

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

|                                  |   |                     |
|----------------------------------|---|---------------------|
| JAMES S. MASTERSON,              | : |                     |
| Plaintiff,                       | : |                     |
|                                  | : |                     |
| v.                               | : | C.A. No. 12-637-PAS |
|                                  | : |                     |
| CAROLYN W. COLVIN, ACTING        | : |                     |
| COMMISSIONER OF SOCIAL SECURITY, | : |                     |
| Defendant.                       | : |                     |

**MEMORANDUM AND ORDER**

This matter is before the Court on the motion of Plaintiff James S. Masterson for reversal of the decision of the Commissioner of Social Security, denying Disability Insurance Benefits (“DIB”) under § 205(g) of the Social Security Act, 42 U.S.C. § 405(g) (the “Act”). Plaintiff, who was represented by counsel throughout the process below, contends that the reasoning of the administrative law judge (“ALJ”) was infected by errors of law and not supported by substantial evidence; he seeks to reverse and/or remand the decision of the Commissioner. The Acting Commissioner, Carolyn W. Colvin, has filed a motion for an order affirming her decision.

With the parties’ consent, this case has been referred to me for all further proceedings and the entry of judgment in accordance with 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. Because I find that the 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 James Masterson, born in 1958, was forty-seven as of the alleged onset of disability, June 14, 2006. Tr. 138. He has a GED and some vocational training. Tr. 183. He

worked in construction – heavy construction – for most of his employed life, recently as a union steward for a construction union from 1996 to 2006. Tr. 177. Plaintiff’s construction work included heavy lifting, roofing and supervising on-site safety precautions. Id.

On the day of his alleged onset of disability, Plaintiff had a catastrophic work-place accident, falling approximately thirty-five feet from a roof and sustaining multiple fractures and a brain injury.<sup>1</sup> Tr. 252-53. Though Plaintiff has largely recovered from these traumatic injuries, he has residual traumatic brain damage and suffers from a cognitive disorder characterized by concentration and memory deficits. Tr. 268-71, 365, 399, 553-54, 643-48. He also suffers from several pre-existing chronic medical conditions that were exacerbated by the fall, most significantly degenerative disc disease of the cervical and lumbar spine. Tr. 594-603. In addition to these impairments, Plaintiff suffers from other potentially limiting conditions, including left-side hearing impairment, right and left shoulder pain, mild obstructive sleep apnea, and chronic insomnia. Tr. 13-14, 176. On his application, he reported: “I have a hearing problem, I have a vision problem, and I can’t move my body. . . . I have a hard time breathing, I have no memory or knowledge resulting from my head injury. I forget everything and I can’t think.” Tr. 176.

Despite his subjective reports of the debilitating nature of his symptoms, Plaintiff returned to work twice after his fall: once in 2008/2009, working at several different jobs involving heavy construction (“heavy construction, concrete work” . . . “real heavy stuff”), and earning \$14,223.21; and a second time for more than six months from mid-June 2010, through January 1, 2011, also doing heavy construction (“repairing beams and bonds”), and earning \$20,229.16. Tr. 39-40, 150, 170. When asked at the hearing why he returned to heavy work so inappropriate for

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<sup>1</sup> Plaintiff received \$85,000 in settlement of his worker’s compensation claim arising from the accident. Tr. 135.

someone who underwent spinal fusion surgery, he said that he did so because he had “trouble sitting down and doing nothing,” and that, both times, his doctor “took [him] out of work” because he “kept on having problems.” Tr. 39-40, 53. However, his medical record has no record of any doctor taking him out of work on either occasion, though there are multiple reports of increased symptoms during these periods of doing heavy construction work. Tr. 566-73, 695, 698, 700. The ALJ accepted Plaintiff’s contention that both work attempts should be treated as unsuccessful due to his impairments, but considered this inconsistent testimony in assessing his credibility. Tr. 12-13, 20.

**A. Treatment History Prior to June 14, 2006, Injury**

Prior to the 2006 fall, Plaintiff’s medical history included diagnoses of mild obstructive sleep apnea and insomnia, Meniere’s disease with left-sided hearing loss, and degenerative disc disease of the cervical and lumbar spine. Tr. 417, 564-65, 594-603. His surgical history included spinal fusion surgeries of the cervical and lumbar spine, a rotator cuff repair, a labyrinthectomy for control of Meniere’s disease, and a cochlear implant surgery to help restore his hearing status post-labyrinthectomy. Tr. 401, 536, 603. Reflecting Plaintiff’s dedication to heavy construction work, the Meniere’s disease originally caused him only moderate left-sided hearing impairment, but Plaintiff chose to “intentionally sacrifice [his] residual hearing with a labyrinthectomy” in order to “guarantee a safe return to work as soon as possible.”<sup>2</sup> Tr. 428 (emphasis in original). Although the cochlear implant improved Plaintiff’s left-sided deafness, his hearing is still impaired in the left ear. Tr. 209, 429. A prior claim for disability insurance benefits was denied on November 13, 2003; there is no information in the record regarding what

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<sup>2</sup> Plaintiff’s treating neurootologist Dr. Brian Duff further explained, “His job requires that he climb scaffolding and operate power equipment, situations in which he could easily injure himself or others if he should suddenly experience an acute attack. Dr. Friedman has advised him to avoid these situations and he is not interested in considering another line of work.” Tr. 428.

disability was claimed and why the claim was denied. See Tr. 172.

**B. Treatment History After the June 14, 2006, Injury and Prior to the April 10, 2007, Spinal Surgery.**

As a result of his 2006 fall, Plaintiff sustained a subarachnoid hemorrhage, a left pneumothorax, a left clavicle fracture, a humerus fracture, facial fractures, L1-3 transverse process fractures and left rib fractures. Tr. 252, 268. After a month-long hospitalization at Rhode Island Hospital, on July 10, 2007, he transferred to Kent County Memorial Hospital Rehabilitation Unit, where he stayed for ten days. Tr. 252, 281, 401. At discharge from Kent, Plaintiff was prescribed a straight cane, a shower chair and a hydrocollator pack for low back pain and referred to physical therapy. Tr. 405. He attended physical therapy from July until September 2006, making good progress during sessions primarily aimed at restoring functional motion to his shoulder and reducing low back pain. Tr. 411-16.

In addition to physical injuries, Plaintiff experienced memory deficits and mood and personality changes after the fall. Tr. 399. While at Kent, he underwent neuropsychological testing with clinical neuropsychologist Eileen Johnson, Ph.D. Tr. 268. She concluded:

[Plaintiff's] history is suggestive of premorbid learning difficulties. At the present time, he presents with mild frontal/executive difficulties and more notable difficulty learning and recalling complex information. The difficulties he had on testing are consistent with those expected following the injury that this patient sustained. As such, his memory and frontal/executive skill are currently compromised compared to baseline.

Tr. 271. Confirming Dr. Johnson's impressions, brain imaging in October and December 2006 identified post-traumatic foci of encephalomalacia in the inferior frontal/olfactory regions, as well as in the right frontal and temporal lobes. Tr. 365.

