treating opinion finding no evidence of carpal tunnel syndrome;⁶ similarly, she complained of severe asthma, yet the medical record

⁵ 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).

⁶ In the additional records submitted to the Appeals Council, Plaintiff included a 1997 diagnosis of carpal tunnel; however, that record concluded that she should return to work. Tr. 485. In the period of alleged disability, the only

reflected her 2011 report that her shortness of breath was stable and her testimony reflected that she used her inhaler “as needed.” Tr. 58, 322, 469.

At Step Four, the ALJ considered the vocational expert’s testimony, Plaintiff’s RFC and past work experience to make the determination that Plaintiff was unable to perform any past relevant work. Tr. 32-33.

At Step Five,⁷ the ALJ relied on his RFC determination and the vocational expert’s testimony to find that Plaintiff was capable of making a successful adjustment to other work. Tr. 33-34. Specifically, in reliance on the transferability of Plaintiff’s job skills from her prior work, the ALJ found that she could perform certain sedentary positions available in the national and Rhode Island economies, such as customer service clerk, telephone order clerk and dispatcher. See SSR 82-41, 1982 WL 31389. Accordingly, the ALJ found that Plaintiff is not disabled within the meaning of the Act. See 42 U.S.C. § 1382c(a)(3)(A); Tr. 34.

D. Appeals Council’s Decision

Plaintiff made a timely request for review by the Appeals Council and submitted new evidence, which the Appeals Council accepted and made part of the record. Tr. 1-6. After considering whether either Plaintiff’s arguments or the additional evidence provided a basis for changing the ALJ’s decision because it is contrary to the weight of the evidence in the record, the Appeals Council decided to deny Plaintiff’s request for review. Tr. 1-2. The decision of the ALJ is therefore the final decision of the Commissioner. 20 C.F.R. § 404.981.

reference to carpal tunnel is the conclusion, following an examination “done very carefully,” that Plaintiff has no clinical evidence of carpal tunnel. Tr. 322.

⁷ Steps One through Four of the sequential evaluation process place the burden of proving her impairments on Plaintiff. See Ortiz v. Sec’y of Health & Human Servs., 890 F.2d 520, 524 (1st Cir. 1989) (per curiam). Once she has sustained her burden, the Commissioner then has the limited burden at Step Five of proving “the existence of other jobs in the national economy that the claimant can perform.” Id.

IV. Issues Presented

It is somewhat difficult to extract Plaintiff's arguments from the information and material she has presented – however, the following appear to be the crux of her challenge to the Commissioner's decision that she is not disabled:

1. The ALJ erred in failing to properly consider the substantial evidence that she is disabled within the meaning of the Act;
2. The ALJ erred in considering her non-compliance with medical recommendations, such as diet and exercise;
3. The Appeals Council erred in failing to consider the determination of disability by the Rhode Island Department of Health and Human Services;
4. The Appeals Council erred in failing to consider new medical information, including a 1997 diagnosis of carpal tunnel syndrome, records regarding a 2004 car accident and additional records from 2010 regarding her knee;
5. The Appeals Council erred in failing to consider the RFC evaluations of a treating source, Dr. Walter Hollinger;
6. This Court should remand for consideration of new evidence of sleep apnea and dental procedures.

V. Standard of Review

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla – that is, the evidence must do more than merely create a suspicion of the existence of a fact, and must include such relevant evidence as a reasonable person would accept as adequate to support the conclusion. Ortiz v. Sec'y of Health & Human Servs., 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec'y of Health & Human Servs., 647 F.2d 218, 222 (1st Cir. 1981); Brown v. Apfel, 71 F. Supp. 2d 28, 30 (D.R.I. 1999). Once the Court concludes that the decision is supported by substantial evidence, the Commissioner must be affirmed, even if the Court would have reached a contrary result as the finder of fact. Rodriguez Pagan v. Sec'y of Health & Human Servs., 819 F.2d 1, 3 (1st Cir. 1987); see also Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991); Lizotte v. Sec'y of Health & Human Servs., 654 F.2d 127, 128 (1st Cir. 1981).

