UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

ELIENA M.	:	
	:	
v.	:	C.A. No. 17-00254-WES
	:	
NANCY A. BERRYHILL, 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 Supplemental Security Income ("SSI") and Disability Insurance Benefits ("DIB") under the Social Security Act (the "Act"), 42 U.S.C. § 405(g). Plaintiff filed her Complaint on May 25, 2017 seeking to reverse the Decision of the Commissioner. On December 12, 2017, Plaintiff filed a Motion to Reverse the Decision of the Commissioner. (ECF Doc. No. 13). On February 2, 2018, the Commissioner filed a Motion for an Order Affirming the Decision of the Commissioner. (ECF Doc. No. 15). Plaintiff filed a Reply Brief on February 23, 2018. (ECF Doc. No. 16).

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 to Reverse (ECF Doc. No. 13) be DENIED and that the Commissioner's Motion to Affirm (ECF Doc. No. 15) be GRANTED.

I. PROCEDURAL HISTORY

Plaintiff filed an application for DIB on December 29, 2014 alleging disability since January 23, 2013 (Tr. 213-219) and an application for SSI on March 18, 2015 alleging disability since April

17, 2013 (Tr. 220-228). Both applications were denied initially and on reconsideration. Plaintiff requested an Administrative Hearing. On June 9, 2016, a hearing was held before Administrative Law Judge Tanya J. Garrian (the "ALJ") at which time Plaintiff, represented by counsel, and a Vocational Expert ("VE") appeared and testified. (Tr. 32-60). The ALJ issued an unfavorable decision to Plaintiff on July 27, 2016. (Tr. 13-31). The Appeals Council denied Plaintiff's request for review on April 12, 2017. (Tr. 1-3). 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 erred at Step 2 by not finding her essential tremors to be a severe impairment and by failing to properly assess her low IQ scores.

The Commissioner disputes Plaintiff's claims and contends that the ALJ's RFC assessment is 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©. 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." Foote 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 5. At Step 2, the ALJ determined that Plaintiff's anxiety disorder, affective disorder and organic mental disorder were severe impairments. (Tr. 19). The ALJ concluded that her essential tremors and substance abuse disorder were not severe conditions. Id. The ALJ concluded at Step 3 that Plaintiff did not have an impairment or combination of impairments that meets or medically equals the severity of one of the listed impairments. Id.

The ALJ concluded that Plaintiff had the following RFC:

> [T]he claimant has the residual functional capacity to perform a full range of work at all exertional levels but with the following non-exertional limitations: limited to work involving simple, routine, competitive, repetitive tasks, in a work environment free of fast-paced production requirements involving only simple work-related decisions, with few, if any, workplace changes (i.e., works in the same place, with essentially the same people, under the same usual conditions and with the same usual work processes, with few changes) and limited to occasional, superficial contact with the public, co-workers and supervisors.

(Tr. 21).

At Step 4, the ALJ found that Plaintiff would be unable to perform past work. (Tr. 24). However, the ALJ found that Plaintiff could perform work as a laundry worker (Dictionary of Occupational Titles ("DOT") 361.687-018, office cleaner (DOT 323.687-014) and cleaner, housekeeper (DOT 323.687-010). (Tr. 25). The ALJ therefore concluded that Plaintiff had not been under a disability from her alleged onset date through the date of the decision.

B. The ALJ Properly Found that Plaintiff Did Not Meet Her Step 2 Burden as to Her Tremors

Plaintiff challenges the ALJ's evaluation of her tremor condition at Step 2. The ALJ concluded that Plaintiff had "failed to submit persuasive medical records relative to th[is] impairment[ ]." (Tr. 19).[1]

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). The Commissioner has adopted a "slight abnormality" standard which provides that 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. Although Step 2 is a de mimimis standard, Orellana v.

[1] Plaintiff notes that her tremors were found severe at Step 2 in connection with a prior unsuccessful disability application. (Tr. 72). However, the ALJ did so "[g]iving the claimant the benefit of the doubt" and despite opinions to the contrary from the state agency medical consultants. Id.