Between July 2006 and April 2007, Plaintiff had numerous medical appointments with his primary care physician, Dr. John Horan, and his orthopedic surgeon, Dr. William Brennan.

Tr. 373-92, 457-48. He consistently complained of worsening lower back pain, neck pain and forgetfulness at these visits, and his physicians noted that he seemed depressed, angry and worried about money. Tr. 381-416, 454-84. Due to the increasing severity of Plaintiff's low back pain, these visits also addressed pain management with narcotic pain medications. See, e.g., 378, 384, 454. By October 2006, four months after the fall, Dr. Brennan advised that Plaintiff's lower back pain was attributable to degenerative disc disease and recommended surgery. Tr. 387. Due to Plaintiff's brain injury, Dr. Brennan sought surgical clearance before proceeding from neurologist Carlos Nieto, MD, who evaluated Plaintiff in October and December and concluded that he "may have mild organic brain syndrome characterized by memory deficit and behavior changes." Tr. 528-29. Dr. Nieto advised Plaintiff to wait three months before scheduling his back surgery. Tr. 400.

In the meantime, Plaintiff continued to rely on narcotic painkillers for pain management, despite adverse impact on his memory and behavior caused by Oxycontin. Tr. 518. By November 2006, his pain was intolerable; he reported that he was using a cane and was unable to walk more than ten feet without stopping and resting. Tr. 382-83. In December 2006, Plaintiff went to the Kent Hospital Emergency Department complaining of neck pain, back pain, two weeks of worsening dizziness and syncope. Tr. 438, 518. He reported that narcotic pain medication was not helping to manage his pain, and that he was unable to sit up, walk or perform daily activities. Tr. 515. While some dizziness and syncope was related to Meniere's disease, which Plaintiff believed had worsened since his fall, Kent doctors speculated that the syncope could be due to the pain. Tr. 518-20. After two days in the hospital, Plaintiff became "visibly upset that his workmen's compensation [was] not coming through," and was "holding up his operation which [would] be definitive therapy for his neck pain and back pain;" he left the

hospital against medical advice. Tr. 439, 522-32.

**C. Treatment History After the April 10, 2007, Spinal Surgery**

On April 10, 2007, Dr. Brennan and Dr. Maria Guglielmo performed Plaintiff's lumbar spine laminectomy, fusion and instrumentation surgery. Tr. 501. The post-operative appointment notes indicate that Plaintiff's pain began to decrease and his activity level steadily improved over the months following the surgery, though pain management and opioid withdrawal were problematic for a while. Tr. 453-54, 488-90, 493, 575-78. Dr. Brennan's seven-month post-operative appointment notes on November 8, 2007, state: "[Plaintiff] is overall doing well. He has no back or leg pain. He says he is back to normal activities and is taking no medication . . . I would let him [d]o activity as tolerated." Tr. 575.

In December 2007 and January 2008, clinical neuropsychologist Francis R. Sparadeo, Ph.D., APA-CPP, repeated neuropsychological testing. Tr. 550. During his interview with Dr. Sparadeo, Plaintiff reported that he was attempting to improve his life by going to the gym to strengthen his back muscles, taking some college classes and performing organizational volunteer activities at the local fire department. Id. He also reported that he hoped to work again but felt he would be unable to do physical work. Id. Dr. Sparadeo noted improvement in Plaintiff's mood due to the increased activity level, although some agitation and anger persisted. Tr. 553. He observed improvement in Plaintiff's cognitive functioning, although impaired concentration, processing speed and memory, and a severely impaired rate of learning persisted. Id. Dr. Sparadeo diagnosed Cognitive Disorder Not Otherwise Specified (NOS) with a GAF of 55<sup>3</sup> and an IQ of 80. Tr. 552-54.

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<sup>3</sup> The Global Assessment of Functioning ("GAF") "is a subjective determination based on a scale of 100 to 1 of 'the clinician's judgment of the individual's overall level of functioning.'" Langley v. Barnhart, 373 F.3d 1116, 1123 n.3 (10th Cir. 2004) (quoting Diagnostic and Statistical Manual of Mental Disorders at 32 (Text Revision 4th ed. 2000) ("DSM-IV-TR")). Plaintiff's GAF of 55 is between 51-60, which is indicative of "[m]oderate symptoms . . . OR

From February 2008 to April 2009, Dr. Brennan's appointment notes indicate that Plaintiff was taking minimal pain medication and seemed improved, although his return to heavy construction work during the period resulted in worsened symptoms. Tr. 566-73. In August 2008, Plaintiff reported that he was again taking pain medication occasionally; Dr. Brennan wrote, "[h]e tries to push it and does a lot of lifting and bending, he will notice some increased pain." Tr. 571. On April 2, 2009, Dr. Brennan noted that Plaintiff was exercising and "is essentially stable as long as he limits his activity." Tr. 566. In 2010, Dr. Brennan's appointment notes again indicate that Plaintiff had returned to work, resulting in increased pain and medication use. Tr. 695, 698, 700. A November 2010 MRI of the lumbar spine showed moderate canal stenosis that had progressed slightly since 2006. Tr. 693-95.

On March 15, 2011, Plaintiff established care at the Veterans Administrative Hospital ("VA") since he no longer had private health insurance. Tr. 61, 740-41. He complained of low back pain, shoulder pain and numbness and chronic insomnia, but reported taking pain medications only when he worked. Tr. 741. His medical history indicated that he exercised by doing pushups, sit-ups and lifting weights. Tr. 741-42. On examination, Plaintiff was able to move both arms above his head, behind his head, and behind his back, but a straight leg raise was positive. Tr. 743.

On April 4, 2011, Plaintiff sought treatment at the VA Emergency Department for a three-week history of neck pain radiating to his right hand. Tr. 730. An x-ray of his cervical spine showed cervical spondylosis and the Emergency Department notes recorded a diagnostic impression of cervical radiculopathy. Tr. 735. On April 21, 2011, he called the VA stating that

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moderate difficulty in social, occupational, or school functioning." DSM-IV-TR, at 34; see also *Bowden v. Astrue*, No. 11-84 DLM, 2012 WL 1999469, at \*3 n.4 (D.R.I. June 4, 2012). The GAF scoring system has been eliminated by the recently published Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2013); however, it was still in use at the time of Plaintiff's assessments.

his back pain had been an eight on a scale of one to ten for two weeks, and requested a steroid injection to relieve the pain. Tr. 715. On May 16, 2011, he received walk-in care for lumbar and cervical pain. Tr. 713-14. The examining physician noted radiation down both arms, greater on the right arm than on the left, and noted some numbness and pain in the fingers. Tr. 712-14. Plaintiff denied any issue with weakness or dropping things, and again requested a cortisone injection for his back pain. Tr. 712. On June 6, 2011, Plaintiff underwent a neck MRI, which showed further degenerative changes in his cervical spine. Tr. 704-06.

