UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

KEVIN E. CARROLL, Plaintiff,	:	
v.	:	C.A. No. 13-456PAS
CAROLYN W. COLVIN, ACTING COMMISSIONER OF SOCIAL SECURITY, Defendant.	:	

MEMORANDUM AND ORDER

Plaintiff Kevin E. Carroll contends that he has been disabled since January 1, 2009, as a result of degenerative lumbar disc/spine disease, depression and anxiety. He asks this Court to reverse or remand 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 argues that the administrative law judge ("ALJ") erred by failing to give appropriate weight to the opinions of his primary care physician, Dr. Lucille Vega, and his rheumatologist, Dr. Edward Reardon. He also challenges the ALJ's finding that his complaints lack credibility. 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 Commissioner's decision that Plaintiff is not disabled is legally correct and supported by substantial evidence, I order that Plaintiff's motion (ECF No. 8) be DENIED and the Commissioner's motion (ECF No. 10) be GRANTED.

I. Background Facts

Plaintiff had reached the stage of life where he was "closely approaching advanced age"[1] on the date of the alleged onset of disability, January 1, 2009. Tr. 54. He had completed the 11th grade and has a GED. At the hearing, he testified that his past relevant work was heavy and unskilled, as a construction laborer and a landscape worker. Tr. 47-48. The medical record reflects that his last work prior to onset was fishing, which he stopped in late 2008 due to lack of work. Tr. 347. Following the alleged onset of disability, he worked for a month in 2009, eight hours per day, moving pallets with a hand truck, earning $25/hour and stopped because the temporary job ended; he worked again briefly in 2010 and the fourth quarter of 2011. Tr. 45-46, 61, 265, 327. Plaintiff collected unemployment compensation in 2009 and 2010. Tr. 45. He lives alone, is able to care for himself, has never married and has no children; he drives his car every day. Tr. 54. During the period of alleged disability, there are references in the medical record to Plaintiff's recreational activities, including badminton, volleyball (which he stopped sometime prior to 2011 due to knee pain), croquet, bike riding and walking up to three miles. Tr. 307, 435, 544, 548, 554, 560. A record from late 2010 indicates that he exercises by walking and doing weight training, push-ups and sit-ups. Tr. 544.

A. Physical Impairment – Degenerative Lumbar Disc/Spinal Disease

Plaintiff's SSI and DIB applications focus on his back as the physical basis for his alleged disability. Tr. 255.

The relevant physical medical history in the period of disability begins in July 2009 with a complaint of a muscle strained while playing badminton, Tr. 304-07, which his physician at Thundermist Health Center expected to resolve without treatment in three to four weeks' time.

[1] A person between ages 50 and 54 is treated as "closely approaching advanced age," so that age is considered along with any severe impairments and limited work experience as impacting the ability to adjust to other work. 20 C.F.R. § 404.1563(d).

Tr. 323. In August 2009, Plaintiff saw his primary care physician, Dr. Lucille Vega; her notes reflect that Plaintiff "has been playing volleyball during the summer" and list his medical issues as asthma, insomnia and bronchitis. Tr. 402. In September 2009, Plaintiff reported to a physician's assistant at Thundermist that he had gotten "laid off from work this past Tuesday morning and will be calling in for unemployment." Tr. 315. There is no suggestion that any impairment was affecting his ability to work. The Thundermist notes make no reference to any back pain. In May 2010, Plaintiff went to the Emergency Department at Kent Hospital, where a lumbosacral spine X-ray showed "[m]inimal progression of spondylosis but no evidence for acute fracture or subluxation." Tr. 368.

From June 2010 to September 2011, Plaintiff had three diagnostic MRIs and one X-ray of his spine. The June 2010 MRI of the lumbosacral spine apparently[2] revealed severe canal stenosis with compression on nerves. Tr. 412-13. In December 2010, a lumbar spine X-ray showed degenerative changes at every visualized level that were overall moderate to severe and most pronounced at the mid and lower lumbar spine. Tr. 427. A September 1, 2011, MRI showed small to moderate disc extrusion and bulging that did not cause a significant degree of central stenosis, but with foraminal stenosis on the right side and foraminal narrowing that was at least moderate on the left. Tr. 453-54. A follow-up on September 15, 2011, showed degenerative changes throughout the lumbar spine, including disc protrusions at the L1-L2, L2-L3 and L5-S1 levels and significant foraminal narrowing on the left at the L5-S1 level. Tr. 451-52. Neither of the September 2011 MRIs depict the severe stenosis observed in June 2010.

[2] The copy of this MRI report in the medical record is unreadable. However, there are legible notes at its foot that reflect "severe canal stenosis." Tr. 412. The parties concur as to its conclusions, although Plaintiff relies on secondary references to it (Dr. Vega's notes). Tr. 396, 548. Their only difference is without distinction – Plaintiff refers to it as having been performed in May 2010 while the Commissioner uses a June 2010 date. I use the June 2010 date for convenience of reference and accept the representations in the briefs with respect to its contents. See ECF Nos. 9 at 1; 10 at 3.

Dr. Vega's first reference in her treating notes to back pain appears on November 18, 2010, when she wrote, "Pt would like a back specialist. Pt has been seeing Dr. Reardon and he is taking the Lortabs ffor [sic] 'quite some time.'" Tr. 545. Her notes on April 14, 2011, state, "referral to neurosurg clinic." Tr. 551. In July 2011, she wrote, "back specialist – 3 mo of P.T. and then possible 50% chance of P.T." Tr. 554. In August 2011, "he has back pains and wants to get into a neurosurg to remedy the spinal stenosis." Tr. 558. After his September 1, 2011, MRI of the lumbar spine, her notes reflect "return to Dr. Prince for the facet shot."[3] Tr. 560.