The determination of substantiality is based upon an evaluation of the record as a whole. Brown, 71 F. Supp. 2d at 30; see also Frustaglia v. Sec’y of Health & Human Servs., 829 F.2d 192, 195 (1st Cir. 1987); Parker v. Bowen, 793 F.2d 1177, 1180 (11th Cir. 1986) (court also must consider evidence detracting from evidence on which Commissioner relied). Thus, the Court’s role in reviewing the Commissioner’s decision is limited. Brown, 71 F. Supp. 2d at 30. The Court does not reinterpret the evidence or otherwise substitute its own judgment for that of the Commissioner. Id. at 30-31 (citing Colon v. Sec’y of Health & Human Servs., 877 F.2d 148, 153 (1st Cir. 1989)). “[T]he resolution of conflicts in the evidence is for the Commissioner, not the courts.” Id. at 31 (citing Richardson v. Perales, 402 U.S. 389, 399 (1971)). A plaintiff’s complaints alone cannot provide a basis for entitlement when they are not supported by medical evidence. See Avery, 797 F.2d at 20-21; 20 C.F.R. § 404.1529(a).

The Court must reverse the ALJ’s decision on plenary review, if the ALJ applies incorrect law, or if the ALJ fails to provide the Court with sufficient reasoning to determine that the law was applied properly. Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) (per curiam); accord Cornelius v. Sullivan, 936 F.2d 1143, 1145-46 (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. Jackson v. Chater, 99 F.3d 1086, 1097-98 (11th Cir. 1996).

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. Seavey, 276 F.3d at 9; 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 an explanation of the basis for the decision. Freeman v. Barnhart, 274 F.3d 606, 609-10 (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.

To remand under Sentence Six, the plaintiff 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 Evangelista v. Sec'y of Health & Human Servs., 826 F.2d 136, 139-43 (1st Cir. 1987). With a Sentence Six remand, the parties must return to the Court after remand to file modified findings of fact. Jackson, 99 F.3d at 1095 (citing Melkonyan v. Sullivan, 501 U.S. 89, 98 (1991)). The Court retains jurisdiction pending remand and does not enter a final judgment until after the completion of remand proceedings. Id.

VI. 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. § 423(d)(1)(A); 20 C.F.R. § 404.1505(a). The impairment must be severe, making the claimant unable to do previous work or any other substantial gainful activity that exists in the national economy. 42 U.S.C. § 423(d)(2); 20 C.F.R. §§ 404.1505-1511.

A. The Five-Step Evaluation

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. § 404.1520. First, if a claimant is working at a substantial gainful activity, the claimant is not disabled. Id. § 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. Id. § 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. Id. § 404.1520(d). Fourth, if a claimant's impairments do not prevent doing past relevant work, the claimant is not disabled. Id. § 404.1520(e)-(f). Fifth, if a claimant's impairments (considering RFC, age, education and past work) prevent doing other work that exists in the local or national economy, a finding of disabled is warranted. Id. § 404.1520(g). Significantly, the claimant bears the burden of proof at Steps One through Four, but the Commissioner bears the burden at Step Five. Wells v. Barnhart, 267 F. Supp. 2d 138, 144 (D. Mass. 2003).

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

Sec'y of Health & Human Servs., 818 F.2d 96, 97 (1st Cir. 1986).

B. Capacity to Perform Other Work

Once the ALJ finds that a claimant cannot return to the prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the local or national economy. Seavey, 276 F.3d at 5. To meet 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 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. (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 RFC 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 VE. Heggarty v. Sullivan, 947 F.2d 990, 996 (1st Cir. 1991). It is only when the claimant can clearly do unlimited types of work at a given RFC that it is unnecessary to call a vocational expert to establish whether the claimant can perform work that 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 RFC indicated by the exertional limitations. Merola v. Astrue, C.A. No. 11-536A, 2012 WL 4482364, at *5 (D.R.I. Sept. 26, 2012).

