UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

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| ERICA LEE RODRIGUES,<br>Plaintiff,<br><br>v.<br><br>CAROLYN W. COLVIN,<br>Acting Commissioner,<br>Social Security Administration,<br>Defendant. | ) | C.A. No. 15-211-M-LDA |

**MEMORANDUM AND ORDER**

JOHN J. McCONNELL, JR., United States District Judge.

Plaintiff Erica Lee Rodrigues seeks judicial review of the final administrative decision of the Commissioner of Social Security denying her claim for Social Security Disability Benefits ("SSDI"). (ECF No. 1.)

Ms. Rodrigues was 41 years old when she stopped working in June 2012 to undergo her fifth spinal surgery. For the majority of her working life, she was a receptionist/accounts payable clerk and an order picker at a manufacturing company. Ms. Rodrigues filed an application seeking benefits, citing back, neck, and leg pain. The Commissioner initially denied her request. She requested review of her case and a hearing before an Administrative Law Judge ("ALJ"). At the hearing, Ms. Rodrigues and a vocational expert testified. In addition to her back problem, she also claimed a mental impairment of depression at her hearing. The ALJ determined that Ms. Rodrigues was not disabled in a manner such that she was entitled to receive benefits. Ms. Rodrigues requested a review of the ruling, which the Appeals Council denied. Upon this denial, the ALJ's decision became the Commissioner's final ruling. Before the Court are Ms. Rodrigues' Motion to Reverse (ECF No. 8) and the Commissioner's Motion to Affirm. (ECF No. 10.)

## I. BACKGROUND

Ms. Rodrigues had her first back surgery in 2000 and a second back surgery in 2002. (Tr. at 234). She saw Dr. Michael Olin in 2004 for low back, calf, and neck pain radiating into the left arm she experienced after falling off a horse sometime in August or September of 2004. (*Id.* at 241, 250). She reported low back, neck, and left and right arm pain throughout her medical records in 2005. (*Id.* at 235-40). A record from Dr. Olin references a referral, in response to Ms. Rodrigues' continued pain, to Dr. Doberstein in August of 2007 for a lumbar fusion, but those medical records are not part of the file. (*Id.* at 234). Ms. Rodrigues had her first neck surgery in April 2011 (*Id.* at 258-63) and the second neck surgery was on July 10, 2012. (*Id.* at 310-11). These two surgeries were recommended because her pain had not decreased despite numerous surgeries, injections, physical therapy, and other treatments.

Ms. Rodrigues treated for her pain with several physicians. In 2011, she began treatment with Dr. Todd Handel at the Handel Center for Spine Sports and Pain Intervention. He gave her multiple injections from 2011 through 2013 and expressed disappointment at the lack of sustained improvement. (*Id.* at 271-93; 352-63; 377-78; 448-49; 454-515; 518).

Dr. Mihaela Iovanel, Ms. Rodrigues' primary care physician, noted in June of 2009 that she reported daily anxiety and chest tightness due to work and family constraints. (*Id.* at 425). Ms. Rodrigues also reported feeling overwhelmed and difficulty sleeping. (*Id.*). She made the same reports during visits with Dr. Iovanel in May, June, and July of 2010. (*Id.* at 407, 409, 447). In a note on August 9, 2012, Dr. Iovanel observed that Ms. Rodrigues seemed emotional and depressed due to her chronic pain. (*Id.* at 438).

Ms. Rodrigues saw three physicians relatively consistently since her first back surgery in 2000 – Dr. Oyelese was her surgeon, Dr. Iovanel was her primary care doctor, and Dr. Handel

treated her pain – and they all agree that Ms. Rodrigues suffers from fibromyalgia[1] and chronic pain syndrome. (*Id.* at 383-84; 386-87; 388-89; 448-49; 450-53; 481-82; 520-21). Dr. Keith Brecher, who Dr. Handel referred Ms. Rodrigues to for an evaluation in October 2013, agreed with the diagnosis of fibromyalgia. (*Id.* at 516-17).

## II. STANDARD OF REVIEW

This Court's review of an ALJ's findings and conclusions is limited: "We must uphold a denial of social security disability benefits unless 'the Secretary has committed a legal or factual error in evaluating a particular claim.' The Secretary's findings of fact are conclusive if supported by substantial evidence." *Manso-Pizarro v. Sec'y of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996) (quoting *Sullivan v. Hudson*, 490 U.S. 877, 885 (1989)).