After the ALJ hearing, on August 3, 2011, Plaintiff consulted with VA neurosurgeon Dr. Maxwell Laurans, who ordered an EMG to evaluate for radiculopathy and possible surgery. Tr. 760, 778. While the ALJ was aware of an EMG, the results were not available to him as of when he published his decision; however, they were produced for consideration by the Appeals Council. These medical records established that the EMG showed no radiculopathy or nerve root dysfunction. Tr. 781. Based on these results, Dr. Laurans advised Plaintiff not to undergo surgery because the risks would substantially outweigh the benefits. Id. Dr. Laurans noted, “[t]he patient is frustrated by all this, and most concerned with obtaining disability which I have told him [I] cannot provide through my clinic. He is clearly upset and agitated by all of this, but unfortunately I cannot offer a surgical treatment which will help him.” Id.

## **II. Travel of the Case**

Plaintiff originally filed an application for DIB on December 8, 2006, alleging onset of disability as of June 14, 2006. Tr. 64. On February 15, 2007, a physical residual functional capacity<sup>4</sup> (“RFC”) assessment was performed by non-examining state agency physician Dr. John

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<sup>4</sup> 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).

Bernando, who acknowledged that Plaintiff was shortly to have surgery to address his severe lower back pain, which was affecting his ability to walk and stand, among other limitations. Tr. 442-49. After the surgery improved his symptoms, based on an RFC assessment completed on July 16, 2007, by non-examining state agency physician Dr. Albert Tonelli, the claim was initially denied on July 23, 2007. Tr. 64. Plaintiff protectively filed again on April 30, 2009, alleging disability as of June 14, 2006. Tr. 10, 138. To develop the record, the Commissioner referred Plaintiff's claim to state agency physicians for physical assessment and to state agency psychologists for mental assessment.

On October 6, 2009, Dr. H.C. Faigel reviewed the entire record from the time of the fall in 2006 and prepared a physical RFC assessment. Tr. 656. Based on his review, Dr. Faigel concluded that Plaintiff's condition stabilized after his April 2007 back surgery, so "he has had recovery to stable state using minimal medication for pain control." Tr. 651. Beginning within one year of the accident, Dr. Faigel opined that Plaintiff's RFC permitted him to sit, stand or walk for about six hours of an eight-hour workday and occasionally lift or carry twenty pounds, but that he was frequently or occasionally (depending on the function) limited in his ability to balance, stoop, crouch and climb ramps, stairs, ladders, ropes and scaffolds. Tr. 650-53. Dr. Faigel concluded that no exertional, manipulative, visual or communicative limitations had been established, and opined that Plaintiff's "alleged symptoms are not supported by his reports to his TP or by the examinations by that TP and are not considered fully credible." Tr. 650-54.

On May 21, 2009, the Commissioner procured a Consultative Examination Report by DDS examiner Dr. Louis Turchetta, Ed.D.<sup>5</sup> Tr. 643-48. After conducting a clinical interview and psychological testing, Dr. Turchetta concluded that Plaintiff had an IQ of 77 and a GAF of

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<sup>5</sup> In his opinion, the ALJ occasionally mistakenly refers to Dr. Turchetta as Dr. Texiera. See Tr. 19.

55, and that his concentration, processing speed and short-term recall were impaired; he attributed these cognitive deficits to his brain injury. Tr. 644-46. During his interview with Dr. Turchetta, Plaintiff reported independence in performing activities of daily living, and said his interests included riding his motorcycle, building and fixing motorcycles and performing weddings as a minister at biker events. Tr. 648. On October 24, 2009, state agency psychiatrist Dr. Michael Slavit reviewed the evidence and prepared a Psychiatric Review Technique form. Tr. 659. Because Dr. Turchetta's Consultative Examination Report had not yet been incorporated into the record, Dr. Slavit primarily based his conclusions on Dr. Sparadeo's December 2007 neuropsychological evaluation. Tr. 671. Noting that Plaintiff reported driving and going out unaccompanied, getting along with others, and taking some college courses, Dr. Slavit concurred that Plaintiff's psychological condition was not severe. Tr. 659-71.

Based on these assessments, Plaintiff's claim was denied on October 24, 2009. Tr. 65. He applied for reconsideration on December 4, 2009, claiming that his symptoms had worsened and that he had developed sleep apnea. Tr. 66, 673. On January 19, 2010, Dr. Stephen Clifford reviewed the case and recommended obtaining a new consultative psychological evaluation, reasoning that sleep apnea could "conceivably" worsen Plaintiff's memory. Tr. 673. The record was supplemented to include Plaintiff's sleep-health records,<sup>6</sup> Dr. Turchetta's May 2009 Consultative Evaluation Report and additional orthopedic notes. Tr. 676.

Based on this additional evidence, agency psychologist Dr. Jeffrey Hughes prepared a Psychiatric Review Technique and Mental RFC Assessment on April 7, 2010. Tr. 676-78. Dr. Hughes found moderate limitations with regard to his ability to understand, remember and carry

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<sup>6</sup> A 1999 polysomnogram done with Dr. Millman showed mild sleep apnea and chronic insomnia. Tr. 564-65. Plaintiff followed up on his sleep apnea and insomnia with pulmonologist Stephen Matarese, DO, on August 6, 2007, and March 31, 2007. Dr. Matarese noted, "[a]lthough Mr. Masterson does complain that his sleep is only about 5 hours in length, it appears to be adequate. There is no difficulty with his work performance. It is not affecting his social situation." Tr. 560-561.

out detailed instructions; his ability to perform activities within a schedule, maintain regular attendance and be punctual within customary tolerances; his ability to maintain attention and concentration for extended periods; his ability to work in coordination with or proximity to others without being distracted by them; his ability to complete a normal workday and workweek without interruptions from psychologically-based symptoms; and his ability to perform at a consistent pace without an unreasonable number of rest periods. Tr. 674-75. Dr. Hughes noted that Plaintiff's sleep evaluation on January 13, 2010, indicated he was sleeping five to six hours per night and remaining alert during the day. Tr. 676. He further concluded that Plaintiff's reported memory and concentration difficulties were credible given his borderline IQ of 77 and his ongoing Oxycontin use. Id. Dr. Hughes summarized his conclusions in a narrative opinion, which concluded that Plaintiff's task persistence is within normal limits and that he could remember and follow simple instructions of one to three steps over a normal workweek, but that he would become distracted, make mistakes or require extra time to complete tasks involving more than three steps; and he would likely forget complex instructions. Id.

On May 3, 2010, state agency physician Dr. Joseph Callaghan reviewed all the evidence in the file and affirmed Dr. Faigel's October 6, 2009, physical RFC assessment. Tr. 692. Based on Plaintiff's polysomnography results, Dr. Callaghan determined that Plaintiff's mild sleep apnea was non-limiting and that his subjective insomnia symptoms were worse than objectively measurable. Id. In addition, Dr. Callaghan commented that Plaintiff's "[o]rtho status" was stable as of Dr. Brennan's October 21, 2009, appointment note, and opined that his alleged 300-foot walk-tolerance was poorly supported by the record. Id. Based on Dr. Callaghan's case analysis, Plaintiff's claim was denied upon reconsideration. Tr. 66.