The record is devoid of evidence reflecting any physical therapy or treatment at any neurosurgical clinic or from a "Dr. Prince." Further, while Plaintiff represents that he received lumbar injections for his spine after the ALJ decision, from August 2012 through January 2013, he did not attempt to submit any evidence of such treatment, or to make a showing of the nature of the treatment, either to the Appeals Council or to this Court. See ECF No. 9 at 8. Apart from Dr. Vega, the only treating records regarding Plaintiff's back are the notes of rheumatologist, Dr. Edward Reardon, who saw Plaintiff once a year for his back impairment from late 2007 through June 2010. Tr. 370-73. In December 2011, Plaintiff returned to Dr. Reardon, who ordered a spinal X-ray, performed in January 2012, which showed mild to moderate degenerative changes, including marginal spurring at multiple levels and disc space narrowing at the L2-L3, with the remaining disc spaces appearing fairly well maintained. Tr. 533-34. On Plaintiff's follow-up visit with Dr. Reardon in February 2012, his notes reflect, "seriously considering surgery," but it appears from Plaintiff's hearing testimony that this relates to bone spurs on his hips and not to his spine. Tr. 56, 530. There is no suggestion in the record that Plaintiff was ever evaluated for spinal surgery.

[3] A "facet shot" is a lumbar injection to relieve spinal pain. Reinke v. Barnhart, No. 1:04-CV-1737-DFH-TAB, 2006 WL 3207943, at *3 (S.D. Ind. May 4, 2006).

B. Impact of Physical Impairment

In support of his disability application, Plaintiff procured assessments of the impact of his physical impairment on his ability to function from both Dr. Vega and Dr. Reardon.

On August 25, 2010, Dr. Vega completed a "Physician Examination Report" for the Rhode Island Department of Human Services, in which she indicated that she could not make any findings with respect to Plaintiff's physical capacities for walking, standing, sitting, reaching, bending, lifting, carrying, pushing and pulling; she suggested that Plaintiff see an occupational or physical therapist. Tr. 417-20. With respect to the long-term impact of his impairments,[4] she opined, "very good prognosis with meds + continuous psych intervention." Tr. 417. A month later, she completed a "Medical Report (General)" indicating that she had been treating Plaintiff since October 6, 2003, and that his relevant diagnoses included "severe spinal canal stenosis w/ back pain," chronic obstructive pulmonary disease ("COPD") and chronic bronchitis with asthma symptoms. Tr. 396. Six months after that report, on February 23, 2011, Dr. Vega completed a Disability Questionnaire in which she checked boxes indicating that she did not believe Plaintiff could sustain competitive employment on a full-time, ongoing basis and that Plaintiff's pain from spinal stenosis resulted in "moderately severe" limitations in his ability to concentrate, keep pace and be productive in a competitive work setting on a sustained basis. Tr. 438-40.

Dr. Reardon, the rheumatologist, completed a Medical Questionnaire on March 22, 2012, stating that he had been treating Plaintiff since 2004 for disc disease of the lumbar spine and generalized osteoarthritis with moderate to severe symptoms; he opined that Plaintiff could not

[4] Dr. Vega's optimistic prognosis appears in the section of the form titled, "Findings on Present Physical Examination." Thus, it may fairly be read as her opinion on Plaintiff's physical impairments, although her reference to psychiatric intervention suggests she was commenting on Plaintiff's overall condition, both physical and mental. Tr. at 417.

sustain competitive employment on a full-time, ongoing basis. Tr. 579. Dr. Reardon's physical capacity evaluation, completed on the same day, is based on checked boxes indicating that Plaintiff could not sit, walk, or stand for longer than an hour at a time, or for more than two total hours in an eight-hour day; that he could only occasionally lift or carry up to five pounds; that he could perform simple grasping with his hands occasionally but could never reach, push, pull or do fine manipulation or over shoulder work; that he could never operate foot controls; that he could never bend, squat, kneel or crawl; and that he could never be exposed to unprotected heights, moving machinery, noise and vibration, extreme temperatures, or dust, fumes and gases. Tr. 580. Dr. Reardon further stated that Plaintiff suffered from moderately severe fatigue that would result in moderately severe limitations in his ability to concentrate, keep pace and be productive in a competitive work setting on a sustained basis. Tr. 581.

The record regarding Plaintiff's physical impairments also includes the results of a physical examination and two record reviews performed by agency physicians; the reports on the record reviews both include assessment of Plaintiff's functional capacity.

On December 16, 2010, state agency consultant physician, Dr. Okosun Edoro, examined Plaintiff, focusing on his claims of back pain, plantar fasciitis and high blood pressure. Tr. 428. He observed that Plaintiff walked with a normal gait and no assistive device. Tr. 429. While Plaintiff's spine was tender, testing of flexion resulted in the conclusion that he retained "full range of movement." Tr. 429-30. Straight leg raise testing was negative. Tr. 429. On January 28, 2011, state agency consultant physician, Dr. Shanker Gupta, reviewed the file and completed a "Physical Residual Functional Capacity Assessment." He concluded that Plaintiff could lift and/or carry ten pounds frequently and up to twenty pounds occasionally; stand, walk and/or sit for about six hours in an eight-hour workday with normal breaks; push or pull with his hands and

feet; occasionally perform postural activities of stooping, kneeling, crouching and crawling and frequently climb ramps/stairs and balance; and must avoid concentrated exposure to extreme cold and hazards such as machinery and heights. Tr. 77-78. On April 4, 2011, state agency consultant physician Dr. Henry Laurelli reviewed Plaintiff's updated file; his conclusions are consistent with those of Dr. Gupta. Tr. 102-03.