"Substantial evidence" is "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 217 (1938)). If the substantial evidence standard is met, factual findings are conclusive even if the record "arguably could support a different conclusion." *Irlanda Ortiz v. Sec'y of Health & Human Servs.*, 955 F.2d 765, 770 (1st Cir. 1991) (citing *Rodriguez Pagan v. Sec'y of Health & Human Servs.*, 819 F.2d 1, 3 (1st Cir. 1987)). This Court must avoid reinterpreting the evidence or otherwise substituting its own judgment for that of the Commissioner. *See Colon v. Sec'y of Health & Human Servs.*, 877

[1] "'Fibromyalgia is a type of chronic pain syndrome affecting the soft tissues, which may, as cause or effect, involve some sort of psychological disorder or an abnormal response to stress. Typically patients describe deep aching, throbbing, or a burning feeling, and they may feel totally drained of energy. Frequently pain is most severe at certain 'tender points' that tend to be the same in most patients.'" *May v. Barnhart*, Civ. No. 06-CV-133 SM, 2007 WL 203986, at *3 (D.N.H. Jan. 25, 2007) (quoting 6 *Attorneys' Textbook of Medicine*, para. 25.01 (3d ed.1999)).

F.2d 148, 153 (1st Cir. 1989). The resolution of conflicts in the evidence is for the Commissioner, not the courts. *Rodriguez v. Sec'y of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981) (citing *Richardson*, 402 U.S. at 399).

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)).

## III. APPLICABLE LAW

The ALJ must follow a five-step sequential evaluation process in evaluating a disability claim. *See* 20 C.F.R. §§ 404.1520, 416.920. First, if a claimant is engaged in substantial gainful activity, she is not disabled. 20 C.F.R. § 404.1520(b). Second, if a claimant does not have any medically determinable 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 Function Capacity ("RFC"), age, education, and past work) prevent her from doing other work that exists in the national economy, then she is disabled. 20 C.F.R. § 404.1520(f). Significantly, the claimant bears the burden of proof at steps one through four, but the

Commissioner bears the burden of proving step five. *Goodermote v. Sec'y of Health & Human Servs.*, 690 F.2d 5, 7 (1st Cir. 1982).

In considering whether a claimant's physical and mental impairments are severe enough to qualify for disability, the ALJ must consider the combined effect of all the claimant's impairments. 42 U.S.C. § 423(d)(2)(B). In calculating a claimant's RFC, the ALJ must consider all of the claimant's impairments, including impairments that are non-severe. 20 C.F.R. § 404.1520(e).

## IV. DISCUSSION

Ms. Rodrigues contends that the ALJ made five errors: (1) his residual functional capacity determination was not supported by substantial evidence; (2) his credibility determination was not supported by substantial evidence; (3) his step two determination that her mental impairment was not severe was not supported by substantial evidence; (4) he adopted an out-of-date and insufficient state agency psychologist assessment; and (5) he failed to fully develop the record. After a thorough review of the record and the briefing in this matter, this Court finds that the ALJ's decision is not supported by substantial evidence on at least two of Ms. Rodrigues' points of error. Therefore, the Commissioner's decision is remanded for further consideration.

### A. Credibility

This is essentially a pain case so the ALJ's credibility determination was critical to its outcome. *See* Social Security Ruling ("SSR") 96–7p at *3 ("Because symptoms, such as pain, sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, any statements of the individual concerning his or her symptoms must be carefully considered."); *see also Auger v. Astrue*, No. C.A. 09-622 S, 2011 WL 846864 (D.R.I. Feb. 3, 2011) *report and recommendation adopted*, No. C.A. 09-622 S, 2011 WL 855275 (D.R.I. Mar. 7, 2011). And although the ALJ has the power to resolve credibility issues, *Ortiz*, 955 F.2d at 769, that

determination must be supported by substantial evidence. *Da Rosa v. Sec'y of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986). If the ALJ decides that an applicant's testimony about her pain is not credible, he "must make specific findings as to the relevant evidence he considered in determining to disbelieve the [claimant]." *Id.* Social Security Ruling 96–7p was promulgated in part "to state the importance of explaining the reasons for the [ALJ's] finding about the credibility of the individual's statements in the disability determination or decision." *Id.* at *1. It also advised that "[b]ecause symptoms, such as pain, sometimes suggest a greater severity of impairment than can be shown by objective medical evidence alone, any statements of the individual concerning his or her symptoms must be carefully considered..." *Id.* at *3. Finally, the policy cautioned that "[w]hen evaluating the credibility of an individual's statements, the [ALJ] must consider the entire case record and give *specific reasons* for the weight given to the individual's statements." *Id.* at *4. (emphasis added).