Plaintiff requested an administrative hearing on June 7, 2010. Tr. 78. On July 20, 2011,

ALJ Gerald Resnick conducted a hearing at which he heard testimony from Plaintiff, represented by counsel, as well as from impartial vocational expert (“VE”) Kenneth R. Smith. Tr. 10, 33. In a written decision dated August 16, 2011, the ALJ found that Plaintiff was not disabled under sections 216(i) and 223(d) of the Social Security Act. Tr. 22. On July 14, 2012, the Appeals Council denied Plaintiff’s request for review. Tr. 1. Having exhausted his administrative options, Plaintiff now appeals the Commissioner’s final decision. 42 U.S.C. § 405(g).

### **III. The ALJ’s Hearing and Decision**

During the hearing, the ALJ questioned Plaintiff about his vocational history, daily activities, and mental and physical impairments before posing two hypotheticals to the VE.

When asked about his daily activities, Plaintiff reported that on a typical day he wakes up at 6 a.m., takes a pill and waits about an hour before he is able to move his back. Tr. 41, 50. He tries to help his wife with household chores and visits his elderly parents at least two or three times a week. Tr. 48-49. Plaintiff testified that he needs to sit with a heating pad for a couple of hours in the middle and at the end of each day to alleviate neck and back pain. Tr. 50-51. He reported his pain is worse in cold and damp weather, and it renders him unable to leave the house on average three days per week. Tr. 48, 51. When asked whether his pain medication has any side effects, he said it makes him “loopy.” Tr. 48. He nevertheless testified that he drove himself to the hearing. Tr. 37.

When asked about his physical impairments, Plaintiff testified that he could likely sit for about an hour or two, stand for about 15 minutes and walk for about ten minutes. Tr. 40. He estimated that he could lift and carry about 25 pounds with his right arm. Tr. 40-41. He reported having difficulties with his left arm and hand, including that he was dropping things and that it had been difficult to open jars lately. Tr. 41-42. He stated that he would have trouble stooping,

squatting, kneeling and climbing stairs, reaching above his head, repetitively pushing or pulling using either arm and repetitively pushing and pulling using legs, particularly the right leg. Tr. 46. He testified that he has used a cane to walk ever since his accident. Tr. 41.

When asked about his mental impairments, Plaintiff acknowledged his memory and concentration difficulties, and said that he had experienced trouble managing stress due to financial pressures. Tr. 47. When asked whether he would have difficulty with ordinary work pressure he responded, “No, I’ve never had any problem with work. I like work,” but when asked if he could work eight hours a day, five days a week, he responded, “I doubt it, sir.” Tr. 47-48.

The ALJ proffered two hypotheticals to the VE. Tr. 56. In the first, the ALJ instructed the VE to assume the claimant’s testimony regarding his limitations was credible; in response, the VE testified that there were no jobs Plaintiff could perform. Tr. 55-56. The ALJ based his second hypothetical on his own RFC finding at Step Four, which he based on Dr. Hughes’s mental RFC and Dr. Faigel’s physical RFC – he asked the VE what jobs Plaintiff could perform assuming:

[T]hat individual can lift and carry 20 pounds occasionally, 10 pounds frequently, sit six hours out of an eight hour workday, stand and walk six hours out of an eight hour workday, occasionally climb ladders, ropes or scaffolding, occasionally balance, occasionally scoop, occasionally crouch and the individual would be limited to simple routine competitive repetitive tasks on a sustained basis over a normal eight hour workday in a stable work environment . . . where the individual performs the same tasks at the same place around the same people, where there is no more than simple decision-making, where there is no requirement to perform complex or detailed tasks.

Tr. 56-57. In response to this hypothetical, the VE testified that Plaintiff could not perform past relevant work but could perform other unskilled jobs at the light level, for example as an assembler, packager or inspector. Tr. 57.

In light of the recent unresolved neck issue revealed by the record, the ALJ asked

Plaintiff's counsel to submit results from Plaintiff's EMG nerve conduction study to validate Plaintiff's neck pain and radiculopathy. Tr. 42-45. He also suggested that Plaintiff's counsel obtain a treating physician's functional assessment. Tr. 44-45. Finally, the ALJ requested a copy of the impartial medical examination report that Dr. Saris had performed for Plaintiff's worker's compensation case. Tr. 45. On August 9 and August 15, 2011, counsel submitted additional written evidence, which the ALJ admitted into the record. Tr. 10, 759, 775. However, this additional evidence revealed that Plaintiff had not yet had a nerve conduction study, contrary to what he had testified at the hearing, and did not include a functional assessment from a treating physician or the report prepared by Dr. Saris. Tr. 20, 759-78. The ALJ determined that although "[t]he claimant's representative failed to provide updated records . . . [t]here [was] adequate information in the record to make an appropriate decision" and "there [was] no reason to believe that this additional information would justify a different decision."<sup>7</sup> Tr. 20.

In his decision, the ALJ began by finding that Plaintiff met the insured requirements of the Act through September 30, 2012. Tr. 12. He then proceeded through the familiar five-step inquiry to determine the merits of Plaintiff's claim of disability. At Step One, he concluded that Plaintiff had not engaged in substantial gainful activity since June 14, 2006; although Plaintiff worked after the alleged onset date, the ALJ regarded each incident of return to work as an unsuccessful work attempt. Tr. 12-13. At Step Two, the ALJ found that Plaintiff's cognitive disorder and degenerative disc disease of the cervical and lumbar spine constituted severe impairments within the meaning of 20 C.F.R. § 404.1520(c). Tr. 13. He acknowledged other medical conditions in Plaintiff's medical record, including obstructive sleep apnea, chronic

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<sup>7</sup> Subsequently, new medical records pertaining to Plaintiff's neck, including a nerve conduction study, were submitted to the Appeals Counsel; these established the absence of radiculopathy or a recommendation for surgery. Tr. 780-93. Plaintiff never submitted either Dr. Saris's report or a treating physician's functional assessment.

insomnia, right and left shoulder impairments and Meniere's disease, but found them to be non-severe as they had not caused Plaintiff any lasting functional limitations that were not improved by medication. Tr. 13-14. At Step Three, the ALJ found that none of the severe impairments, alone or in combination, met or medically equaled any "listed" impairments. Tr. 14.

The ALJ determined Plaintiff's RFC at Step Four. He concluded that Plaintiff could perform light work as defined in 20 C.F.R. § 404.1567(b) and that he could "lift and/or carry 20 pounds occasionally and 10 pounds frequently, sit/stand/walk 6 hours in an 8-hour workday, occasionally climb ropes, scaffolds and ladders, balance, stoop, and crouch." Tr. 15. He also found that Plaintiff "would be limited to simple routine competitive, repetitive tasks on a sustained basis over a normal 8 hour workday, in a stable work environment . . . where an individual performs the same tasks at approximately the same time at the same place around the same people[,] where there is no more than simple decision making, and no requirement to perform complex or detailed tasks." Tr. 15. In reaching this RFC finding, the ALJ afforded substantial evidentiary weight to Dr. Faigel's October 6, 2009, physical RFC assessment, which was affirmed on May 3, 2010, by Dr. Callahan, and to Dr. Hughes's April 7, 2010, mental RFC assessment; he noted "there [were] no medical opinions in the record to contradict these findings." Tr. 20-21.