C. Mental Impairments – Depression and Anxiety

Plaintiff's SSI and DIB applications focus on anxiety, depression and panic attacks as the mental bases for his alleged disability. Tr. 255.

Plaintiff's relevant mental health history for the period of disability begins with treatment in January through October 2009, at Thundermist Health Center, whose providers prescribed Xanax and later Klonopin for depression and anxiety. Tr. 341. During these visits, physician notes indicate "PSYCH oriented x 3, affect normal, no thought disorder" and "[m]inimal [d]epression." Tr. 333-34, 342. Three mental status examinations were performed during this period, two resulting in a GAF score of 60[5] and one resulting in a GAF score of 55. Tr. 320, 329-30. The notes also indicate that behavioral health treatment was not indicated. Tr. 330. Plaintiff's relationship with Thundermist soured when its providers refused to continue to prescribe Xanax. Tr. 471-74. In October 2009, Plaintiff switched to psychiatrist Dr. Thomas Paolino for mental health treatment. Tr. 378-79. After an examination performed on November 12, 2009, Dr. Paolino assessed Plaintiff's current GAF score as 70. Tr. 390. Dr. Paolino's notes are otherwise skimpy and largely indecipherable. Tr. 515. In all, it seems that Plaintiff saw Dr. Paolino nine times over the period from November 2009 through the end of 2011. Tr. 512-15.

[5] A Global Assessment of Functioning (GAF") score between 51 and 60 indicates moderate symptoms and one between 61 to 70 indicates "some mild symptoms . . . but generally functioning pretty well, has some meaningful relationships." A score of 41 to 50 indicates "serious symptoms." Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision 32-34 (4th ed. 2000) ("DSM-IV-TR").

In addition, Dr. Vega, Plaintiff's primary care physician, also addressed Plaintiff's anxiety and depression, counseling him on relaxation strategies. Tr. 542, 551, 558. In November 2010, she declined to prescribe "any more Xanax's up and over his psych (Dr. Paolino)." Tr. 546.

D. Impact of Mental Impairments

In support of his disability application, Plaintiff procured assessments of the impact of his mental impairments on his ability to function from both Dr. Paolino and Dr. Vega.

Dr. Paolino's first submission, dated January 3, 2011, is a "To Whom It May Concern" note stating only that "my patient, Kevin Carroll, is unable to return to work indefinitely." Tr. 509. On August 30, 2011, he wrote the second, which states in full that Plaintiff "is unable to work due to severe psychological problems." Tr. 510. No information is provided regarding the foundation for these conclusions.

Dr. Vega completed the "Physician Examination Report" for the Rhode Island Department of Human Services, the same form discussed above, on August 25, 2010. Tr. 417-20. Regarding the impact of his impairments,[6] she opined, "very good prognosis with meds + continuous psych intervention." Tr. 417. She assessed Plaintiff as moderately limited in his mental abilities to maintain attention and concentration, to complete tasks in a timely manner, to interact appropriately with co-workers and supervisors and to respond appropriately to changes in work routine or environment and as slightly limited in the abilities to remember and carry out simple instructions, to make simple work-related decisions and to work at a consistent pace without extraordinary supervision. Tr. 419. On February 23, 2011, Dr. Vega completed the second evaluation, again addressing both physical and mental limitations. Tr. 438-40. As to mental impairments, she opined that his anxiety is moderate to severe, which in combination with his pain and physical impairment, prevents him from sustaining competitive employment on

[6] See n.4, *supra*.

a full-time, ongoing basis. Tr. 438-39.

The record regarding Plaintiff's mental impairments also includes an examination performed by an agency psychiatrist and a mental residual functional capacity assessment prepared by an agency psychologist.

The psychiatric evaluation was conducted on January 7, 2011, by state agency consultant psychiatrist, Dr. Ghulam Mustafa Surti. Tr. 434-36. Plaintiff reported that he could do day-to-day activities including driving and playing chess with friends, though he had trouble with grocery shopping due to anxiety and was no longer able to play volleyball due to knee pain. Tr. 435. On examination, Plaintiff performed well on various tests of memory and persistence and displayed calm affect and normal rate of speech, with linear, goal-directed thought process and an anxious, nervous mood. Tr. 435-36. Dr. Surti assessed Plaintiff as "a middle age male who seems to have a history of anxiety and mild depressive symptoms possibly panic attacks," with a moderate GAF score of 50 to 55. Tr. 435-36.

On April 6, 2011, state agency consultant psychologist, Dr. Clifford Gordon, prepared an assessment of Plaintiff's mental residual functional capacity based on a review of the record. Tr. 104-06. He concluded that Plaintiff is moderately limited with respect to detailed instructions and his attention and concentration; his ability to maintain a routine or schedule; his ability to complete a workday or week without interruptions at a consistent pace; his ability to interact with the general public, maintain socially appropriate behavior and basic standards of neatness and cleanliness; and his ability to respond to changes in work setting, set realistic goals or make independent plans. Id. In addition, the record contains reports of psychologists Dr. Marnee Colburn and Dr. Gordon, concluding that the evidence of Plaintiff's mental impairments is insufficient to satisfy the "C" listing criteria at Step Two of the sequential analysis. Tr. 75-76,

100-01.