C. Making Credibility Determinations

Where an ALJ decides not to credit a claimant's testimony, the ALJ must articulate specific and adequate reasons for doing so, or the record must be obvious as to the credibility finding. See Da Rosa v. Sec'y of Health & Human Servs., 803 F.2d 24, 26 (1st Cir. 1986); Rohrberg v. Apfel, 26 F. Supp. 2d 303, 309-10 (D. Mass. 1998). 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.

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)).

D. 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 medical and other evidence (e.g., medical signs and laboratory findings) is furnished showing the existence of a medical impairment that 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 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 that

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, 797 F.2d at 29; Gullon v. Astrue, No. 11-cv-099ML, 2011 WL 6748498, at *5-6 (D.R.I. Nov. 30, 2011). An individual's statement as to pain is not, by itself, conclusive of disability. 42 U.S.C. § 423(d)(5)(A). Guidance in assessing the credibility of the claimant's statement is provided by the Commissioner's 1996 ruling. SSR 96-7p, 1996 WL 374186. Credibility of an individual's statement about pain or other symptoms and their functional effects is the degree to which the statement can be believed and accepted as true; in making this determination, the ALJ must consider the entire case record and may find that all, only some, or none of an individual's allegations are credible. Id. at *4. One strong indication of the credibility of an individual's statements is their consistency, both internally and with other information in the record. Id. at *5-6.

VII. Application and Analysis

A. Challenge to ALJ's Decision

The ALJ's decision is thorough, well-reasoned and well-anchored in the evidence, which consisted of Plaintiff's application, the medical record and the testimony at the hearing. At Step

Two, the decision carefully evaluates each claimed impairment and either labels it as severe or explains why it is not. In determining Plaintiff's RFC at Step Four, the ALJ lays out the evidence that he reviewed, including Plaintiff's testimony and the information in her application about her work both prior to and during the period of disability, her living circumstances and activities of daily living, her limitations, her complaints of pain and her medications, together with a careful summary of the relevant medical evidence. He gives meticulous consideration to all of it, and affords significant weight to the opinions of the agency consulting physicians, both of whom had reviewed Plaintiff's medical records and opined that she could perform light and sedentary work with certain limitations. See 20 C.F.R. § 404.1527(e) (such opinions may constitute substantial evidence where they involve a thorough review of the medical record). Facing a record devoid of any opinion by any treating source to the contrary, the ALJ's reliance on them is well founded and certainly does not constitute error.

In discounting the credibility of Plaintiff's testimony about the intensity, persistence and limiting effects of her symptoms, the ALJ properly applied the standards set out in 20 C.F. R. § 404.1529, SSR 96-3p, 1996 WL 374181, SSR 96-7p, 1996 WL 374186, and the guidance in Avery, 797 F.2d at 29. In doing so, the ALJ noted the inconsistency between her complaints and the treatments recommended by her treating sources. For example, while the diagnostic finding of a torn medial meniscus is well founded, the ALJ noted that Plaintiff's treatment for that complaint has been generally conservative, routine and intermittent. Tr. 31. Indeed, no doctor had ever imposed work limitations on Plaintiff that would have precluded her long-term ability to work. Although Plaintiff testified that "stress" prevented her from returning to work, there is no evidence from any medical source that Plaintiff suffered from vocationally-significant limitations due to a mental impairment during the relevant time period. Aside from one

observation of anxiety in 2007, no treating source ever noted any mental health issues or recommended mental health treatment. The ALJ also relied on considerable information about Plaintiff's activities of daily living, including that she lives alone, relies on public transportation, uses a computer, socializes with family members, attends church and uses appropriate coping techniques to handle stress. The ALJ found these activities to be inconsistent with Plaintiff's complaints about her symptoms and limitations. Finally, the ALJ noted not only Plaintiff's work while allegedly disabled but also the fundamental inconsistency between her receipt of unemployment benefits under a state program that requires ability and availability for work and an allegation in a federal disability program for the same period that she is unable to engage in substantial gainful activity. Tr. 32.

