IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JUAN ORTIZ,	:	
	:	
Plaintiff	:	
	:	CIVIL NO. 16-03591
v.	:	
	:	
NANCY A. BERRYHILL,	:	
Acting Commissioner	:	
of Social Security	:	
Defendant	:	

REPORT AND RECOMMENDATION

RICHARD A. LLORET **February 28, 2017**
U.S. MAGISTRATE JUDGE

Juan Ortiz ("Ortiz") alleges the Administrative Law Judge ("ALJ") erred in denying his application for Social Security Disability Benefits ("DIB") and Supplemental Security Income ("SSI"). See Pl.'s Br. & Statement of Issues in Support of Req. for Review ("Pl. Br.") at 2. Specifically, Ortiz argues that the ALJ erred 1) in finding Ortiz's multiple impairments to be "non-severe"; 2) in failing to properly weigh the opinion of Dr. Hazbun, Ortiz's treating physician; 3) in that substantial evidence does not support the ALJ's RFC assessment; and 4) in that substantial evidence does not support the ALJ's credibility assessment. Pl. Br. at 1-2.

After careful review of the record, I find the ALJ erred in finding Ortiz's fibromyalgia was non-severe. The ALJ also erred in failing to properly weigh the opinion evidence of Dr. Hazbun, and the residual functional capacity ("RFC") assessment is not supported by substantial evidence. The ALJ's opinion is not supported by substantial evidence.

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PROCEDURAL HISTORY

Ortiz filed an application for a period of disability and DIB on July 30, 2013. Also on July 30, 2013, Ortiz filed an application for SSI. On October 7, 2013 Ortiz's claims were denied. R. 76-83. A hearing was held before ALJ Daniel Myers on December 15, 2014 pursuant to Ortiz's timely request. R. 35-54. On February 23, 2015, ALJ Myers issued a decision denying Ortiz's application for DIB and SSI. R. 19-27. On June 9, 2016, the Appeals Council denied Ortiz's request for review.

This request for review pursuant to 42 U.S.C. § 405(g) followed.

FACTUAL HISTORY

Ortiz was 44-years-old at the time of the administrative hearing. R. 36. Ortiz is unmarried and does not have any children of his own, but he has four stepsons who live with their mother in Lancaster, Pennsylvania. Ortiz's highest level of education is tenth grade. He testified that he left school in the tenth grade because he "was growing up with no mom, no dad, so it was difficult where I was living, so I decided to go on my own and make my own life." R. 37. Ortiz was working full-time as early as age 14. *Id.*

Ortiz described his employment history for the fifteen years leading up to the administrative hearing. R. 38. Approximately fifteen years ago, Ortiz worked in construction in Redondo Perinne, Puerto Rico. He stopped this work because his stepson had leukemia, and he moved to Pennsylvania to seek treatment. *Id.* He obtained a job as a "forklift operator and warehouse inventory", where he remained for five years until he was laid off. R. 38-38. He then had a few temporary jobs, until he found full-time employment as a tow truck operator. R. 39. He worked for three different tow truck companies over the course of approximately two years. *Id.* Ortiz ultimately stopped working because he was experiencing "too much pain", "too much swelling" and because

he was unable to sleep at night due to the back pain. R. 39; R. 42.

Ortiz testified that he is unable to work due to pain in his body and his legs that he has experienced for six years. R. 37. He has "two bad disks [sic]" and fibromyalgia. *Id*. The location of the pain caused by his fibromyalgia "depends on the day" and can be in his legs, back, and arms. R. 40. Ortiz is taking four medications to treat his pain and fibromyalgia.[1] Ortiz testified that these medications are prescribed by Dr. Hazbun[2], with whom Ortiz has been treating since 2010. Ortiz also described constant lower back pain, which is worsened by work. R. 40-41.

Ortiz is able to sit for 20-30 minutes at a time, and he is able to stand for 30-40 minutes. R. 41-42. He is able to walk approximately one to two blocks before he experiences pain. R. 42. Ortiz testified that "[m]ost of the time I'm laying [sic] down because of the pain." R. 41. Ortiz is able to sleep two to three hours per night, and he naps during the day. R. 43-44. Ortiz avoids household chores because it will result in pain. R. 44.

Ortiz has difficulty with concentration and focus on a daily basis due to the pain. R. 44-45. He explained that he is unable to watch a television program from start to finish. Ortiz is able to drive but he has difficulty with sitting for long periods of time. R. 47.

