

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

ROSANNA BROWN :
 :
 v. : C.A. No. 15-284S
 :
 CAROLYN COLVIN, Acting :
 Commissioner of the Social Security :
 Administration :

REPORT AND RECOMMENDATION

Lincoln D. Almond, United States Magistrate Judge

This matter is before the Court for judicial review of a final decision of the Commissioner of the Social Security Administration (“Commissioner”) denying Disability Insurance Benefits (“DIB”) under the Social Security Act (the “Act”), 42 U.S.C. § 405(g). Plaintiff filed her Complaint on July 9, 2015 seeking to reverse the decision of the Commissioner. On June 21, 2016, Plaintiff filed a Motion for Reversal of the Disability Determination. (Document No. 12). On August 22, 2016, the Commissioner filed a Motion for an Order Affirming the Decision of the Commissioner. (Document No. 15). Plaintiff filed a Reply Brief on September 16, 2016. (Document No. 17).

This matter has been referred to me for preliminary review, findings and recommended disposition. 28 U.S.C. § 636(b)(1)(B); LR Cv 72. Based upon my review of the record, the parties’ submissions and independent research, I find that there is substantial evidence in this record to support the Commissioner’s decision and findings that Plaintiff is not disabled within the meaning of the Act. Consequently, I recommend that Plaintiff’s Motion (Document No. 12) be DENIED and that the Commissioner’s Motion (Document No. 15) be GRANTED.

I. PROCEDURAL HISTORY

Plaintiff filed an application for DIB on April 9, 2012 (Tr. 165-168) alleging disability since September 12, 2008. The application was denied initially on December 10, 2012 (Tr. 88-96) and on reconsideration on March 25, 2013. (Tr. 98-107). Plaintiff's date last insured is December 31, 2010. Plaintiff requested an Administrative Hearing. On December 5, 2013, a hearing was held before Administrative Law Judge Gerald Resnick (the "ALJ") at which time Plaintiff, represented by counsel, and a vocational expert ("VE") appeared and testified. (Tr. 59-86). The ALJ issued an unfavorable decision to Plaintiff on January 16, 2014. (Tr. 31-44). The Appeals Council denied Plaintiff's request for review on June 17, 2015. (Tr. 1-4). Therefore the ALJ's decision became final. A timely appeal was then filed with this Court.

II. THE PARTIES' POSITIONS

Plaintiff argues that the ALJ's Step 4 determination is erroneous and that substantial evidence does not support the ALJ's RFC assessment or adverse credibility determination.

The Commissioner disputes Plaintiff's claims and contends that any Step 4 error is harmless on this record and that the ALJ's findings are supported by substantial evidence and must be affirmed.

III. THE STANDARD OF REVIEW

The Commissioner's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Substantial evidence is more than a scintilla i.e., the evidence must do more than merely create a suspicion of the existence of a fact, and must include such relevant evidence as a reasonable person would accept as adequate to support the conclusion. Ortiz v. Sec'y of Health

and Human Servs., 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec’y of Health and Human Servs., 647 F.2d 218, 222 (1st Cir. 1981).

Where the Commissioner’s decision is supported by substantial evidence, the court must affirm, even if the court would have reached a contrary result as finder of fact. Rodriguez Pagan v. Sec’y of Health and Human Servs., 819 F.2d 1, 3 (1st Cir. 1987); Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991). The court must view the evidence as a whole, taking into account evidence favorable as well as unfavorable to the decision. Frustaglia v. Sec’y of Health and Human Servs., 829 F.2d 192, 195 (1st Cir. 1987); Parker v. Bowen, 793 F.2d 1177 (11th Cir. 1986) (court also must consider evidence detracting from evidence on which Commissioner relied).