Although the ALJ found that Plaintiff's physical and cognitive impairments could reasonably be expected to cause his alleged symptoms, he found that Plaintiff's "statements concerning the intensity, persistence, and limiting effects of these symptoms [were] not credible to the extent they [were] inconsistent with the above residual functional capacity assessment." Tr. 18. Specifically, he found that "[t]he alleged limitations in sitting, standing, walking, using the hands, lifting, carrying, attention, concentration, focusing, memory, need to lie down,

dizziness, need for frequent absences, and inability to leave his home are not substantiated by competent medical evidence to the degree alleged.” Id. While acknowledging that Plaintiff had clearly experienced pain, based on application of the Avery factors,<sup>8</sup> the ALJ found that the evidence did not establish that the pain rendered Plaintiff incapable of performing work within his RFC. Id.

At Step Five, the ALJ relied on the VE’s testimony in response to his second hypothetical, and found that Plaintiff was capable of making a successful adjustment to other light work. Tr. 21-22. Specifically, the ALJ found that Plaintiff could perform light and unskilled positions that exist in the national and Rhode Island/Southeastern Massachusetts regional economies, such as assembler, packager and inspector. Tr. 22.

#### **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 assessed Plaintiff’s credibility by rejecting Plaintiff’s testimony about his limitations and ability to work and by wrongly concluding that his testimony was inconsistent with the evidence in the record.
2. The ALJ failed to include Plaintiff’s IQ in the hypothetical posed to the VE, and thereby erred in relying on the VE’s responsive testimony for his Step Five finding.

#### **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.

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<sup>8</sup> Avery v. Sec’y of Health & Human Servs., 797 F.2d 19, 29 (1st Cir. 1986) (standard to be applied in assessing credibility of testimony about severity of pain).

Sec'y of Health & Human Servs., 955 F.2d 765, 769 (1st Cir. 1991) (per curiam); Rodriguez v. Sec'y of Health & Human Servs., 647 F.2d 218, 222 (1st Cir. 1981); Brown v. Apfel, 71 F. Supp. 2d 28, 30 (D.R.I. 1999). Once the Court concludes that the decision is supported by substantial evidence, the Commissioner must be affirmed, even if the Court would have reached a contrary result as the finder of fact. Rodriguez Pagan v. Sec'y of Health & Human Servs., 819 F.2d 1, 3 (1st Cir. 1987); see also Barnes v. Sullivan, 932 F.2d 1356, 1358 (11th Cir. 1991); Lizotte v. Sec'y of Health & Human Servs., 654 F.2d 127, 128 (1st Cir. 1981).

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

The Court must reverse the ALJ's decision on plenary review, if the ALJ applies incorrect law, or if the ALJ fails to provide the Court with sufficient reasoning to determine that the law was applied properly. Nguyen v. Chater, 172 F.3d 31, 35 (1st Cir. 1999) (per curiam); accord Cornelius v. Sullivan, 936 F.2d 1143, 1145-46 (11th Cir. 1991). Remand is unnecessary where all of the essential evidence was before the Appeals Council when it denied review, and

the evidence establishes without any doubt that the claimant was disabled. Seavey v. Barnhart, 276 F.3d 1, 11 (1st Cir. 2001) (citing Mowery v. Heckler, 771 F.2d 966, 973 (6th Cir. 1985)).

The Court may remand a case to the Commissioner for a rehearing under Sentence Four of 42 U.S.C. § 405(g); under Sentence Six of 42 U.S.C. § 405(g); or under both sentences.

Jackson v. Chater, 99 F.3d 1086, 1097-98 (11th Cir. 1996).

To remand under Sentence Four, the Court must either find that the Commissioner's decision is not supported by substantial evidence, or that the Commissioner incorrectly applied the law relevant to the disability claim. Seavey, 276 F.3d at 9; accord Brenem v. Harris, 621 F.2d 688, 690 (5th Cir. 1980) (remand appropriate where record was insufficient to affirm, but also was insufficient for district court to find claimant disabled). Where the Court cannot discern the basis for the Commissioner's decision, a Sentence Four remand may be appropriate to allow an explanation of the basis for the decision. Freeman v. Barnhart, 274 F.3d 606, 609-10 (1st Cir. 2001). On remand under Sentence Four, the ALJ should review the case on a complete record, including any new material evidence. Diorio v. Heckler, 721 F.2d 726, 729 (11th Cir. 1983) (necessary for ALJ on remand to consider psychiatric report tendered to Appeals Council). After a Sentence Four remand, the Court enters a final and appealable judgment immediately, and thus loses jurisdiction. Freeman, 274 F.3d at 610.

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

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

To remand under Sentence Six, the plaintiff must establish: (1) that there is new, non-cumulative evidence; (2) that the evidence is material, relevant and probative so that there is a reasonable possibility that it would change the administrative result; and (3) there is good cause for failure

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

## **VI. Disability Determination**

The law defines disability as the inability to do any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505(a). The impairment must be severe, making the claimant unable to do previous work or any other substantial gainful activity that exists in the national economy. 42 U.S.C. § 423(d)(2); 20 C.F.R. § 404.1505-1511.

### **A. The Five-Step Evaluation**

The ALJ must follow five steps in evaluating a claim of disability. See 20 C.F.R. § 404.1520. First, if a claimant is working at a substantial gainful activity, the claimant is not disabled. 20 C.F.R. § 404.1520(b). Second, if a claimant does not have any impairment or combination of impairments that significantly limit physical or mental ability to do basic work activities, then the claimant does not have a severe impairment and is not disabled. Id. § 404.1520(c). Third, if a claimant’s impairments meet or equal an impairment listed in 20 C.F.R. Part 404, Appendix 1, the claimant is disabled. Id. § 404.1520(d). Fourth, if a claimant’s impairments do not prevent doing past relevant work, the claimant is not disabled. Id. § 404.1520(e)-(f). Fifth, if a claimant’s impairments (considering RFC, age, education and past work) prevent doing other work that exists in the local or national economy, a finding of disabled

is warranted. Id. § 404.1520(g). Significantly, the claimant bears the burden of proof at Steps One through Four, but the Commissioner bears the burden at Step Five. Wells v. Barnhart, 267 F. Supp. 2d 138, 144 (D. Mass. 2003).

The claimant must prove the existence of a disability on or before the last day of insured status for the purposes of disability benefits. Deblois v. Sec’y of Health & Human Servs., 686 F.2d 76, 79 (1st Cir. 1982); 42 U.S.C. §§ 423(a), (c). If a claimant becomes disabled after loss of insured status, the claim for disability benefits must be denied despite disability. Cruz Rivera v. Sec’y of Health & Human Servs., 818 F.2d 96, 97 (1st Cir. 1986).