The Vocational Expert, Terry Leslie, testified that Ortiz had past relevant work as a forklift operator and a tow truck driver, which were both semi-skilled medium work

[1] Ortiz's medications include Remeron and Lisinopril to treat depression and Cymbalta and Duloxetine to treat fibromyalgia. R. 24.
[2] Based on my review of the medical records, these medications are prescribed by Dr. Reese, Ortiz's rheumatologist.

with a Specific Vocational Preparation[3] of 3. R. 48. Ortiz's employment as a "kitchen helper" was unskilled medium work with an SVP of 2. *Id*. Finally, Ortiz's employment as a carpenter was skilled medium work with an SVP of 7. *Id*. The ALJ posed the following hypothetical:

> Assume, please, a hypothetical individual who's 44 years old and has a tenth grade education. Let's assume this hypothetical individual is capable of the full range of light duty work with the following limitations: This person is limited to only occasional stooping, kneeling, crouching, crawling, and climbing stairs; the person must avoid hazards, such as unprotected heights; the person must avoid temperature extremes, and wetness and humidity.

R. 49. Based on this hypothetical, Mr. Leslie opined that Ortiz is unable to perform his past relevant work. *Id*. Mr. Leslie also opined that occupations exist in the national or the regional economies that this individual can perform including packing line worker, office cleaner, and machine tender, all of which are light work with an SVP of 2. R. 49-50. The ALJ posed a second hypothetical, which included limitations to "routine repetitive tasks in a stable environment, and required an occupation involving only occasional changes to the routine work setting." R. 50. Based on these additional limitations, Mr. Leslie opined that the hypothetical individual could still perform the above occupations. *Id*.

> On cross-examination Ortiz's attorney posed the following hypothetical:
>
> The hypothetical individual is limited to lifting, carrying 10 pounds occasionally, sitting, standing less than two hours in an eight-hour working day . . . sit [sic] less than two hours, stand and walk less than two hours in an eight-hour working day.

R. 51. Based on these limitations, the vocational expert concluded that this individual would not be able to perform gainful activity. *Id*. Ortiz's attorney then asked Mr. Leslie

[3] Specific Vocational Preparation ("SVP") is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.

to consider the ALJ's two hypotheticals and include that the individual requires unscheduled breaks every twenty minutes for five minutes at a time. Mr. Leslie opined that this would also preclude gainful employment. *Id.* Mr. Leslie testified that, in general, employers will not tolerate more than two days per month of absenteeism on a consistent basis. R. 52.

DISCUSSION

A claimant is disabled if he is unable to engage in "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 12 months." 20 C.F.R. § 416.905; *see also Diaz v. Comm'r of Soc. Sec.*, 577 F.3d 500, 503 (3d Cir. 2009). An ALJ must conduct a five step sequential analysis when reviewing a claim. For this analysis, the ALJ considers whether a claimant: (1) is engaged in substantial gainful employment; (2) has one or more severe impairments, which significantly limit the claimant's ability to perform basic work; (3) has impairments that meet or equal the criteria associated with impairments in the Social Security Regulations so as to mandate a disability finding; (4) has an RFC to perform work with the claimant's limitations and can return to the claimant's previous work with that RFC; and (5) can perform any other work existing in the national economy. *See* 20 C.F.R. § 416.920(a)(4)(i)-(v); *see also Ramirez v. Barnhart*, 372 F.3d 546, 550-51 (3d Cir. 2004).

In reviewing an ALJ's disability determination, I must accept all the ALJ's fact findings if supported by substantial evidence or "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 390 (1971) (citing to *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229

(1938)); *see also* 42 U.S.C. § 405(g). I may not weigh the evidence or substitute my own conclusions for those of the ALJ. *Chandler v. Comm'r of Soc. Sec.*, 667 F.3d 356, 359 (3d Cir. 2011). However, the ALJ's legal conclusions and application of legal principles are subject to "plenary review." *See Payton v. Barnhart*, 416 F. Supp. 2d 385, 387 (E.D. Pa. 2006).

A. The ALJ's findings at step two.

Ortiz argues that the ALJ committed reversible error at step two of his analysis by failing to find that Ortiz's fibromyalgia, rheumatoid arthritis, and obesity were severe impairments. I find that the ALJ's determination that Ortiz's fibromyalgia was not severe is not supported by substantial evidence and remand is warranted. With respect to Ortiz's claims of rheumatoid arthritis and obesity, for reasons discussed below, I find that the ALJ's determination of non-severity is supported by substantial evidence.