II. Travel of the Case

Plaintiff protectively filed applications for DIB and SSI in August 2010, alleging disability as of January 1, 2009. Tr. 192-95, 199-205. His applications were denied initially and on reconsideration. Tr. 127-30, 134-36, 137-39. He requested a hearing before an ALJ. Tr. 140-42. On April 3, 2012, the ALJ held a hearing at which Plaintiff, who was represented by counsel, and a vocational expert appeared and testified. Tr. 53-67. On April 18, 2012, the ALJ issued a decision finding that Plaintiff was not disabled at any time relevant to the decision. Tr. 20-33. On May 17, 2013, the Appeals Council denied Plaintiff's request for review, making the ALJ's decision the final decision of the Commissioner. Tr. 1-4. Having exhausted his administrative options, Plaintiff filed this case. 42 U.S.C. § 405(g).

III. The ALJ's Hearing and Decision

At his hearing, Plaintiff testified that he lives alone and drives every day when his car is working. Tr. 53-54. He claimed to be in constant pain, so that he can only stand for ten to fifteen minutes, and only sit for ten minutes, always with pain. Tr. 55. He said he could walk up to a mile and a half for three consecutive days but the walk would cause hip and knee pain; he could lift and carry no more than five pounds, and would have problems with repetitive pushing or pulling of leg controls, stooping, squatting, kneeling, bending and climbing stairs. Tr. 56-58. He claimed to have difficulty with memory, concentration and focus, crowds and handling stress, including ordinary work pressures. Tr. 58. He said that he expected to have surgery on his hip to remove bone spurs and calcium deposits through his arthritis doctor, Dr. Reardon. Tr. 56. While he "wished" he could work eight hours a day, five days a week, he claimed that he spent seven hours of a nine-hour day lying down. Tr. 59-60. Based on his collection of

unemployment benefits during parts of 2009 and 2010, he conceded that he had represented that he was ready, willing and able to work during those periods. Tr. 64.

The vocational expert testified that Plaintiff's past relevant work in construction and landscaping appeared to be heavy and unskilled. Tr. 47-48, 63. The ALJ posed two hypotheticals to the vocational expert. First, he asked about a hypothetical claimant, sharing Plaintiff's vocational history, but limited as set out in Dr. Reardon's March 2012 physical capacity evaluation and Dr. Vega's February 2011 Disability Questionnaire; the vocational expert testified that there would be no work that Plaintiff could perform. Tr. 48-49. The ALJ next asked about a hypothetical claimant, sharing Plaintiff's vocational history, who was limited to lifting twenty pounds occasionally and ten pounds frequently; sitting, standing and/or walking six hours out of an eight-hour work day; frequently climbing ramps and stairs and occasionally stooping, kneeling, crouching or crawling; performing simple, routine, competitive, repetitive, non-abstract tasks on a sustained basis in a stable work environment; and who would be unable to tolerate extreme cold or exposure to fumes, odors, dust, gases, poor ventilation, unprotected heights or dangerous moving machinery. Tr. 49-50. The vocational expert responded that light unskilled work would be available, such as cleaning and packaging jobs, which exist in significant numbers at the national and regional levels. Tr. 50-51.

In his decision, the ALJ first found that Plaintiff met the insured requirements of the Act through December 31, 2012. Tr. 22. He then proceeded though the familiar five-step sequential evaluation to determine the merits of Plaintiff's claim. After concluding at Step One that Plaintiff apparently had not engaged in substantial gainful activity since January 1, 2009, the

alleged onset date,[7] he moved to Step Two, finding that Plaintiff had the severe impairments of degenerative lumbar disc/spine disease, affective disorder (depression) and anxiety disorder (anxiety/a panic disorder). Tr. 23. Based on an individualized analysis of each impairment, the ALJ concluded that Plaintiff's intermittent complaints of gastrointestinal problems, the muscle strain from volleyball or badminton in 2009, the plantar fasciitis in 2011, asthma/COPD and knee and hip pain were all non-severe in that they did not impose more than minimal functional limitations, or were not expected to last for at least twelve consecutive months. Tr. 24-25. At Step Three, the ALJ found that none of Plaintiff's severe impairments met or medically equaled the severity of any relevant listing. Tr. 23-26.

The ALJ determined Plaintiff's residual functional capacity ("RFC")[8] at Step Four, concluding that he could perform light work as defined in 20 C.F.R. §§ 404.1567(b), 416.967(b),[9] with various limitations: avoid heights, dangerous and moving machinery, extreme temperatures and pulmonary irritants; only occasional kneeling, stooping, climbing, crouching and crawling; only simple, routine, competitive, repetitive tasks in a stable work environment with no more than simple decision-making; no close interpersonal interactions with coworkers or significant interaction with the public; and no complex or detailed tasks. Tr. 27. The ALJ's RFC finding was based on the information provided by Plaintiff in his application and testimony, the symptoms as shown by the medical records, and the opinion evidence from treating and agency

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[7] The ALJ found that some of the work in 2009 was at a level below substantial gainful activity, while the balance was temporary, so that Plaintiff's lack of work during the period of alleged disability was sufficient to adjudicate the claim. Tr. 23.

[8] 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).