#### **B. Capacity to Perform Other Work**

Once the ALJ finds that a claimant cannot return to the prior work, the burden of proof shifts to the Commissioner to establish that the claimant could perform other work that exists in the local or national economy. Seavey, 276 F.3d at 5. To meet this burden, the ALJ must develop a full record regarding the vocational opportunities available to a claimant. Allen v. Sullivan, 880 F.2d 1200, 1201 (11th Cir. 1989). This burden may sometimes be met through reliance on the Medical-Vocational Guidelines (the “grids”). Seavey, 276 F.3d at 5. Exclusive reliance on the grids is appropriate where the claimant suffers primarily from an exertional impairment, without significant non-exertional factors. Id. (exclusive reliance on the grids is appropriate in cases involving only exertional impairments, impairments which place limits on an individual’s ability to meet job strength requirements). Exclusive reliance is not appropriate when a claimant is unable to perform a full range of work at a given RFC or when a claimant has a non-exertional impairment that significantly limits basic work skills. Nguyen, 172 F.3d at 36. In almost all of such cases, the Commissioner’s burden can be met only through the use of a VE. Heggarty v. Sullivan, 947 F.2d 990, 996 (1st Cir. 1991). It is only when the claimant can clearly

do unlimited types of work at a given RFC that it is unnecessary to call a VE to establish whether the claimant can perform work that exists in the national economy. See Ferguson v. Schweiker, 641 F.2d 243, 248 (5th Cir. 1981). In any event, the ALJ must make a specific finding as to whether the non-exertional limitations are severe enough to preclude a wide range of employment at the given RFC indicated by the exertional limitations. Merola v. Astrue, C.A. No. 11-536A, 2012 WL 4482364, at \*5 (D.R.I. Sept. 26, 2012).

### **C. Making Credibility Determinations**

Where an ALJ decides not to credit a claimant's testimony, the ALJ must articulate specific and adequate reasons for doing so, or the record must be obvious as to the credibility finding. See Da Rosa v. Sec'y of Health & Human Servs., 803 F.2d 24, 26 (1st Cir. 1986); Rohrberg v. Apfel, 26 F. Supp. 2d 303, 309-10 (D. Mass. 1998). A reviewing court will not disturb a clearly articulated credibility finding with substantial supporting evidence in the record. See Frustaglia, 829 F.2d at 195.

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

### **D. Pain**

"Pain can constitute a significant non-exertional impairment." Nguyen, 172 F.3d at 36. Congress has determined that a claimant will not be considered disabled unless medical and

other evidence (e.g., medical signs and laboratory findings) is furnished showing the existence of a medical impairment that could reasonably be expected to produce the pain or symptoms alleged. 42 U.S.C. § 423(d)(5)(A). The ALJ must consider all of a claimant's statements about symptoms, including pain, and determine the extent to which the symptoms can reasonably be accepted as consistent with the objective medical evidence. 20 C.F.R. § 404.1528. In determining whether the medical signs and laboratory findings show medical impairments that reasonably could be expected to produce the pain alleged, the ALJ must apply the First Circuit's six-part pain analysis and consider the following factors:

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

Avery, 797 F.2d at 29; Gullon v. Astrue, No. 11-cv-099ML, 2011 WL 6748498, at \*5-6 (D.R.I. Nov. 30, 2011). An individual's statement as to pain is not, by itself, conclusive of disability. 42 U.S.C. § 423(d)(5)(A). Guidance in assessing the credibility of the claimant's statement is provided by the Commissioner's 1996 ruling. SSR 96-7p, 1996 WL 374186 (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 strong indication of the

credibility of an individual's statements is their consistency, both internally and with other information in the record. Id. at \*5-6.

## **VII. Application and Analysis**

### **A. ALJ's Assessment of Credibility**

Plaintiff argues that the ALJ “failed to provide clear and convincing reasons for rejecting Plaintiff’s testimony regarding the severity of his symptoms and limitations.” ECF No. 9, at 9. This argument is legally flawed in that it relies on decisions from the Ninth Circuit, which adopt a standard different from that which is controlling in this Court. The First Circuit requires the ALJ to articulate clear and adequate reasons for discrediting a claimant’s testimony. Da Rosa, 803 F.2d at 26. These reasons need not be clear and convincing so long as there is substantial evidence in the record to support them. See Frustaglia, 829 F.2d at 195 (“[t]he credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference”). This is especially true when the ALJ supports his credibility determination with specific findings and by reference to specific evidence. See id.; Evans v. Astrue, No. CA 11-146 S, 2012 WL 4482366, at \*11 (D.R.I. Aug. 23, 2012). To the extent that a claim of functional limitation caused by pain is in play, the ALJ’s credibility determination must be made through the lens of the Avery factors. 797 F.2d at 29.

In making his credibility determination, the ALJ sifted carefully and methodically through the medical evidence pertaining to Plaintiff’s physical and cognitive impairments. Tr. 17-20. Concerning Plaintiff’s physical impairments, the ALJ noted that although “[t]he record does not contain a functional assessment by any treating source,” “[p]hysical examinations by treating sources do not support the claimant’s allegations.” Tr. 21. The ALJ carefully reviewed

Plaintiff's own reports to treating sources over the years regarding activities inconsistent with his testimony; for example, he reported in July 2007 that he was doing well, riding a bike, exercising at home, weaning off pain medications, and that an increase in pain was triggered by going out on a boat.<sup>9</sup> Tr. 18, 578; Pettigrew v. Astrue, No. 11-cv-167-PB, 2011 WL 5282640, at \*7-8 (D.N.H. Nov. 1, 2011) (appropriate for ALJ to consider treatment notes, which are inconsistent with testimony regarding debilitating effects of impairments); Nardolillo v. Astrue, No. CA 09-603 S, 2011 WL 1532147, at \*13 (D.R.I. Mar. 29, 2011) (same). The ALJ coupled this evidence with the opinions of treating sources that Plaintiff's back surgery was successful overall in relieving his symptoms and that his remaining symptoms, which were exacerbated by heavy work and weather, could effectively be treated with pain medications. Tr. 18-20. The ALJ gave substantial weight to Dr. Faigel's opinion, which was based on a review of the record, and Dr. Callahan's case analysis, which affirmed Dr. Faigel's assessment. Both of these sources concluded that Plaintiff's self-reports of his symptoms were not fully credible because they were not supported by his reports to his treating physicians or by the objective medical evidence. Tr. 654, 692.

With regard to Plaintiff's cognitive impairment, the ALJ considered Dr. Johnson's and Dr. Nieto's 2006 treatment reports, Dr. Sparadeo's 2007 treatment report, Dr. Turchetta's 2009 consultative examination report and Dr. Hughes's 2010 mental RFC assessment. The ALJ determined that "Dr. Sparadeo's diagnosis of a cognitive disorder, not otherwise specified, with a GAF of 55 is not consistent with a severely disabling impairment(s)." Tr. 19. Similarly, he noted "Dr. Teixeira [Turchetta] also opined that the claimant had a cognitive disorder and

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<sup>9</sup> Another stark example not mentioned by the ALJ, but which illustrates the ALJ's conclusion regarding credibility is Plaintiff's testimony on July 20, 2011, that he was dropping things with his left hand, which contrasts with a May 16, 2011, entry in his medical record from the VA in which Plaintiff denied any issue with weakness or dropping things in either his arms or his hands. Compare Tr. 41, with Tr. 712.

ascribed a GAF of 55, which is indicative of only moderate symptoms and/or a moderate impairment in occupational, school or social functioning.”<sup>10</sup> Id.