The court must reverse the ALJ’s decision on plenary review, however, if the ALJ applies incorrect law, or if the ALJ fails to provide the court with sufficient reasoning to determine that he or she properly applied the law. Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) (per curiam); accord Cornelius v. Sullivan, 936 F.2d 1143, 1145 (11th Cir. 1991). Remand is unnecessary where all of the essential evidence was before the Appeals Council when it denied review, and the evidence establishes without any doubt that the claimant was disabled. Seavey v. Barnhart, 276 F.3d 1, 11 (1st Cir. 2001) citing, Mowery v. Heckler, 771 F.2d 966, 973 (6th Cir. 1985).

The court may remand a case to the Commissioner for a rehearing under sentence four of 42 U.S.C. § 405(g); under sentence six of 42 U.S.C. § 405(g); or under both sentences. Seavey, 276 F.3d at 8. To remand under sentence four, the court must either find that the Commissioner’s decision is not supported by substantial evidence, or that the Commissioner incorrectly applied the law relevant to the disability claim. Id.; accord Brenem v. Harris, 621 F.2d 688, 690 (5th Cir. 1980)

(remand appropriate where record was insufficient to affirm, but also was insufficient for district court to find claimant disabled).

Where the court cannot discern the basis for the Commissioner's decision, a sentence-four remand may be appropriate to allow her to explain the basis for her decision. Freeman v. Barnhart, 274 F.3d 606, 609-610 (1st Cir. 2001). On remand under sentence four, the ALJ should review the case on a complete record, including any new material evidence. Diorio v. Heckler, 721 F.2d 726, 729 (11th Cir. 1983) (necessary for ALJ on remand to consider psychiatric report tendered to Appeals Council). After a sentence four remand, the court enters a final and appealable judgment immediately, and thus loses jurisdiction. Freeman, 274 F.3d at 610.

In contrast, sentence six of 42 U.S.C. § 405(g) provides:

The court...may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding;

42 U.S.C. § 405(g). To remand under sentence six, the claimant must establish: (1) that there is new, non-cumulative evidence; (2) that the evidence is material, relevant and probative so that there is a reasonable possibility that it would change the administrative result; and (3) there is good cause for failure to submit the evidence at the administrative level. See Jackson v. Chater, 99 F.3d 1086, 1090-1092 (11th Cir. 1996).

A sentence six remand may be warranted, even in the absence of an error by the Commissioner, if new, material evidence becomes available to the claimant. Id. With a sentence six remand, the parties must return to the court after remand to file modified findings of fact. Id.

The court retains jurisdiction pending remand, and does not enter a final judgment until after the completion of remand proceedings. Id.

IV. THE LAW

The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §§ 416(i), 423(d)(1); 20 C.F.R. § 404.1505. The impairment must be severe, making the claimant unable to do her previous work, or any other substantial gainful activity which exists in the national economy. 42 U.S.C. § 423(d)(2); 20 C.F.R. §§ 404.1505-404.1511.

A. Treating Physicians

Substantial weight should be given to the opinion, diagnosis and medical evidence of a treating physician unless there is good cause to do otherwise. See Rohrberg v. Apfel, 26 F. Supp. 2d 303, 311 (D. Mass. 1998); 20 C.F.R. § 404.1527(d). 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. 20 C.F.R. § 404.1527(d)(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 and Human Servs., 848 F.2d 271, 275-276 (1st Cir. 1988).

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) the nature and extent of the treatment relationship; (3) the 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). 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).

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(e). 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 residual functional capacity (see 20 C.F.R. §§ 404.1545 and 404.1546), or the application of vocational factors because that ultimate determination is the province of the Commissioner. 20 C.F.R. § 404.1527(e). See also Dudley v. Sec'y of Health and Human Servs., 816 F.2d 792, 794 (1st Cir. 1987).

B. Developing the Record

The ALJ has a duty to fully and fairly develop the record. Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir. 1991). The Commissioner also has a duty to notify a claimant of the statutory right to retained counsel at the social security hearing, and to solicit a knowing and voluntary waiver of that right if counsel is not retained. See 42 U.S.C. § 406; Evangelista v. Sec'y of Health and Human Servs., 826 F.2d 136, 142 (1st Cir. 1987). The obligation to fully and fairly develop the record exists

if a claimant has waived the right to retained counsel, and even if the claimant is represented by counsel. Id. However, where an unrepresented claimant has not waived the right to retained counsel, the ALJ's obligation to develop a full and fair record rises to a special duty. See Heggarty, 947 F.2d at 997, citing Currier v. Sec'y of Health Educ. and Welfare, 612 F.2d 594, 598 (1st Cir. 1980).