[9] 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 will cite to one set only. See id.

sources. Tr. 27-31. While finding that Plaintiff has experienced pain, other symptoms and functional limitations, he nevertheless made an adverse finding with respect to Plaintiff's credibility based on 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 v. Secretary of Health and Human Services, 797 F.2d 19, 20-21 (1st Cir. 1986). Dr. Vega's February 2011 opinion, Dr. Reardon's March 2012 RFC and Dr. Paolino's terse 2011 letters were afforded minimal weight because they are conclusory and inconsistent with the record as a whole. Tr. 29.

In reliance on the RFC, the ALJ found that Plaintiff was unable to perform his past relevant work. Tr. 31. The vocational expert's testimony established that Plaintiff could perform other work in cleaning, assembling and packaging, all light unskilled jobs existing in significant numbers in the national economy. Tr. 31-32. Accordingly, the ALJ concluded that Plaintiff is not disabled or entitled to receive DIB or SSI. Tr. 32-33.

IV. Issues Presented

Plaintiff presents two arguments to establish that the Commissioner's decision is not supported by substantial evidence and is infected by legal error:

1. The ALJ improperly rejected Plaintiff's testimony concerning the intensity, persistence and limiting effects of his symptoms as not credible to the extent that they were inconsistent with the RFC of the non-examining state physician.

2. The ALJ failed to give appropriate weight to the opinions of Plaintiff's treating physicians.

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. §§ 416(I), 423(d)(1); 20 C.F.R. §§ 404.1505, 416.905. 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, 416.905-911.

A. Treating Physicians

Substantial weight should be given to the opinion, diagnosis and medical evidence of a treating physician unless there are good reasons to do otherwise. See Rohrberg v. Apfel, 26 F. Supp. 2d 303, 311 (D. Mass. 1998); 20 C.F.R. §§ 404.1527(c), 416.927(c). If a treating physician's opinion on the nature and severity of a claimant's impairments is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and is not inconsistent with the other substantial evidence in the record, the ALJ must give it controlling weight. Konuch v. Astrue, No. 11-193L, 2012 WL 5032667, at *4-5 (D.R.I. Sept. 13, 2012); 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2). The ALJ may discount a treating physician's opinion or report regarding an inability to work if it is unsupported by objective medical evidence or is wholly

conclusory. See Keating v. Sec'y of Health & Human Servs., 848 F.2d 271, 275-76 (1st Cir. 1988). The ALJ's decision must articulate the weight given, providing "good reasons" for the determination. See Sargent v. Astrue, No. CA 11–220 ML, 2012 WL 5413132, at *7-8, 11-12 (D.R.I. Sept. 20, 2012) (where ALJ failed to point to evidence to support weight accorded treating source opinion, court will not speculate and try to glean from the record; remand so that ALJ can explicitly set forth findings).

Where a treating physician has merely made conclusory statements, the ALJ may afford them such weight as is supported by clinical or laboratory findings and other consistent evidence of a claimant's impairments. See Wheeler v. Heckler, 784 F.2d 1073, 1075 (11th Cir. 1986). When a treating physician's opinion does not warrant controlling weight, the ALJ must nevertheless weigh the medical opinion based on the (1) length of the treatment relationship and the frequency of examination; (2) nature and extent of the treatment relationship; (3) medical evidence supporting the opinion; (4) consistency with the record as a whole; (5) specialization in the medical conditions at issue; and (6) other factors which tend to support or contradict the opinion. 20 C.F.R §§ 404.1527(c), 416.927(c). However, a treating physician's opinion is generally entitled to more weight than a consulting physician's opinion. See 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2).

The ALJ is required to review all of the medical findings and other evidence that support a medical source's statement that a claimant is disabled. However, the ALJ is responsible for making the ultimate determination about whether a claimant meets the statutory definition of disability. 20 C.F.R. §§ 404.1527(d), 416.927(d). The ALJ is not required to give any special significance to the status of a physician as treating or non-treating in weighing an opinion on whether the claimant meets a listed impairment, a claimant's RFC (see 20 C.F.R. §§ 404.1545-

1546, 416.945-946), or the application of vocational factors because that ultimate determination is the province of the Commissioner. 20 C.F.R. §§ 404.1527(d), 416.927(d); see also Dudley v. Sec'y of Health & Human Servs., 816 F.2d 792, 794 (1st Cir. 1987) (per curiam).

B. The Five-Step Evaluation

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. §§ 404.1520, 416.920. First, if a claimant is working at a substantial gainful activity, the claimant is not disabled. 20 C.F.R. §§ 404.1520(b), 416.920(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), 416.920(c). Third, if a claimant's impairments meet or equal an impairment listed in 20 C.F.R. Parts 404 and 416, Appendix 1, the claimant is disabled. Id. §§ 404.1520(d), 416.920(d). Fourth, if a claimant's impairments do not prevent doing past relevant work, the claimant is not disabled. Id. §§ 404.1520(e)-(f); 416.920(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), 416.920(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) (five step process applies to both DIB and SSI claims).

In determining whether a claimant's physical and mental impairments are sufficiently severe, the ALJ must consider the combined effect of all of the claimant's impairments and must consider any medically severe combination of impairments throughout the disability determination process. 42 U.S.C. § 423(d)(2)(B). Accordingly, the ALJ must make specific and

well-articulated findings as to the effect of a combination of impairments when determining whether an individual is disabled. Davis v. Shalala, 985 F.2d 528, 534 (11th Cir. 1993).