In addition to medical evidence, the ALJ based his credibility determination on the inconsistency between Plaintiff’s testimony about his limitations and Plaintiff’s two “work attempts” at heavy construction, one of which lasted for more than six months, during the period of alleged disability. Tr. 20; see Balaguer v. Astrue, 880 F. Supp. 2d 258, 269-70 (D. Mass. 2012) (holding that inconsistencies in plaintiff’s testimony regarding work activity during alleged period constituted substantial evidence for a negative credibility determination). Plaintiff’s 2009 work history report describes the functions he performed during the 2008 “work attempt;” it reveals that over a six-month period in 2008, he was walking six to eight hours of the work day and frequently lifting twenty-five to forty pounds, exceeding the constraints of Dr. Faigel’s RFC and dramatically inconsistent with his own testimony that he could not walk for more than ten minutes. Tr. 40, 227-31; see McKinstry v. Astrue, No. 5:10-cv-319, 2012 WL 619112, at \*8 (D. Vt. Feb. 23, 2012) (citing 20 C.F.R. § 404.1571) (even if work during relevant period does not rise to level of significant gainful activity, ALJ may consider when assessing credibility). Equally material to the adverse credibility finding was Plaintiff’s testimony that he stopped work each time because his doctor took him out of work, which was contradicted by the medical records. Tr. 20, 40. The ALJ also considered Plaintiff’s collection of unemployment benefits in 2011 as pertinent to credibility based on the finding that unemployment benefits require a representation that Plaintiff was then ready, willing and able to work, which is inconsistent with claimed disability in the same time period. Tr. 20-21; see Colon v. Astrue, 841

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<sup>10</sup> An error by the ALJ in his characterization of Dr. Turchetta’s opinion appears to be typographical and not material. The ALJ wrote, “Dr. Teixeira [Turchetta] opined that the claimant’s brain injury had not significantly impacted on his cognitive functioning.” Tr. 19. In fact, Dr. Turchetta opined that “his brain injury has significantly impacted his cognitive functioning.” Tr. 646. The balance of the ALJ’s discussion of Plaintiff’s mental limitations is consistent with an accurate read of Dr. Turchetta’s opinion. Tr. 19.

F. Supp. 2d 495, 501 (D. Mass. 2012) (permissible to regard collection of unemployment benefits as indication that claimant is able to work and not disabled) (citing Wimberly v. Labor & Indus. Relations Comm'n, 479 U.S. 511, 515 (1987)).

Part of the ALJ's lengthy explication of the many bases for his adverse credibility determination is a short discussion of the inconsistency between Plaintiff's testimony about his limitations and his testimony and statements to treating medical sources about his activities of daily living. Tr. 19-20. Plaintiff attacks the ALJ's credibility determination for placing undue "emphasis on Plaintiff's daily activities." ECF No. 9, at 9; see Borino v. Astrue, 917 F. Supp. 2d 166, 173-74 (D.R.I. 2013) (ALJ erred in relying exclusively on evidence of plaintiff's daily activities to reach a negative credibility determination). This argument falls badly short because the ALJ did not rely exclusively – or even primarily – on evidence of Plaintiff's daily activities in reaching his credibility determination. Rather, he considered it among other factors, which is entirely appropriate: while "a claimant's performance of household chores or the like ought not be equated to an ability to participate effectively in the workforce, evidence of daily activities can be used to support a negative credibility finding." Teixeira v. Astrue, 755 F. Supp. 2d 340, 347 (D. Mass. 2010) (citing Berrios Lopez v. Sec'y of Health & Human Servs., 951 F.2d 427, 429 (1st Cir. 1991)). Here, the ALJ did not commit error in considering the evidence of Plaintiff's activities of daily living, including household chores, his exercise regimen and volunteer activities, as additional support for his adverse credibility finding. See Balaguer, 880 F. Supp. 2d at 269-70.

Finally, Plaintiff argues that his credibility was supported by the two 2007 agency physical RFC assessments (Dr. Bernardo's from February 2007 and Dr. Tonelli's from July 2007) and that the ALJ erred in basing his physical RFC finding exclusively upon Dr. Faigel's

October 2009 RFC assessment without regard for those done in 2007. Plaintiff contends that the 2007 assessments are inconsistent with Dr. Faigel's RFC and consistent with Plaintiff's testimony, so that it was error to disregard them. See Dedis v. Chater, 956 F. Supp. 45, 51 (D. Mass. 1997) ("While the ALJ is free to make a finding which gives less credence to certain evidence, he cannot simply ignore . . . the body of evidence opposed to [his] view."). Plaintiff also argues that the ALJ should have "determine[d] whether Plaintiff's disability included a period of time from the date of onset of June 14, 2006, to the time of [Dr. Faigel's] October 6, 2009 RFC." ECF No. 9, at 10.

The ALJ's failure to discuss the 2007 Bernardo and Tonelli RFC assessments is not error, nor are they opposed to the ALJ's view. Dr. Faigel, on whom the ALJ relied, examined the entire record for the entire period of alleged disability – Dr. Faigel's assessment refers to the persistent pain and approval for back surgery in March 2007, which is the focus of Dr. Bernardo's assessment, and specifically mentions the post-surgery assessment done by Dr. Tonelli on July 16, 2007. Tr. 651. Accordingly, far from being inconsistent with Dr. Faigel's assessment, they are incorporated into his analysis; by relying on Dr. Faigel, the ALJ was effectively taking the earlier assessments into account.

It is significant that both of the 2007 assessments were performed at a time when Plaintiff's condition was rapidly changing: Dr. Bernardo completed his RFC shortly before Plaintiff's back surgery, while Dr. Tonelli completed his as Plaintiff was recovering and showing promising post-operative improvement. Tr. 442-44, 540-41. This is confirmed by Dr. Faigel who opines that Plaintiff's condition had stabilized after the accident and the back surgery within a year after the fall.<sup>11</sup> Tr. 651. Under such circumstances, the ALJ's failure to discuss them

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<sup>11</sup> Based on the Act's definition of "disability," Plaintiff's condition in the early months after his fall does not create a period of disability. See 42 U.S.C. § 423(d)(1) (disability defined as inability to do substantial gainful activity by

separately is not error. See Alcantara v. Astrue, 257 F. App'x 333, 333-35 (1st Cir. 2007) (per curiam) (ALJ erroneously relied on earlier opinion when medical evidence is added after opinion issued); Bell v. Astrue, No. 11-CV-45-PB, 2012 WL 124841, at \*8 (D.N.H. Jan. 17, 2012) (“A state agency consultant’s opinion that is based on an incomplete record, when later evidence supports the claimant’s limitations, cannot provide substantial evidence to support the ALJ’s decision to deny benefits.”). With respect to credibility, the 2007 assessments reflect Plaintiff’s temporary medical status just before and after the back surgery in April 2007 and do not buttress the credibility of Plaintiff’s testimony at the hearing in 2011.