As Judge Yohn noted in *McClease v. Comm'r of Soc. Sec.*,

> The severity test at step two is a *de minimis* screening device to dispose of groundless claims. The ALJ will generally find a condition to be severe if it has any significant effect on a claimant's ability to work. . . . As the Third Circuit has explained, although the standard for substantial evidence at step two is the same as at all other steps, *because step two is to be rarely utilized as basis for the denial of benefits . . . its invocation is certain to raise a judicial eyebrow*.

2009 WL 3497775, at *4 (E.D. Pa. 2009) (internal citations and quotations omitted, emphasis added). Further, "[i]f the evidence presented by the claimant presents more than a 'slight abnormality,' the step-two requirement of 'severe' is met, and the sequential evaluation process should continue." *Id.* at *13 (citing *Newell v. Comm'r of Soc. Sec.*, 347 F.3d 541, 546 (3d Cir. 2003)). The Court in *Bowen v. Yuckert* explained,

> Great care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual's ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation

> step. Rather, it should be continued. In such a circumstance, if the impairment does not meet or equal the severity level of the relevant medical listing, sequential evaluation requires that the adjudicator evaluate the individual's ability to do past work, or to do other work based on the consideration of age, education, and prior work experience. Social Security Ruling 85–28, App. to Pet. for Cert. 44a.

482 U.S. 137, 158, 107 S. Ct. 2287, 2300, 96 L. Ed. 2d 119 (1987) (O'Connor, J. concurring) (quoting SSR 85-28). "Reasonable doubts on severity are to be resolved in favor of the claimant." *Newell*, 347 F.3d at 546-47. It is error for the ALJ to weigh the evidence adduced by the claimant against the opinions of the consulting and/or reviewing examiner. *See Magwood v. Comm'r of Soc. Sec.*, 417 Fed. Appx. 130, 132 (3d Cir. 2008).

With this framework in mind, I will address each alleged impairment separately.

1. *The ALJ erred in finding Ortiz's fibromyalgia non-severe.*

Ortiz came forward with evidence to show that his fibromyalgia was more than a "slight abnormality." Ortiz was initially diagnosed with fibromyalgia on September 27, 2011 by his rheumatologist, Dr. Richard W. Reese. Ortiz's medications include Cymbalta and Duloxetine to treat fibromyalgia, as prescribed by Dr. Reese. He has sought continuing and consistent treatment relating to this diagnosis over the course of four years.

This diagnosis is supported by Ortiz's other medical providers, Ortiz's testimony,[4] and his subjective complaints in the medical records. Ortiz sought medical treatment with his primary care physician, Dr. Adrian Hazbun, on a monthly basis from October 28, 2010 until October 14, 2014, with complaints of pain related to his diagnosis of

[4] *See e.g.* R. 37 (Ortiz testified that he is unable to work due to pain in his body and legs that has persisted for six years); R. 40-42 (Ortiz is unable to stand, sit, or walk for long periods of time due to pain); and R. 44 (Ortiz is unable to perform household chores because it will exacerbate his pain).

fibromyalgia. *See* R. 361-362 ("41 year old male here for arthralgias (joint pain) and myalgias (muscle pain). The rheumatologist diagnosed him with fibromyalgia and has him on three medications. His symptoms have not improved. He can only work for 2 hours at a time and is unable to sit or bend over. He has to stand or lie down. He has been unable to return to work."); R. 358 (Ortiz presented for a follow-up related to fibromyalgia. The records note that he "tries to work but is unable to do even light physical activity for more than an hour"); R. 360 ("41 year old male here for [follow-up] [for] fibromyalgia. He is still having pain."); R. 343 (Ortiz complained of "pain all over, mostly lower back, left side of neck and left shoulder. He has feet pain as well.").

Ortiz came forward with substantial evidence under the *de minimis* threshold of step two, to demonstrate that his fibromyalgia was more than a "slight abnormality." In so far as this evidence could be considered borderline, reasonable doubts as to severity are to be decided in favor of Ortiz at step two. *Newell*, 347 F.3d at 546-47.

Instead, the ALJ found Ortiz's impairment was non-severe because "the rheumatologist noted that the claimant had a diagnosis of possible fibromyalgia and further noted that this is a diagnosis of exclusion." R. 22. The ALJ is correct that on April 11, 2011, Dr. Reese opined that Ortiz's symptoms including "multiple soft tissue tender points and poor sleep patterns . . . go along with possible fibromyalgia syndrome which is, of course, a diagnosis of exclusion." R. 445. The ALJ fails to explain or reconcile that on September 27, 2011, Dr. Reese excluded other possible diagnoses and concluded that Ortiz's diagnosis was fibromyalgia. R. 281. Likewise, the ALJ did not address that, subsequent to this September 27, 2011 diagnosis, the medical records from Dr. Reese and Dr. Hazbun all reflect the diagnosis and treatment of fibromyalgia.