Apart from rehashing her many complaints and arguing that she had demonstrated that she was disabled and experiencing financial hardship due to her disability, Plaintiff's only concrete critique of the ALJ's decision is his reliance on her non-compliance with repeated medical recommendations that she diet and exercise. However, the ALJ did not find that Plaintiff's obesity, alone or in combination with her other impairments, was not disabling because of her failure to follow medical directives – if he had, that probably would have been error. SSR 02-1p, 2000 WL 628049; Gibrich v. Astrue, C09-1617-MJP, 2010 WL 2747276, at *5-6 (W.D. Wash. June 16, 2010); cf. Holmes v. Constantino, C.A. No. 12-931, slip op. at 20 (D.R.I. Feb. 19, 2014) (crucial to conclusion of no error in Medicaid eligibility decision is hearing officer's reliance on noncompliance with medical recommendations to diet and stop smoking to support credibility finding; it would have been error if hearing officer had denied eligibility based on finding that claimant was disabled but disability would have been cured if claimant complied). Rather, the ALJ relied on Plaintiff's failure to follow the advice of her

doctors to diet and exercise as one of the many bases for his adverse credibility finding, which is legally permissible. See, e.g., Williams v. Barnhart, 393 F.3d 798, 802 (8th Cir. 2005) (“A failure to follow a recommended course of treatment . . . weighs against a claimant’s credibility.”); Breshears v. Colvin, No. 12-2094, 2013 WL 2155073, at *6 (W.D. Ark. May 17, 2013) (ALJ properly discounted credibility when plaintiff did not comply with repeated diet and exercise recommendations); Hunley v. Astrue, 2:07-CV-138, 2008 WL 2201502, at *8 (E.D. Tenn. May 23, 2008) (noncompliance with diet recommendation is evidence to support conclusion that plaintiff’s complaints are overstated). In addition, the recommendation of exercise by treating sources is some evidence bearing adversely on the credibility of Plaintiff’s claims that she cannot exercise. Myers v. Colvin, 721 F.3d 521, 527 (8th Cir. 2013) (physician’s unrestricted recommendations to increase physical exercise inconsistent with claim of physical limitations obesity case). I find no error in the ALJ’s reliance on the noncompliance evidence.

One argument that Plaintiff does not present, but which I pause to consider, is whether the ALJ should have developed the record with a consulting examination by a psychologist, as her attorney suggested at the hearing. There is no question that social security proceedings “are not strictly adversarial,” Miranda v. Sec’y of Health, Educ. & Welfare, 514 F.2d 996, 998 (1st Cir. 1975), and that the ALJ bears the responsibility for adequate development of the record.

Evangelista, 826 F.2d at 142; see Deblois, 686 F.2d at 80-81; Currier, 612 F.2d at 598.

However, the heightened duty to develop the record that is applicable when a claimant is *pro se* does not apply to this case because Plaintiff was represented by counsel throughout the administrative proceeding. Conte v. McMahon, 472 F. Supp. 2d 39, 45 (D. Mass. 2007) (claimant “had legal representation, which places less of a burden on the [ALJ] independently to develop the record”); see also Gullon, 2011 WL 6748498, at *4; Bomes v. Schweiker, 544 F.

Supp. 72, 76 (D. Mass. 1982). Nevertheless, the ALJ had some duty to develop the record.