The claimant must prove the existence of a disability on or before the last day of insured status for the purposes of disability benefits. Deblois, 686 F.2d at 79; 42 U.S.C. §§ 416(i)(3), 423(a), 423(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).

C. 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 vocational expert. 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 which exists in the national economy. See Ferguson v. Schweiker, 641 F.2d 243, 248 (5th Cir. 1981). In any event, the ALJ must make a specific finding as to whether the non-exertional limitations are severe enough to preclude a wide range of employment at the given 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).

D. 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 DaRosa v. Sec'y of Health & Human Servs., 803 F.2d 24, 26 (1st Cir. 1986); Rohrberg, 26 F. Supp. 2d at 309-10. 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)).

E. 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 which could reasonably be expected to produce the pain or symptoms alleged. 42 U.S.C. § 423(d)(5)(A). The ALJ must consider all of a claimant's statements about 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, 416.928. In determining whether the medical signs and laboratory findings show medical impairments which reasonably could be expected to produce the pain alleged, the ALJ must apply the First Circuit's six-part pain analysis and consider the following factors:

1. The nature, location, onset, duration, frequency, radiation, and intensity of any pain;

2. Precipitating and aggravating factors (e.g., movement, activity, environmental conditions);

3. Type, dosage, effectiveness, and adverse side-effects of any pain medication;

4. Treatment, other than medication, for relief of pain;

5. Functional restrictions; and

6. The claimant's daily activities.

Avery, 797 F.2d at 29; Gullon ex rel. N.A.P.P. v. Astrue, No. 11-099ML, 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 (July 2, 1996). 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 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. ALJ's Assessment of Credibility

When an ALJ decides not to credit a claimant's testimony, he must articulate specific and adequate reasons for doing so, or the record must be obvious as to the credibility finding. See DaRosa, 803 F.2d at 26; Rohrberg, 26 F. Supp. 2d at 309-10. A reviewing court will not disturb a clearly articulated credibility finding supported by substantial record evidence. See Frustaglia, 829 F.2d at 195. The credibility determination requires consideration of such factors as daily living activities; the characteristics of pain; the type, effectiveness and side effects of medication; the treatment and non-medical measures used to relieve pain and other symptoms; the consistency of the claimant's statements with other record evidence; and the level and frequency of the claimant's attempts to obtain relief relative to the level of his complaints. See SSR 96-7p, 1996 WL 374186, at *5, *7.

Here, Plaintiff testified that he is always in pain so that he cannot sit or stand for more than ten to fifteen minutes before he is forced to change position; he also claimed that he can lift "[m]aybe five pounds." Tr. 55-57. This testimony contrasts markedly with his reports to his medical providers that, during the relevant period, he was bike-riding, playing badminton, volleyball and croquet, walking up to three miles and exercising by doing weight training, sit-ups and push-ups. Tr. 306-07, 435, 544, 548, 554, 560. The ALJ properly considered these inconsistencies. See Tr. 26, 29; Button v. Astrue, C.A. No. 11-563M, 2013 WL 1419325, at *17 (D.R.I. Feb. 25, 2013) (claimed inability to stand for more than twenty minutes inconsistent with references to hunting). His hearing testimony regarding his inability to sit was somewhat dramatically controverted by both his hearing testimony that he drives daily and his explanation for his late appearance at the hearing ("I've been driving around for the last hour and a half.").

Tr. 52, 54. The adverse credibility finding was also permissibly grounded on Plaintiff's stints of work in 2009 and 2010, which are inconsistent with his claimed limitations during the same period. Tr. 23, 28. Plaintiff's receipt of unemployment benefits in 2009 and 2010, which required him to hold himself out as ready, willing and able to work during those periods, Tr. 64, while not "the decisive factor in the denial of [disability] benefits," were properly considered as additional evidence reflecting negatively on credibility. Perez v. Sec'y Health, Educ. & Welfare, 622 F.2d 1, 3 (1st Cir. 1980); Colon v. Astrue, 841 F. Supp. 2d 495, 501 (D. Mass. 2012).

In challenging the ALJ's well supported adverse credibility finding, Plaintiff points to this Court's recent decision in Borino v. Astrue, 917 F. Supp. 2d 166 (D.R.I. 2013). He argues that the ALJ's consideration of the largely conservative treatment for his back, without "more intensive treatment such as physical therapy, epidural injections or surgery" constitutes error. See Tr. 24. This argument is largely misplaced. In Borino, the ALJ improperly considered the claimant's failure to obtain recommended orthopedic treatment without taking into account the claimant's lack of medical insurance, 917 F. Supp. 2d at 174, while here, Plaintiff's primary care physician suggested that he make an appointment at the neurosurgery clinic for his back pain and specifically noted that he had Medicaid coverage to pay for it, yet there is no evidence that Plaintiff ever followed up. Tr. 551-52. On one point, however, Plaintiff's Borino reference is on target – the ALJ does appear to have erred in noting the absence of any spinal injection because the record suggests that Plaintiff did have a spinal injection administered by a Dr. Prince.[10] Tr.