Astrue, 547 F. Supp. 2d 1169, 1172 (E.D. Wash. 2008) (citing Bowen v. Yuckert, 482 U.S. 137, 153-154 (1987)), it is still a standard and a standard on which Plaintiff bears the burden of proof. See Desjardins v. Astrue, No. 09-2-B-W, 2009 WL 3152808 (D.Me. Sept. 28, 2009). In her Step 2 analysis, the ALJ thoroughly discussed Plaintiff's tremors in the context of the record as a whole and concluded that there was insufficient medical evidence presented establishing that Plaintiff's tremors were a "severe" impairment. (Tr. 19).

An ALJ may properly base his or her Step 2 finding on the absence of medical evidence supporting a finding that a claimant suffers from a "severe medically determinable physical or mental impairment" which "significantly limits" her physical or mental ability to do basic work activities. 20 C.F.R. § 404.1520(a)(4)(ii), (c). (emphasis added). See also Teves v. Astrue, No. 08-246-B-W, 2009 WL 961231 (D.Me. April 7, 2009) ("[A] claimant's testimony about symptoms is insufficient to establish a severe impairment at Step 2 in the absence of medical evidence."). At Step 2, Plaintiff bore the burden of demonstrating that she had a "medically determinable" physical or mental impairment(s) that significantly limited her ability to do basic work activity at the relevant time. Id. The ALJ found that Plaintiff did not met that burden as to her tremors, and Plaintiff has shown no error in her finding.

The ALJ acknowledged that there was evidence of observable tremors in the record, citing Dr. Schnirman's observations during a neuropsychological evaluation in March 2014. (Tr. 19; see Tr. 354). Plaintiff's attempts to bolster Dr. Schnirman's report as valid are irrelevant, however, as the ALJ did not question the validity of Dr. Schnirman's observations of shaking. (Tr. 19). The ALJ also accurately observed that a large portion of the record showed no evidence of tremors. (Tr. 19 citing Exhs. B7F and B10F).

Plaintiff's claim that the ALJ erred in citing Exhibit B10F because it also contained a record noting minimal essential tremor is unpersuasive. Although Dr. McCormick observed "minimal"

essential tremor in July 2015 (Tr. 604), she specifically noted "no tremor" in four other visits documented in Exhibit B10F. (See Tr. 609, 612, 615, 617). Thus, the ALJ did not err in citing Exhibit B10F to support her finding that Plaintiff's examinations "routinely" failed to reveal evidence of tremors. (Tr. 19). The fact that there was some evidence of tremors in the record is insufficient to entitle Plaintiff to remand. See Rodriguez Pagan, 819 F.2d at 3 ("We must affirm the [Commissioner]'s resolution, even if the record arguably could justify a different conclusion, so long as it is supported by substantial evidence.").

Additionally, Plaintiff's argument that she was prescribed medication for tremors does not establish whether her tremors significantly limited her ability to do basic work activities. In fact, Plaintiff testified that medication helped her condition. (Tr. 44, 51). Thus, this fact does not support Plaintiff's burden at Step 2. See Tsarelka v. Sec'y of HHS, 842 F.2d 529, 534 (1st Cir. 1988) ("Implicit in a finding of disability is a determination that exiting treatment alternatives would not restore a claimant's ability to work.").

Plaintiff has simply shown no error in the ALJ's conclusion that her tremors were not a severe impairment because, although there was some evidence of tremors in the record, treatment notes also frequently made no mention of tremors or affirmatively noted the absence of tremors. (Tr. 19). After twice noting tremors in the fall of 2013, (Tr. 384, 394), Dr. Curtice then noted no tremor (Tr. 363, 370) and did not observe a tremor again until March 2014. (Tr. 360). Dr. Schnirman also observed shaking around this same time. (Tr. 354). After this, there was no recorded observation of tremors again until August and September. (Tr. 484, 493). Moreover, Dr. McCormick consistently observed no tremor every month for almost a year (Tr. 475, 481, 574-575, 567, 580, 607, 609, 612, 615) until she noted "minimal" essential tremor in July 2015. (Tr. 604). The ALJ's Step 2 finding also is supported by Dr. Ramirez's and Dr. Conklin's opinions. Dr. Ramirez specifically noted observations of tremors in the

fall of 2013 and the fall of 2014, but nevertheless opined that this impairment was not severe based upon his review of the medical records. (Tr. 111). Dr. Conklin similarly acknowledged observations of tremors and that Plaintiff took medication for this condition, but cited ten treatment notes specifically indicating "no tremor." (Tr. 123). She also noted that Plaintiff was independent in her personal care with only some difficulty, did laundry and drove. Id. Based on all this evidence, Dr. Conklin opined that Plaintiff's tremors were not a severe impairment. Id. These opinions directly support the ALJ's finding.