The duty to procure a consulting evaluation is triggered only when the medical evidence is ambiguous or inadequate for proper evaluation. Daniell v. Astrue, 384 F. App'x 798, 803 (10th Cir. 2010); Schultz v. Astrue, 362 F. App'x 634, 636 (9th Cir. 2010). Here, the ALJ had a record that provided a full development of the facts of the case, yet not one of Plaintiff's many treating sources ever recommended mental health treatment or diagnosed a mental health condition and only one – in 2007 – even noted anxiety.⁸ See Breshears, 2013 WL 2155073, at *7 (no error in failing to procure mental consultive examination where claimant diagnosed with depression but never referred for treatment and medical record otherwise detailed and comprehensive). Plaintiff's testimony mentioned stress, but also included her appropriate socialization with family, her use of coping techniques to counter anxiety, her lack of difficulty with authority figures, her ability to adapt to changes in routine and her lack of any issues with drugs or alcohol. Even Plaintiff's new evidence (the opinion of her treating physician, Dr. Hollinger), which was presented to the Appeals Council, confirms that Plaintiff did not suffer from any mental impairment. Tr. 500. Collectively, this constitutes substantial evidence amply supporting the ALJ's determination not to develop the record with a consulting examination by a psychologist. Based on this record, it is pellucid that the presentation of yet another medical report is not essential to afford Plaintiff a fair hearing. See Evangelista, 826 F.2d at 140.

In sum, the evidence supporting the ALJ's finding that Plaintiff could perform a limited range of light and sedentary work, based "upon an evaluation of the record as a whole," is more than substantial. Brown, 71 F. Supp. 2d at 30 (citing Ortiz, 955 F.2d at 769) ("We must uphold

⁸ In Plaintiff's written submission to this Court, there is one other potential reference to a psychological diagnosis: Plaintiff's brief states, "[a] comunitive disorder brought on from the stress and pain from illness and disorders I have been under, a psychologist has named it as a non-adjustment disorder." ECF No. 17 at 2. There is no further explanation and there is no diagnosis from a psychologist in the record. With nothing to go on, I am obliged to disregard this mysterious statement.

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." Under such circumstances, the Court must "defer to the Commissioner's findings." Ward v. Comm'r of Soc. Sec., 211 F.3d 652, 655 (1st Cir. 2000). When the ALJ's decision is supported by substantial evidence in the record, as it is here, it must be confirmed. Rodriguez Pagan, 819 F.2d at 3.

B. Challenge to the Appeals Council's Decision

In denying Plaintiff's request for review, the Appeals Council found that Plaintiff's new evidence "does not provide a basis for changing the [ALJ's] decision." Tr. 2. In this Circuit, the Appeals Council's decision refusing review is discretionary; the Council must review a case only if the ALJ's decision is "contrary to the weight of the evidence currently of record." Mills v. Apfel, 244 F.3d 1, 7 (1st Cir. 2001) (citing 20 C.F.R. § 416.1470(b)). The Appeals Council need not and often does not give reasons. Id. at 5. However, when the Appeals Council articulates a reason for denying review, there is no justification for remand unless that reason is "egregiously mistaken." Id.; Harrison v. Barnhart, No. 06-30005, 2006 WL 3898287, at *2 (D. Mass. Dec. 22, 2006) (scope for challenging Appeals Council's denial of review is "exceedingly narrow.").

When the Appeals Council accepts new evidence, which claimants are permitted to submit, 20 C.F.R. § 404.900(b), the evidence may provide grounds for remand if it is material in that the Commissioner's decision might reasonably have been different had the evidence been presented at the time of the ALJ's decision. Falu v. Sec'y of Health & Human Servs., 703 F.2d 24, 27 (1st Cir. 1983). To be material, the new evidence must be: (1) necessary to develop the facts of the case fully; (2) not cumulative; and (3) essential to a fair hearing. Evangelista, 826 F.2d at 139. The mere existence of evidence in addition to that submitted before the hearing examiner will not constitute sufficient cause for remand. Teal v. Mathews, 425 F. Supp. 474,

481 (D. Md. 1976). Rather, to qualify under the new/material standard, the evidence must be meaningful – neither pleonastic nor irrelevant to the basis for the earlier decision. Evangelista, 826 F.2d at 139-40.