C. Medical Tests and Examinations

The ALJ is required to order additional medical tests and exams only when a claimant's medical sources do not give sufficient medical evidence about an impairment to determine whether the claimant is disabled. 20 C.F.R. § 416.917; see also Conley v. Bowen, 781 F.2d 143, 146 (8th Cir. 1986). In fulfilling his duty to conduct a full and fair inquiry, the ALJ is not required to order a consultative examination unless the record establishes that such an examination is necessary to enable the ALJ to render an informed decision. Carrillo Marin v. Sec'y of Health and Human Servs., 758 F.2d 14, 17 (1st Cir. 1985).

D. The Five-step Evaluation

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. §§ 404.1520, 416.920. First, if a claimant is working at a substantial gainful activity, she is not disabled. 20 C.F.R. § 404.1520(b). Second, if a claimant does not have any impairment or combination of impairments which significantly limit her physical or mental ability to do basic work activities, then she does not have a severe impairment and is not disabled. 20 C.F.R. § 404.1520(c). Third, if a claimant's impairments meet or equal an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1, she is disabled. 20 C.F.R. § 404.1520(d). Fourth, if a claimant's impairments do not prevent her from doing past relevant work, she is not disabled. 20 C.F.R. § 404.1520(e). Fifth,

if a claimant's impairments (considering her residual functional capacity, age, education, and past work) prevent her from doing other work that exists in the national economy, then she is disabled. 20 C.F.R. § 404.1520(f). Significantly, the claimant bears the burden of proof at steps one through four, but the Commissioner bears the burden at step five. Wells v. Barnhart, 267 F. Supp. 2d 138, 144 (D. Mass. 2003) (five-step process applies to both SSDI and SSI claims).

In determining whether a claimant's physical and mental impairments are sufficiently severe, the ALJ must consider the combined effect of all of the claimant's impairments, and must consider any medically severe combination of impairments throughout the disability determination process. 42 U.S.C. § 423(d)(2)(B). Accordingly, the ALJ must make specific and well-articulated findings as to the effect of a combination of impairments when determining whether an individual is disabled. Davis v. Shalala, 985 F.2d 528, 534 (11th Cir. 1993).

The claimant bears the ultimate burden of proving the existence of a disability as defined by the Social Security Act. Seavey, 276 F.3d at 5. The claimant must prove disability on or before the last day of her insured status for the purposes of disability benefits. Deblois v. Sec'y of Health and Human Servs., 686 F.2d 76 (1st Cir. 1982), 42 U.S.C. §§ 416(i)(3), 423(a), (c). If a claimant becomes disabled after she has lost insured status, her claim for disability benefits must be denied despite her disability. Id.

E. Other Work

Once the ALJ finds that a claimant cannot return to her prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the national economy. Seavey, 276 F.3d at 5. In determining whether the Commissioner has met this burden, the ALJ must develop a full record regarding the vocational opportunities available to a

claimant. Allen v. Sullivan, 880 F.2d 1200, 1201 (11th Cir. 1989). This burden may sometimes be met through exclusive reliance on the Medical-Vocational Guidelines (the “grids”). Seavey, 276 F.3d at 5. Exclusive reliance on the “grids” is appropriate where the claimant suffers primarily from an exertional impairment, without significant non-exertional factors. Id.; see also Heckler v. Campbell, 461 U.S. 458, 103 S. Ct. 1952, 76 L.Ed.2d 66 (1983) (exclusive reliance on the grids is appropriate in cases involving only exertional impairments, impairments which place limits on an individual’s ability to meet job strength requirements).