I find that the ALJ made clearly-articulated credibility findings based on substantial supporting evidence in the record. Frustaglia, 829 F.2d at 195. I further find that the ALJ properly examined the inconsistency of Plaintiff’s testimony about pain and its functional effects by reference to the rest of the entire case record. SSR 96-7p, 1996 WL 374186, at \*4 (July 2, 1996). Accordingly, Plaintiff’s challenge to the ALJ’s credibility findings is rejected.

#### **B. ALJ’s Hypothetical**

Plaintiff attacks the ALJ’s hypothetical based on the failure to mention Plaintiff’s IQ, arguing that the omission means that the VE’s response does not amount to substantial evidence to support his finding that there are jobs in significant numbers in the national economy that Plaintiff can perform. Musto v. Halter, 135 F. Supp. 2d 220, 231-32 (D. Mass. 2001) (when hypothetical omitted limitation on prolonged sitting, VE’s response is not “substantial evidence”). This argument is based on a decision from the Eastern District of Missouri. Coleman v. Astrue, No. 4:11CV2131 CDP, 2013 WL 665084, at \*9 (E.D. Mo. Feb. 25, 2013).

This Court finds no error in the ALJ’s failure to explicitly incorporate Plaintiff’s IQ into

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reason of impairment that has lasted or can be expected to last for a continuous period of not less than twelve months).

his hypothetical to the VE. Dr. Hughes, whose assessment formed the basis for the cognitive aspect of the ALJ's hypothetical, noted that Plaintiff has a Cognitive Disorder NOS and a borderline IQ.<sup>12</sup> His report boiled this evidence down to a set of functional limitations in forming Plaintiff's mental RFC assessment, specifically noting that he found Plaintiff's reported memory and concentration difficulties to be credible given his IQ and his use of narcotic pain medications. See Starr v. Comm'r of Soc. Sec., Civil Action No. 2:12-cv-290, 2013 WL 653280, at \*3 (S.D. Ohio Feb. 21, 2013) (ALJ may omit moderate limits from hypothetical where narrative portion of RFC incorporated all of plaintiff's impairments). It was therefore proper for the ALJ to afford substantial evidentiary weight to Dr. Hughes's opinion in assessing Plaintiff's mental RFC and to use Dr. Hughes's limitations for the hypothetical, without incorporating the medical findings on which Dr. Hughes's limitations were based. Torres v. Sec'y of Health & Human Servs., 870 F.2d 742, 745-46 (1st Cir. 1989) (no error for ALJ to pose hypothetical that did not synthesize all evidence in record); Vang v. Barnhart, CA 05-454 DLM, slip op. at 8 (D.R.I. Jan. 22, 2008) (no error for ALJ to fail to mention GAF finding; ALJ not required to address every piece of evidence in record); Laffely v. Barnhart, No. 04-273-P-C, 2005 WL 1923515, at \*7 (D. Me. Aug. 9, 2005) (choosing not to remand when ALJ did not specifically reference an uncontroverted limitation of plaintiff in his RFC finding because ALJ's Step Five finding relied upon testimony by VE that incorporated restriction).

Plaintiff's reliance on Coleman is misplaced. Coleman dealt with the failure of the ALJ to develop the record by ordering an IQ test for a claimant whose out-of-date scores suggested average intelligence, but who was diagnosed by at least one psychologist as mildly mentally

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<sup>12</sup> Dr. Hughes examined testing performed in 2007 that yielded a full scale IQ of 80 and testing performed in 2009 that yielded a full scale IQ of 77. He relied on the lower value in developing his mental RFC assessment. Tr. 676, 679.

retarded. 2013 WL 665084, at \*4, 8. With a record studded with inconsistencies about the claimant's true intellectual capacity, the court found that it was error requiring remand for the ALJ to fail to discuss the impact of the ambiguous IQ evidence on his RFC. Id. at \*9. By contrast with the Coleman claimant, Plaintiff's IQ was tested twice during the period of disability, each time yielding consistent results; also unlike Coleman, the IQ value was specifically discussed and taken into account by Dr. Hughes in developing the mental RFC, which was the foundation for the ALJ's hypothetical.

Plaintiff's final argument focuses on Dr. Nieto's evaluation report written in October 2006; he contends that it establishes that his psychological symptoms were more severe in the months following his fall. Tr. 399-400. Dr. Nieto's report of Plaintiff's condition "with status post head trauma" does not undermine the mental impairments found by the ALJ, which he laid out in the hypothetical based on Dr. Hughes's RFC. Rather, Dr. Nieto confirms that in October 2006 Plaintiff's cognitive functions were still recovering from the fall; however, Dr. Hughes's assessment is specifically based on a period beginning one year after the fall. Tr. 674. Plaintiff's temporarily more severe symptoms as observed by Dr. Nieto in 2006 do not establish that he was disabled within the meaning of the Act. 42 U.S.C. § 423(d)(1) (disability must last for a continuous period of not less than twelve months). Nor do they compel the conclusion that a hypothetical lacking the IQ score was not based on substantial evidence.

Even if one posits error in the omission of the IQ, the Court finds that Plaintiff's failure to object to the hypothetical and to ask follow-up questions of the VE based on the IQ forecloses him from claiming error now. The First Circuit has clearly explicated when a claimant waives potential error in failing to object to the hypothetical or to follow up with the VE. See Torres v. Sec'y of Health & Human Servs., 976 F.2d 724, at \*5-6 (1st Cir. 1992) (per curiam)

(unpublished table opinion) (“Torres II”); Torres, 870 F.2d at 745-46 (“Torres I”). Read together, these cases clarify that, if the ALJ omits a single, simple fact (like Plaintiff’s IQ) that was a dominant aspect of Plaintiff’s limitations, was clearly laid out in the medical record and was clearly omitted from the hypothetical, Plaintiff must take advantage of the opportunity to ask the VE whether the fact alters his opinion or, failing to do so, be deemed to have waived the potential error. Torres I, 870 F.2d at 745-46; see Pires v. Astrue, 553 F. Supp. 2d 15, 25 (D. Mass. 2008) (failure of claimant’s attorney to object or pose his own question to VE about information omitted from hypothetical waives opportunity to argue error). The claimant does not waive only when the omission of certain limitations is opaque because the claimant does not yet know what the ALJ may find. Torres II, 976 F.2d 724, at \*6 (unrealistic to require claimant to anticipate what limitations ALJ will find and to require claimant to insure that hypothetical reflects those limitations).

I find that there was no error in the ALJ’s failure to mention Plaintiff’s IQ in the hypothetical that elicited the VE’s response on which his opinion relied. I further find that, if it be error, Plaintiff’s failure to object to the hypothetical or to question the VE about the impact of his IQ bars him from raising the omission on appeal.

### **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  
September 19, 2013