None of the new evidence submitted to the Appeals Council comes close to meeting this standard. The most significant – Dr. Hollinger’s two RFC assessments – are substantially consistent with the ALJ’s determination that Plaintiff is effectively limited to sedentary work; therefore; they are merely cumulative. See Sullivan v. Finkelstein, 496 U.S. 617, 626 (1990) (new evidence does not justify remand if it is merely cumulative); Evangelista, 826 F.2d at 139 (same). The disability finding of the Rhode Island Department of Health and Human Services is not binding on the Commissioner and may be disregarded. 20 C.F.R. § 404.1504; see Morris v. Astrue, No. 11-cv-248-JL, 2012 WL 4499348, at *12 (D.N.H. Sept. 28, 2012) (proper to afford little weight to state determination of disability); Ahearn v. Astrue, No. 06-94-B-W, 2007 WL 951562, at *4-5 (D. Me. Mar. 27, 2007) (no error in ALJ’s failure to consider or accord any weight to state disability finding). Finally, the new medical evidence is mostly outside of the relevant time period; more importantly, all of it confirms that Plaintiff’s treating sources believed that she could work and that her knee did not require aggressive treatment. In short, it is entirely consistent with the ALJ’s findings.

The Appeals Council committed no error, never mind egregious mistake. Its decision does not provide any grounds for the relief Plaintiff seeks.

C. New Evidence Presented to the Court

Plaintiff’s presentation to this Court included three new pieces of evidence. The first, a partial copy of what appears to be the adverse decision of the Rhode Island administrative hearing officer, may be disregarded because Plaintiff’s removal of two key pages makes it

impossible to rely upon. In any event, there is no need to remand for consideration of such cumulative evidence of the state disability proceeding. The letter regarding the state determination of disability is already in the administrative record, but is immaterial because “a decision by another agency that you are disabled . . . is not binding on us,” 20 C.F.R. § 404.1504, so that such evidence may properly be disregarded. Ahearn, 2007 WL 951562, at *4-5. Similarly, the evidentiary fragment regarding a tooth extraction in 2011 cannot constitute proof of a potential impairment with the duration necessary to give rise to a disability. 42 U.S.C. § 423(d)(1)(A) (impairment must prevent gainful activity for a continuous period of not less than twelve months to be considered disabling).

That leaves the new diagnosis of mild sleep apnea based on a test performed on November 13, 2012. There is no evidence of sleep apnea in the record from the date of onset in 2007 until the ALJ’s decision on March 26, 2012. This report constitutes a new diagnosis that is buttressed by no evidence suggesting that sleep apnea affected Plaintiff’s ability to work during the period covered by these applications; accordingly, it is not material to Plaintiff’s condition during the relevant period and may properly be disregarded. See Gullon, 2011 WL 6748498, at *10 (new diagnosis dated five months after ALJ decision immaterial because no evidence that impairment was present during relevant period). Congress plainly intended that Sentence Six remands “should be few and far between, that a yo-yo effect be avoided – to the end that the process not bog down and unduly impede the timely resolution of social security appeals.” Evangelista, 826 F.2d at 141. The mere fact that evidence post-dates agency proceedings does not establish good cause for remand. Budzko v. Soc. Sec. Admin. Comm’r, 229 F.3d 1133, at *1 (1st Cir. 2000) (per curiam). The diagnosis of mild sleep apnea may be new evidence but does not justify remand.

VIII. Conclusion

Based on the foregoing, Plaintiff's motion for reversal (ECF Nos. 13-14) is DENIED and the Commissioner's motion for affirmance (ECF No. 16) is GRANTED.

A separate and final judgment shall enter.

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
February 20, 2014