[10] This comes from a secondary reference in Dr. Vega's notes; there is no direct medical evidence of any spinal injections. Plaintiff also argues, but presents no supporting medical evidence, that he received three more spinal injections beginning four months after the ALJ's decision. ECF No. 9 at 8. In the absence of an evidentiary proffer, this Court should not wander into the analytic quagmire that consideration of such post-hearing treatment requires. See Gullon, 2011 WL 6748498, at *10. Remand can be based only on a showing that there is new evidence that is material; it cannot be based solely on an unsupported representation of counsel that Plaintiff had spinal injections. 42 U.S.C. § 405(g). With no information about the nature of these injections, particularly where the record already reflects a spinal injection, Plaintiff has failed to sustain his burden of establishing that the post-hearing injections constitute material new evidence requiring remand and that they are not merely cumulative or pertaining to a

560. Nevertheless, I find that this error is swamped by the other substantial evidence that Plaintiff's complaints were overstated. See Borino, 917 F. Supp. 2d at 173-74 (error in mistaken finding that claimant did not get treatment for depression results in reversal when every other foundational finding for lack of credibility is also flawed). Accordingly, it is harmless because "it is 'inconsequential to the ultimate nondisability determination.'" Rivera v. Comm'r of Soc. Sec. Admin., Civil No. 12-1479(BJM), 2013 WL 4736396, at *11 (D.P.R. Sept. 3. 2013).

Plaintiff's next attack on the credibility finding is somewhat puzzlingly grounded on the ALJ's supposed failure to consider the June 2010 MRI, which refers to severe stenosis.[11] In fact, the ALJ did consider that MRI, Tr. 23, but also noted subsequent studies of Plaintiff's spine that found no significant stenosis. Tr. 23-24. There is no error in the ALJ's reliance on the longitudinal evidence of all of the imaging studies of Plaintiff's spine.

Also unavailing is Plaintiff's argument that the ALJ erred in failing to factor Plaintiff's testimony that he spends his days lying down into the analysis of Plaintiff's inconsistent daily living activities. Plaintiff overreads Borino, which held that, when a claimant's report described her activities as specifically limited by chronic pain, it is error for the ALJ to rely on the activities out of context without consideration of the impact of the limitations imposed by the pain. 917 F. Supp. 2d at 174. Here, the contemporaneous medical records and examination reports mention Plaintiff's living alone without assistance, driving, socializing with friends, playing chess, walking, bike riding and playing badminton, volley ball and croquet, yet do not ever refer to Plaintiff's claim at the hearing that he must lie down for most of his waking hours.

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condition that developed after the relevant period. See Conte v. McMahon, 472 F. Supp. 2d 39, 44 (D. Mass. 2007) (party seeking remand bears the burden either to produce the evidence or to make a showing of nature of evidence that it would proffer to hearing officer if remand is allowed).

[11] See n.2, *supra*.

Tr. 53-54, 307, 435, 544, 548, 554, 560. Further, the ALJ did note several instances where the activity was limited by a claimed impairment. See, e.g., Tr. 24 (badminton or volleyball caused foot strain); Tr. 25 (knee and hip pain limited standing and walking). The ALJ did not err in relying on the evidence of Plaintiff's activities of daily living. See Berrios Lopez v. Sec'y of Health & Human Servs., 951 F.2d 427, 429 (1st Cir. 1991) (activities of daily living "can be used to support a negative credibility finding").

In short, and mindful of the need to tread softly, because it is the responsibility of the Commissioner to determine issues of credibility and to draw inferences from the record, I find that the ALJ's credibility determination was infected at most by harmless error. Cruz v. Astrue, C.A. No. 11-638M, 2013 WL 795063, at *16 (D.R.I. Feb. 12, 2013). Overall, it is based on specific and adequate reasons that are clearly articulated and well grounded in substantial evidence; accordingly, it is entitled to deference. Id.

B. ALJ's Weighing of Treating Physician Opinion Evidence

Plaintiff's case presented the ALJ with the challenge of evaluating what weight to give the assessment prepared for this application by primary care physician, Dr. Vega, and the physical capacity evaluation prepared by rheumatologist, Dr. Reardon, each of which conflicts with the physician's own treatment notes, other credible medical evidence and much of the record information about Plaintiff's pain, daily living and work activities and ability to function.

The determination regarding the weight to give treating physician opinions is governed by 20 C.F.R. § 404.1527(c). See generally Morales v. Comm'r of Soc. Sec., 2 F. App'x. 34, 36 (1st Cir. 2001) (ALJ had legally sufficient basis to discount treating physician's opinion that was not corroborated by clinical findings and was refuted by the rest of the record evidence). The opinions of Dr. Vega and Dr. Reardon must be afforded substantial weight unless there are good

reasons to do otherwise. See Rohrberg, 26 F. Supp. 2d at 311; 20 C.F.R. §§ 404.1527(c), 416.927(c). However, the ALJ may discount a treating physician's opinion if it is unsupported by objective medical evidence or is wholly conclusory. See Keating, 848 F.2d at 275-76. In reviewing the ALJ's determination regarding the weight to afford to these opinions, this Court's role is limited: if the ALJ's approach is supported by substantial evidence, the permissibility of alternative interpretations is beside the point – it is not for this Court to reweigh the evidence or substitute its judgment for that of the ALJ. Amaral v. Comm'r of Soc. Sec., 797 F. Supp. 2d 154, 162-63 (D. Mass. 2010).

Dr. Vega submitted a medical report with no conclusions and two forms with her opinions – one in August 2010 and the second in February 2011. Tr. 417-20, 438-40. The inconsistency between her two opinions is some of the substantial evidence buttressing the ALJ's determination to afford the second opinion minimal weight.