Exclusive reliance is not appropriate when a claimant is unable to perform a full range of work at a given residual functional level or when a claimant has a non-exertional impairment that significantly limits basic work skills. Nguyen, 172 F.3d at 36. In almost all of such cases, the Commissioner’s burden can be met only through the use of a vocational expert. Heggarty, 947 F.2d at 996. It is only when the claimant can clearly do unlimited types of work at a given residual functional level that it is unnecessary to call a vocational expert to establish whether the claimant can perform work which exists in the national economy. See Ferguson v. Schweiker, 641 F.2d 243, 248 (5th Cir. 1981). In any event, the ALJ must make a specific finding as to whether the non-exertional limitations are severe enough to preclude a wide range of employment at the given work capacity level indicated by the exertional limitations.

1. Pain

“Pain can constitute a significant non-exertional impairment.” Nguyen, 172 F.3d at 36. Congress has determined that a claimant will not be considered disabled unless he furnishes medical and other evidence (e.g., medical signs and laboratory findings) showing the existence of a medical impairment which could reasonably be expected to produce the pain or symptoms alleged. 42 U.S.C.

§ 423(d)(5)(A). The ALJ must consider all of a claimant's statements about his symptoms, including pain, and determine the extent to which the symptoms can reasonably be accepted as consistent with the objective medical evidence. 20 C.F.R. § 404.1528. In determining whether the medical signs and laboratory findings show medical impairments which reasonably could be expected to produce the pain alleged, the ALJ must apply the First Circuit's six-part pain analysis and consider the following factors:

- (1) The nature, location, onset, duration, frequency, radiation, and intensity of any pain;
- (2) Precipitating and aggravating factors (e.g., movement, activity, environmental conditions);
- (3) Type, dosage, effectiveness, and adverse side-effects of any pain medication;
- (4) Treatment, other than medication, for relief of pain;
- (5) Functional restrictions; and
- (6) The claimant's daily activities.

Avery v. Sec'y of Health and Human Servs., 797 F.2d 19, 29 (1st Cir. 1986). An individual's statement as to pain is not, by itself, conclusive of disability. 42 U.S.C. § 423(d)(5)(A).

2. Credibility

Where an ALJ decides not to credit a claimant's testimony about pain, the ALJ must articulate specific and adequate reasons for doing so, or the record must be obvious as to the credibility finding. Rohrberg, 26 F. Supp. 2d at 309. A reviewing court will not disturb a clearly articulated credibility finding with substantial supporting evidence in the record. See Frustaglia, 829 F.2d at 195. The failure to articulate the reasons for discrediting subjective pain testimony requires

that the testimony be accepted as true. See DaRosa v. Sec’y of Health and Human Servs., 803 F.2d 24 (1st Cir. 1986).

A lack of a sufficiently explicit credibility finding becomes a ground for remand when credibility is critical to the outcome of the case. See Smallwood v. Schweiker, 681 F.2d 1349, 1352 (11th Cir. 1982). If proof of disability is based on subjective evidence and a credibility determination is, therefore, critical to the decision, “the ALJ must either explicitly discredit such testimony or the implication must be so clear as to amount to a specific credibility finding.” Footte v. Chater, 67 F.3d 1553, 1562 (11th Cir. 1995) (quoting Tieniber v. Heckler, 720 F.2d 1251, 1255 (11th Cir. 1983)).

V. APPLICATION AND ANALYSIS

A. The ALJ’s Decision

The ALJ decided this case adverse to Plaintiff at Step 4. At Step 2, the ALJ found that Plaintiff’s hand impairments and post-hernia repair abdominal pain were “severe” impairments as defined in 20 C.F.R. § 404.1520(c). (Tr. 40). However, at Step 3, the ALJ concluded that Plaintiff’s impairments did not, singly or in combination, meet or medically equal any of the Listings. Id. As to RFC, the ALJ determined that Plaintiff was able to perform a limited range of light work with both exertional and environmental limitations. (Tr. 41). Based on this RFC and testimony from the VE, the ALJ concluded that Plaintiff was capable of performing her past relevant work as a spooler “as actually and generally performed.” (Tr. 43).¹

¹ Although the ALJ observed that the VE described a number of “representative other positions” which could be performed, Defendant concedes that this observation does not constitute an alternative Step 5 finding that might support a “harmless error” finding as to Plaintiff’s Step 4 argument. (Tr. 44; Document No. 15 at p. 8, n.5).