Ms. Rodrigues argues that the ALJ's evaluation of her pain and credibility is legally insufficient. In this case, the ALJ concluded that Ms. Rodrigues' testimony about the debilitating nature of her pain was not consistent with the medical evidence in the record to the degree alleged. (Tr. at 21). He also determined that her pain "has not been of sufficient severity or credible to the extent to persuade him that since June 26, 2012, the alleged onset date, [Ms. Rodrigues] has been incapable of performing work within the residual functional capacity." (*Id.*). Subjective complaints of pain against a medical record that is inhospitable to those complaints are not fatal, however, to an individual's disability claim. In considering the credibility of Ms. Rodrigues' pain, "the absence of objective medical evidence supporting an individual's statements about the intensity and persistence of pain or other symptoms is only one factor that the adjudicator must

consider in assessing an individual's credibility." *Makuch v. Halter*, 170 F. Supp. 2d 117, 127 (D. Mass. 2001) (citing SSR 96–7p).

If, after evaluating the objective findings, the ALJ determines that the claimant's reports of pain are significantly greater than what could be reasonably anticipated from the objective evidence, the ALJ must then consider other relevant information such as evidence of: (1) the claimant's daily activities; (2) the location, duration, frequency, and intensity of the pain; (3) precipitating and aggravating factors; (4) the type, dosage, effectiveness and side effects of any medication taken to alleviate the pain or other symptoms; (5) treatment, other than medication, received for relief of pain; (6) any other measures used to relieve pain or other symptoms; and (7) any other factors relating to claimant's functional limitations and restrictions attributable to pain. *See Avery v. Sec'y of Health & Human Servs.*, 797 F.2d 19, 29 (1st Cir. 1986); 20 C.F.R. §§ 404.1529(c)(3)(i)-(vii).

First of all, the ALJ erroneously asserted that Ms. Rodrigues was not credible because she failed to show objective evidence of pain. This is an error of law because "complaints of pain need not be precisely corroborated by objective findings, but they must be consistent with medical findings." *Dupuis v. Sec'y of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989); *see also Ormon v. Astrue*, 497 Fed. Appx. 81, 86-7 (1st Cir. 2012). Indeed, Ms. Rodrigues' medical records and findings were consistent with her alleged disability because they evidence that she has received numerous treatments for pain associated with each surgery and, while some efforts have been minimally successful, she continued to report that she was in disabling pain.

The Commissioner also contends that the ALJ acted properly in rejecting her complaints of severe pain because medical records say that Ms. Rodrigues' surgeries appeared to be generally successful. However, the ALJ also credited medical opinions diagnosing Ms. Rodrigues with a

severe chronic pain syndrome and fibromyalgia, diagnoses that are generally subjective. Despite this subjectivity, the medical records demonstrate that Ms. Rodrigues was treated for her pain in the form of many injections over the years when her complaints of chronic pain were at an apex. Thus, in the face of those objective records and medical opinions, the ALJ's decision to discredit Ms. Rodrigues' statements about the severity of her pain as a blockade to her continued employment needed to be explained in more detail as to why and to what extent he disbelieved her and detailed facts as to the reasons why.

This case presents a close call and ordinarily the ALJ's credibility determinations are entitled to considerable deference. However, Ms. Rodrigues' medical records demonstrate numerous back and neck surgeries and the pain associated with those operations over the course of thirteen years. She testified about her pain and functional limitations, and her complaints at the hearing are entirely consistent in her medical records over this substantial period of time. Furthermore, the Commissioner does not highlight any record where any of Ms. Rodrigues' doctors questioned her pain, making the ALJ's decision to discredit her unfounded in the record evidence. *See Johnson v. Astrue*, 597 F.3d 409, 414 (1st Cir. 2009).

The Court finds, moreover, that the ALJ did not give enough credit to her consistent return to work over most of those years that she was reporting constant pain. While the ALJ is not required, of course, to credit her subjective allegations of pain, he is required to provide an adequate and detailed explanation as to the reason(s) for not finding her credible. Since the ALJ did not do so with enough detail in this particular case, the Court remands this case for further evaluation and consideration. Ms. Rodrigues is entitled to a detailed, fact-based explanation, beyond boilerplate language, as to why the ALJ determined she was not fully credible.