In her 2010 form, Dr. Vega indicated that she considered Plaintiff's prognosis "very good," and declined to opine regarding whether Plaintiff was functionally limited in any physical respect as a result of the impairments she identified – "I can not determine these findings." Tr. 419. Without the support of any mental status examination, she expressed her view regarding the impact of Plaintiff's mental impairments finding him slightly and moderately impaired in various functions. Id. The ALJ credited Dr. Vega's 2010 opinion and incorporated the mental limitations into the RFC finding.

Dr. Vega's 2011 form was filled out seven months after her 2010 form. In between the two forms, she saw Plaintiff four times, but these visits were largely limited to treatment of an abdominal difficulty unrelated to his relevant impairments. In her treating notes from this period, the only reference to his back pain is on November 18, 2010, when she noted that he

would be following up with Dr. Reardon and "University Ortho for central spinal stenosis," while the only reference to his mental impairment is her refusal to prescribe more Xanax. Tr. 545-46. These treating notes also reflect that Plaintiff exercised through weight training, walking, sit-ups and push-ups. Tr. 544. In contrast to her notes, Dr. Vega's 2011 form concludes that Plaintiff's physical and mental impairments cause moderate to severe limitations on his ability to work so that he cannot sustain competitive employment on a full-time ongoing basis. Tr. 439.

The ALJ properly discounted Dr. Vega's conclusory assessment on the ultimate issue of disability, because that is a matter reserved to his prerogative. See 20 C.F.R. § 404.1527(d). He clearly articulated good reasons for discounting the balance of her opinion, finding it inconsistent with her own assessment from 2010, when she found Plaintiff's prognosis very good and considered herself unable to opine on physical limitations; inconsistent with her treatment notes that reflect conservative treatment; and inconsistent with references in her notes and those of other treating sources regarding Plaintiff's activities (walking, bike riding, badminton) and prior work. The ALJ also noted that Dr. Vega's notes do not describe any neurological deficits, muscle atrophy, muscle spasm or limitation of motion so that the conclusions set out in her 2011 form lack a foundation in objective medical evidence. See Keating, 848 F.2d at 275-76 (ALJ may discount treating physician opinion if it is inconsistent with objective medical evidence or wholly conclusory). Finally, the ALJ pointed out that Dr. Vega's 2011 report was written based on the June 2010 MRI, which apparently showed "severe canal stenosis;"[12] she does not consider the impact of subsequent MRIs and X-rays, none of which depicted significant stenosis. Tr. 23-24 & n.3. There is no error in the determination to afford Dr. Vega's 2011 opinion minimal weight.

[12] See n.2, *supra*.

Unlike Dr. Vega, Dr. Reardon completed an RFC assessment that provides a detailed opinion regarding Plaintiff's limitations. Tr. 578-81. He assessed Plaintiff as profoundly impaired, opining for example that he is unable to sit, walk or stand for more than one hour, unable to work for more than one to two hours per day and unable to operate machinery using foot controls. Tr. 580. Dr. Reardon's cursory treatment notes do not reflect any medical findings, clinical tests, mental status examinations or other observations to support these dramatic conclusions. See 20 C.F.R. § 404.1527(c)(3) ("[t]he more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion,"). Further, as the ALJ noted, Dr. Reardon's RFC is completely inconsistent with the rest of the evidence in the record, which reflects Plaintiff's prior work, his ability to live alone, his driving and his many physical activities. Tr. 29. It is worth noting again that Plaintiff himself contradicted Dr. Reardon's conclusions that he could not sit for more than one hour or ever operate foot controls when he justified his late arrival at the ALJ hearing because he had been "driving around for the last hour and a half." Tr. 52. The ALJ did not err in affording minimal weight to Dr. Reardon's RFC assessment.

Plaintiff's final assault on the ALJ's well-crafted decision – his argument that the ALJ erred in elevating the state consulting sources over these two treating sources[13] – again takes its substance from Borino, but again, he overreads it. Borino stands for the proposition that an ALJ cannot discount the treating doctor's conclusions as "inconsistent with the record evidence" by reference only to the non-examining physicians' assessments, particularly where the ALJ himself did not credit the agency opinions. 917 F. Supp. 2d at 173. Here, by contrast, the ALJ did not

[13] Plaintiff wisely does not challenge the ALJ's decision to afford minimal weight to Dr. Paolino's two letter opinions, which state simply that Plaintiff cannot work. Apart from their totally conclusory nature, they are starkly inconsistent with the one data point that is decipherable in Dr. Paolino's treatment notes – his assessment that Plaintiff suffered from only mild mental limitations. Tr. 390.

look to the non-examining physicians' conclusions to support his finding that the treating sources were inconsistent with the record as a whole. Rather, he properly looked to Plaintiff's testimony and application for evidence of his prior work and activities of daily living, to all of the treating medical evidence, to the objective test results and to the opining doctors' own notes. He separately analyzed each treating source, applying the factors mandated by 20 C.F.R. § 404.1527(c), and found that each fell short. Tr. 29. He also tested the RFC assessments prepared by the non-examining sources against the record as a whole, found them consistent and well supported and therefore entitled to significant probative weight. Id.

I find no error in the ALJ's approach to the opinion evidence.

VIII. Conclusion

Based on the foregoing, Plaintiff's motion for reversal (ECF No. 8) is DENIED and the Commissioner's motion for affirmance (ECF No. 10) is GRANTED.

A separate and final judgment shall enter.

/s/ Patricia A. Sullivan
PATRICIA A. SULLIVAN
United States Magistrate Judge
February 26, 2014