Plaintiff also has not shown that her tremors significantly limited her ability to do basic work activities, as she must to show error in the ALJ's Step 2 finding. See Roberts v. Colvin, CA No. 14-289-JJM, 2015 WL 1040672, at *8 (D.R.I. March 10, 2015; 20 C.F.R. §§ 404.1522(b)(1) and 415.922(b)(1). "[T]he mere 'mention' of [an impairment] does not carry Plaintiff's burden of producing evidence of resulting limitations." Ballou v. Astrue, No. CA 07-386-M, 2009 WL 1140127, at *6 (D.R.I. Apr. 27, 2009). The only evidence of limitations Plaintiff points to is the medical source statement submitted from Thundermist, stating that Plaintiff's tremors limited her to using her fingers, hands and arms only 10% of the workday. (Tr. 566-567). The ALJ explained that she gave no weight to this statement because it was unclear who completed the form, given the illegible signature, and because there was nothing in the objective record to support such extreme limitations. (Tr. 19). Plaintiff claims error only because the ALJ could have ascertained whether Dr. McCormick was the author of the form. (ECF Doc. No. 13 at pp. 13-14). Even assuming the opinion came from Dr. McCormick,[2] however, the ALJ properly rejected it.

[2] Plaintiff saw Dr. McCormick on January 12, 2015, the date on the medical source statement, and Dr. McCormick noted on that date that Plaintiff was "[t]here to fill out paperwork for SSI for her tremors." (Tr. 579). Thus, it is apparent that Dr. McCormick was the author of the opinion in question.

A treating physician's opinion is not entitled to controlling weight unless it is well supported by medically acceptable clinical and laboratory diagnostic techniques and not inconsistent with the other substantial evidence in the record. 20 C.F.R. §§ 404.1527(c)(2), 416.927(c)(2). Here, the ALJ explained that she gave no weight to the medical source statement because there was nothing in the objective record to support the extreme limitation to use of fingers, hands and arms only 10% of the workday. (Tr. 19). The ALJ elaborated that neurological examinations in 2015 routinely failed to reveal evidence of a tremor and often specifically noted no tremor. Id. Plaintiff does not, and cannot on this record, challenge this reasoning. (ECF Doc. No. 13 at pp. 13-14).

The record supports the ALJ's reasoning. On January 12, 2015, the date the medical source statement was signed, Dr. McCormick specifically noted no tremor. (Tr. 580). Dr. McCormick also had not observed a tremor for five months before this date. (Tr. 475, 481, 484). And, she did not note a tremor again for six months, until she noted a minimal tremor in July 2015. (Tr. 574-575, 567, 604, 607, 612, 615). After that single reference, there is no further mention of tremors in the medical record. Moreover, Plaintiff's testimony that she made coffee, sometimes did housework, helped make dinner, played games on her phone, drove, dressed and showered (Tr. 42-50) also fails to support the opinion that she could not use her fingers, hands or arms more than 10% of the workday. The ALJ permissibly rejected the medical source statement for this reason, even if it came from a treating physician. See Leonard v. Colvin, No. 15-155S, 2016 WL 3063853, at *10 (D.R.I. Mar. 29, 2016) (upholding the ALJ's decision to give limited weight to a treating physician's opinion because it was unsupported by objective medical evidence), rep. & rec. adopted, 2016 WL 3077874 (D.R.I. May 31, 2016); 20 C.F.R. §§ 404.1527(c)(3), 416.927(c)(3) ("The more a medical source presents relevant evidence to support a medical opinion, particularly medical signs and laboratory findings, the more weight we will give that medical opinion.").

Because substantial evidence, including Dr. Ramirez's and Dr. Conklin's opinions, support the ALJ's finding that Plaintiff's tremors were not severe and Plaintiff has not pointed to any competent evidence of record that this impairment significantly limited her ability to do basic work activities, she has not established any Step 2 error. See Rodriguez Pagan, 819 F.2d at 3.