### B. The ALJ Erred In Ignoring Dr. Clifford Gordon's Opinion That Her Mental Impairment Was Severe

"Great care should be exercised in applying the not severe impairment concept." SSR 85–28 at *4. At Step 2, an impairment is considered severe when it "significantly limits [a claimant's] physical or mental ability to do basic work activities." 20 C.F.R. § 404.1520(c). An impairment is "non-severe" when the medical evidence establishes only a slight abnormality that has "no more than a minimal effect on an individual's ability to work." SSR 85–28 at *3. Although Step 2 is a *de minimis* standard, it still must be met by a claimant who retains the burden of proof. *McDonald v. Sec'y of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). An ALJ may root his Step 2 decision on a finding that there is no medical evidence that a claimant suffers from a "severe *medically determinable* physical or mental impairment" that "significantly limits" her physical or mental ability to do basic work activities. 20 C.F.R. § 404.1520(a)(4)(ii); 20 C.F.R. § 404.1520(c) (emphasis added). This decision may be based solely on medical evidence, 20 C.F.R. § 404.1528(a), not on a claimant's own testimony about her symptoms in the absence of medical evidence. *See Teves v. Astrue*, Civil No. 08–246–B–W, 2009 WL 961231, at *4 (D. Me. April 7, 2009).

Ms. Rodrigues argues that the ALJ erred in failing to find that her mental impairment was severe at Step 2. Specifically, Ms. Rodrigues highlights that the ALJ erred when he completely ignored state agency reviewing physician Dr. Clifford Gordon's opinion that she suffered from a severe mental impairment, described as affective disorder, that limited her work related functioning. The Commissioner acknowledges that the ALJ did not review Dr. Gordon's opinion, but argues that this error is harmless. The Court disagrees.

"Where an ALJ does not explicitly reject a medical opinion or set forth specific, legitimate reasons for crediting one medical opinion over another, he errs." *Garrison v. Colvin*, 759 F.3d

995, 1012-13 (9th Cir. 2014). Because medical opinions, along with other relevant evidence, are the evidence that the ALJ uses to determine whether an applicant is disabled, the ALJ cannot ignore one or more opinions that may disagree with his ultimate conclusion. The regulations promise applicants that "[r]egardless of its source, we will evaluate every medical opinion we receive." 20 C.F.R. § 404.1527 (c). If the ALJ had reviewed Dr. Gordon's report, he would have learned that Dr. Gordon opined that Ms. Rodrigues' mental impairment was severe, causing moderate limitations in several work-related functions such as the ability to carry out detailed instructions; to maintain attention and concentration for extended periods; to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances; to sustain an ordinary routine without special supervision; and to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods. (Tr. at 65-66).

As to the Commissioner's suggestion that this oversight was harmless error, an "ALJ's error is harmless where it is 'inconsequential to the ultimate nondisability determination.'" *Rivera v. Comm'r of Soc. Sec. Admin.*, No. 12–1479, 2013 WL 4736396, at *11 (D.P.R. Sept. 3, 2013) (quoting *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)). These findings alone without other medical record evidence may not rise to the level of a disabling mental impairment, but the regulations promise applicants that each medical opinion will be evaluated and that was not done here. Dr. Gordon's opinion may have influenced the ALJ's ultimate decision, but because he admittedly did not review it, Ms. Rodrigues, and this reviewing Court, are left to speculate. The Court finds that the ALJ's decision to overlook Dr. Gordon's contrary opinion was an error that requires remand.

Because the Court concludes that this case should be remanded on the two grounds discussed herein, the Court need not explore in detail the remaining errors Ms. Rodrigues claims. The Court emphasizes that the Commissioner should not assume these issues were omitted from the opinion because no error was found. Indeed, the Court admonishes the Commissioner that, on remand, special care should be taken with regard to the RFC determination, especially in light of Dr. Gordon's opinion and Ms. Rodrigues' own testimony about her pain.

## V. CONCLUSION

Ms. Rodrigues' Motion to Reverse and/or Remand (ECF No. 8) is GRANTED and the Commissioner's Motion to Affirm (ECF No. 10) is DENIED. This matter is remanded to the Commissioner for further administrative proceedings as outlined herein.

IT IS SO ORDERED.

John J. McConnell, Jr.
United States District Judge
March 17, 2016