B. Plaintiff Has Not Shown Any Step 4 Error

Plaintiff attacks the ALJ's Step 4 finding that she could perform her past relevant work as a spooler because it conflicts with the RFC assessment that Plaintiff avoid exposure to moving machinery. (Document No. 12-1 at p. 12). Plaintiff contends that the determination was based on "confusing and contradictory" VE testimony. Id.

As an initial matter, Defendant concedes that the ALJ erred by finding that Plaintiff could perform her past relevant work as a spooler as the job is "generally performed." (Document No. 15 at p. 10). However, Defendant argues that such error is harmless because substantial evidence supports the ALJ's alternate finding that she could perform such work "as she actually performed it." Id. at p. 10.

At the hearing, the ALJ clearly presented the following hypothetical to the VE (Tr. 81-82): the individual could occasionally lift and carry twenty pounds, frequently lift and carry ten pounds, stand and walk about six hours, sit about six hours; occasionally push or pull with the right arm; occasionally use the right hand for fine manipulation; occasionally balance, stoop, kneel and crouch; never crawl or climb ladders, ropes or scaffolds; and must avoid moderate exposure to moving machinery and unprotected heights and concentrated exposure to extreme cold, fumes, odors, dust, gases and/or ventilation. (Tr. 82-83). The ALJ then asked "what jobs, if any, could be performed, including her past relevant work as a spooler, which is what they [the State Agency] apparently found?" (Tr. 83). The VE responded by beginning to discuss the impact of the limitations on the unskilled factory jobs available to the individual, but the ALJ then asked the VE to address whether the individual could perform Plaintiff's prior work as a spooling operator, as described in Exhibit 3E. (Tr. 83) ((citing Ex. 3E) (Tr. 197-204)). The VE unequivocally answered that the job could be

performed. (Tr. 84). He had testified earlier that he reviewed the vocationally relevant exhibits in the record. (Tr. 79). The ALJ asked the VE if his testimony was consistent with the Dictionary of Occupational Titles and the VE responded that it was. (Tr. 85).² The ALJ was entitled to rely on the VE's testimony that an individual with the hypothetical limitations could perform Plaintiff's prior work as a spooler as she actually performed it. (Tr. 82-84). See Rose v. Shalala, 34 F.3d 13, 19 (1st Cir. 1994); Arocho v. Sec'y of HHS, 670 F.2d 374, 375 (1st Cir. 1982). Despite Plaintiff's present claim that the VE's testimony was confusing, her counsel at the ALJ hearing apparently did not agree since he did not direct any clarifying questions to the VE and waived a closing statement. (Tr. 85-86). Plaintiff has shown no Step 4 error.

Plaintiff also contends that the ALJ's RFC finding does not match the hypothetical provided to the VE. (Document No. 12-1 at p. 15). Plaintiff is correct; however, the ALJ's hypothetical to the VE was more restrictive than the ultimate RFC the ALJ imposed. Compare Tr. 82 ("must avoid even moderate exposure to moving machinery...") with Tr. 41 at Finding 6 ("must avoid concentrated exposure to...moving machinery..."). While discrepancies between the ALJ's hypothetical to the VE and the ultimate RFC finding can preclude the testimony from constituting substantial evidence in support of the ALJ's finding, see Rose, 34 F.3d at 19, remand here is unnecessary because the hypothetical posed to the VE was more restrictive than the ultimate RFC finding. The VE's testimony that the hypothetical individual could perform the spooler job as Plaintiff actually performed is not less probative because the ALJ ultimately concluded that she was

² According to the DOT, the position of spooling machine operator does not involve exposure to "moving mech parts." 1991 WL 678656.

not as limited as the hypothetical individual. Accordingly, the VE's testimony still constitutes substantial evidence supporting the ALJ's finding.