C. Plaintiff Has Not Shown Any Reversible Error in the ALJ's Consideration of Her IQ Scores

Plaintiff also is not entitled to remand based on the ALJ's consideration of her IQ scores. Plaintiff claims that the ALJ erred in questioning the validity of the IQ scores of 52 and 54 that Dr. Culbert assessed in 2014 and 2016, respectively. (ECF Doc. No. 13 at pp. 15-16). She does not explain how this alleged error affected the ALJ's determination, however. Id. Therefore, she has not shown reversible error. See Kandzerski v. Colvin, No. 15-401, 2016 WL 7632863, at *5 (D.R.I. Dec. 9, 2016).

In particular, the ALJ's finding is supported by the opinions of Dr. Jacobson and Dr. Killenberg. Dr. Jacobson considered Dr. Culbert's 2014 IQ testing (Tr. 110), and opined that Plaintiff was mildly limited in activities of daily living and social functioning and moderately limited in maintaining concentration, persistence or pace. (Tr. 112). Dr. Killenberg also considered the 2014 scores (Tr. 121), and opined that Plaintiff was mildly limited in activities of daily living; moderately limited in social functioning and moderately limited in maintaining concentration, persistence or pace. (Tr. 124). Thus, the ALJ's findings were consistent with the opinions of the state agency psychologists who considered Plaintiff's lowest IQ score.

Moreover, the ALJ's mental RFC finding is directly supported by the state agency psychologists' opinions. Dr. Jacobson and Dr. Killenberg both opined that Plaintiff could understand and remember simple instructions and sustain attention for simple repetitive tasks that were not fast-

paced for extended periods of two-hour segments over the workday and workweek. (Tr. 115, 127-128). Dr. Killenberg also opined that Plaintiff could sustain appropriate interactions in work settings with minimal interpersonal demands and would function best in a stable work environment. (Tr. 128). The ALJ found that Plaintiff was limited to simple, routine, competitive, repetitive tasks in a work environment free of fast-paced production requirements involving only simple, work-related decisions with few, if any, workplace changes and was limited to occasional, superficial contact with the public, co-workers and supervisors. (Tr. 21). Thus, the ALJ's finding was arguably more favorable than the opinions of the state agency psychologists who considered Plaintiff's lowest IQ score. It is Plaintiff's burden to show that her impairments meet or equal a Listing. Dudley v. Sec'y of HHS, 816 F.2d 792, 793 (1st Cir. 1987).

Plaintiff also fails to establish any error as to Listing 12.05. Here, after discussing the IQ scores, the ALJ stated that "the claimant's ability to complete activities of daily living starkly contradicts the suggestion that she is intellectually disabled." (Tr. 24). "Activities of daily living include adaptive activities such as cleaning, shopping, cooking, taking public transportation, paying bills, maintaining a residence, [and] caring appropriately for…grooming and hygiene." 20 C.F.R. Pt. 404, Subpt. P, App'x 12.00C.1. (emphasis added). Thus, the ALJ considered the substance of the inquiry whether Plaintiff had shown the deficits in adaptive functioning necessary to satisfy Listing 12.05. Plaintiff has not challenged this explanation. And, again, the ALJ's finding is supported by the state agency psychologists' opinions. Dr. Jacobson considered Dr. Culbert's IQ testing but explained that Plaintiff's function report and work history suggested at least borderline intellectual functioning. (Tr. 111-112). Dr. Killenberg made a similar notation. (Tr. 125). Neither state agency psychologist opined that Plaintiff met or medically equaled any Listing, despite considering Dr. Culbert's IQ scores. (Tr. 111-112, 121, 124-125).

The record also supports the ALJ's reasoning that Plaintiff's activities of daily living were not consistent with Listing 12.05's definition of intellectual disability. Plaintiff told Dr. Schnirman that she spent most of her time home alone doing housework, taking care of her dogs, watching television or playing games on her phone. (Tr. 353). In her function report, Plaintiff noted only some physical difficulties with personal care and reported that she helped prepare meals, did laundry and drove. (Tr. 300-302). And, Plaintiff testified at the hearing that she helped her fiancé with cooking and shopping, made coffee, did housework, played games on her phone, drove and attended to her personal care. (Tr. 42-50). This evidence substantially supports the ALJ's conclusion that Plaintiff did not meet the requirements for intellectual disability because it does not show the deficits in adaptive functioning required by Listing 12.05.

CONCLUSION

For the reasons discussed herein, I recommend that Plaintiff's Motion to Reverse (ECF Doc. No. 13) be DENIED and that Defendant's Motion to Affirm (ECF Doc. No. 15) be GRANTED. I further 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
March 14, 2018