C. Plaintiff Has Shown No Error in the ALJ's RFC Assessment

Plaintiff contends that the ALJ did not properly account for the fact that Plaintiff's physical capacity for work changed over time and "involved a different pain generator in 2013 after her hernia surgery." (Document No. 12-1 at p. 15). Plaintiff also faults the Appeals Council for "summarily passing" on treating source opinions obtained after the ALJ hearing. (See Tr. 1-4).

First, as to the Appeal Council decision, it reviewed the post-hearing evidence submitted by Plaintiff and found it to be "new information" which "does not affect the decision about whether you were disabled beginning on or before January 16, 2014" (the date of the ALJ's decision). (Tr. 2). The Appeals Council advised Plaintiff that her recourse was to file a new claim. Id.³

Generally, the discretionary decision of the Appeals Council to deny a request for review of an ALJ's decision is not reviewable. A judicial review under 42 U.S.C. § 405(g) is typically focused on the findings and reasoning of the ALJ, i.e., whether the ALJ's findings are supported by substantial evidence and whether the ALJ properly applied the law. Of course, it makes no sense from an efficiency standpoint for a reviewing court to spend time and resources critiquing the work of the Appeals Council when it has jurisdiction to review the underlying and operative ALJ decision. In other words, reversible error by an ALJ can be remedied by the Court regardless of what the Appeals Council did or did not do.

³ Plaintiff contends that SSR 11-1p creates a "horribly unfair procedural trap" that is intended to force claimants to abandon appeals. (Document No. 12-1 at pp. 17-18). While the application of SSR 11-1p may force a claimant to make a difficult strategic decision, Plaintiff has not shown that either the ALJ or the Appeals Council committed any legal error in her particular case. In addition, she does not cite even a single judicial decision in which an ALJ's determination was reversed and remanded due to the claimed unfairness of SSR 11-1p.

The First Circuit has, however, held that review of Appeals Council action may be appropriate in those cases “where new evidence is tendered after the ALJ decision.” Mills v. Apfel, 244 F.3d 1, 5 (1st Cir. 2001). In such cases, “an Appeals Council refusal to review the ALJ may be reviewable where it gives an egregiously mistaken ground for this action.” Id. This avenue of review has been described as “exceedingly narrow.” Harrison v. Barnhart, C.A. No. 06-30005-KPN, 2006 WL 3898287 (D. Mass. Dec. 22, 2006). Further, the term “egregious” has been interpreted to mean “[e]xtremely or remarkably bad; flagrant.” Ortiz Rosado v. Barnhart, 340 F. Supp. 2d 63, 67 (D. Mass. 2004) (quoting Black’s Law Dictionary (7th ed. 1999)).

In Mills, the First Circuit recognized that an Appeals Council denial of a request for review has all the “hallmarks” of an unreviewable, discretionary decision. Mills, 244 F.3d at 5. The Appeals Council is given a great deal of latitude under the regulations and “need not and often does not give reasons” for its decisions. Id. Thus, the First Circuit “assume[d] that the Appeals Council’s refusal to review would be effectively unreviewable if no reason were given for the refusal.” Id. at p. 6. It did, however, create a narrow exception for review when the Appeals Council “gives an egregiously mistaken ground for [its] action.” Id. at p. 5. The First Circuit did not find this result to be a “serious anomaly” because “there is reason enough to correct an articulated mistake even though one cannot plumb the thousands of simple ‘review denied’ decisions that the Appeals Council must issue every year.” Id. at p. 6.

Since Plaintiff proffered the “new” evidence to the Appeals Council, it is undisputed that the Mills test, and not the more forgiving Evangelista test, applies. See Ortiz Rosado, 340 F. Supp. 2d at 67 n.1. Plaintiff has not established that the Appeals Council was “egregiously mistaken” in its decision to deny Plaintiff’s request for review. It is undisputed that the opinions of Dr. Stratton and

Dr. Perry were prepared after the ALJ's decision, on February 18, 2014 and June 4, 2014, respectively. (Tr. 20-22, 26-28). Neither opinion is expressly retrospective, id., and Dr. Perry failed to answer a question specifically asking the "earliest date" that his description of Plaintiff's symptoms and limitations applied. (Tr. 23). As the Appeals Council accurately noted, this evidence does not directly address whether Plaintiff was disabled prior to the ALJ's decision. "An implicit materiality requirement is that the new evidence relate to the time period for which benefits were denied, and that it not concern evidence of a later-acquired disability or of the subsequent deterioration of the previous non-disabling condition." Beliveau ex rel. Beliveau v. Apfel, 154 F. Supp. 2d 89, 95 (D. Mass. 2001) (quoting Szubak v. Sec'y of HHS, 745 F.2d 831, 833 (3rd Cir. 1984)). The Court must review the ALJ's decision based on the record before him at the time. Further, although the ALJ did not have the opportunity to consider such report, he did have all of the relevant records when he rendered his decision. Plaintiff has shown no error.

Plaintiff also argued that the ALJ had no medical opinion before him as to the functional impact of her hernia surgery and residual pain. Plaintiff's hernia repair was performed in May 2012. (Tr. 384). When Dr. Conklin reviewed the record in December 2012, she observed that Plaintiff was "S/P [status quo] umbilical hernia repair" and that there were "no associated functional limitations." (Tr. 94). The records before Dr. Conklin included references to post-surgical pain and note that a post-surgical ultrasound did not show a residual hernia or other abnormalities. (Tr. 316, 318). The ALJ was entitled to rely on Dr. Conklin's opinion, and its subsequent affirmance by Dr. Laurelli. (Tr. 105).⁴ It is within the [Commissioner's] domain to give greater weight to the testimony and

⁴ Plaintiff criticizes Dr. Laurelli's January 30, 2013 affirmance as a "remarkably hasty" determination. (Tr. 106). However, the record reflects that Plaintiff represented on December 20, 2012 that she had "no additional evidence to submit" and she did not submit Appeal Form SSA-3441 until May 13, 2013. (Exh. 8E). Further, on Form SSA-3441,

reports of medical experts who are commissioned by the [Commissioner].” See Keating v. Sec’y of HHS, 848 F.2d 271, 275 n.1 (1st Cir. 1988) (citing Lizotte v. Sec’y of HHS, 654 F.2d 127, 128 (1st Cir. 1981)). Plaintiff has shown no error.⁵

VI. CONCLUSION

For the reasons discussed herein, I recommend that Plaintiff’s Motion for Reversal (Document No. 12) be DENIED and that Defendant’s Motion to Affirm (Document No. 15) be GRANTED. Further, I recommend that Final Judgment enter in favor of Defendant.

Any objection to this Report and Recommendation must be specific and must be filed with the Clerk of the Court within fourteen days of its receipt. See Fed. R. Civ. P. 72(b); LR Cv 72. Failure to file specific objections in a timely manner constitutes waiver of the right to review by the District Court and the right to appeal the District Court’s decision. See United States v. Valencia-Copete, 792 F.2d 4, 6 (1st Cir. 1986); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980).

/s/ Lincoln D. Almond
LINCOLN D. ALMOND
United States Magistrate Judge
September 20, 2016

she reported no change in her condition since January 9, 2013. (Tr. 219). Thus, even if the reconsideration was “hasty,” Plaintiff has not shown any prejudice or legal error.

⁵ Plaintiff’s final challenge to the ALJ’s credibility determination merits little discussion. Plaintiff improperly asks the Court to reweigh the evidence on credibility. The ALJ properly weighed the evidence, including Plaintiff’s prior statements and daily activities, and found that her allegations of disabling pain were “not entirely credible.” (Tr. 41-42). He acknowledged her reports of chronic hand and abdominal pain and appropriately accounted for them in his RFC determination to the extent supported by the record. (See e.g., Tr. 82-83). Plaintiff has shown no error.