As discussed more fully below in section (B), the ALJ also improperly afforded little weight to the opinion of Ortiz's primary care physician, and substituted his own lay opinion for that of the medical professionals. This is reversible error.

I find that the ALJ's decision – that Ortiz's fibromyalgia was not a severe impairment under the low threshold at step two – is not supported by substantial evidence. I recommend remand on this ground. [5] *See Hendricks v. Barnhart*, 2007 WL 2791833 (E.D.Pa. Sept. 25, 2007) (holding that "[s]ubstantial evidence does not support the ALJ's finding that Plaintiff's fibromyalgia is not a severe condition, and the matter must be remanded for a determination of whether Plaintiff's fibromyalgia is a severe condition, and if so, its impact on Plaintiff's RFC.").

2. The ALJ did not err in finding Ortiz's rheumatoid arthritis non-severe.

Ortiz argues that the ALJ also erred in finding his rheumatoid arthritis non-severe at step two. I disagree. Substantial evidence does not support a finding that Ortiz's rheumatoid arthritis is a severe impairment. Unlike the fibromyalgia diagnosis, which is supported by substantial medical evidence, the medical records do not refer to a definitive diagnosis or consistent treatment relating to rheumatoid arthritis. Limited

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[5] I note that:

> Where at least one impairment is found to be "severe" and all limitations (including those resulting from "non-severe" impairments) are reflected in the ultimate residual functional capacity determination, any error committed at the second step of the sequential evaluation process can fairly be characterized as harmless.

Richards v. Astrue, No. 08-cv-284, 2010 WL 2606523, at *6 (E.D. Pa. June 28, 2010) (citing *Lewis v. Astrue*, 498 F.3d 909, 911 (9th Cir. 2007); *Maziarz v. Sec'y of Health & Human Servs.*, 837 F.2d 240, 244 (6th Cir. 1987)). As discussed *infra*, because all limitations were not reflected in the ultimate residual functional capacity determination, I cannot find the step two error to be harmless.

medical records refer to "possible rheumatoid arthritis" in 2010. R. 274 (Water Street Health Service records dated August 30, 2010 note, "unclear if this is rheumatoid arthritis"); R. 280 ("Labs suggest possible rheumatoid arthritis."). There are no additional references to this diagnosis or treatment relating to rheumatoid arthritis until 2013, at which time the diagnosis remains ambivalent. *See e.g.* R. 506 ("Clearly [Ortiz] fits the diagnosis for classification for rheumatoid arthritis"); *but see* R. 512 ("[Rule out] inflammatory arthritis"); R. 502 and R. 496 ("possible rheumatoid arthritis").

Based on the foregoing, it was not an error for the ALJ to consider Ortiz's chronic pain issues "under the general umbrella of arthritic changes." R. 22. I find that substantial evidence supports the ALJ's finding that Ortiz's rheumatoid arthritis was a non-severe impairment.

3. *The ALJ did not err in finding Ortiz's obesity non-severe.*

Ortiz also argues that the ALJ erred in finding his obesity non-severe at step two. The Commissioner argues that the ALJ had no cause to find a severe impairment of obesity because Ortiz did not allege obesity as one of his disabling conditions and made no mention of obesity at the hearing. I agree.

In *Adams v. Barnhart*, 2005 WL 1313456 (E.D.Pa. May 31, 2005), the claimant alleged that the ALJ failed to consider the impact of her obesity to her impairments in the second, third, and fifth steps of the sequential process. The Court held that the ALJ's failure to address the claimant's obesity was not a reason for remand. In reaching this conclusion, the Court reasoned,

> Neither Plaintiff nor any other witnesses testified that Plaintiff was obese or that her weight further impaired her ability to work. Nor were there any medical records provided to indicate such. In addition, Plaintiff did not mention her alleged obesity in her disability application . . . Moreover, any contention that the ALJ should have obtained an updated medical opinion is untenable because (1)

> Plaintiff did not raise the issue of her obesity at the hearing, (2) her medical records do not mention obesity or her need for weight loss, and (3) her medical records do not suggest that obesity is a factor in Plaintiff's medical condition or functional level.

Id. at *4 (citing *Meredith v. Barnhart*, No. Civ. A. 03-6422, 2004 WL 2367816, at *3 (E.D.Pa. Oct. 19, 2004).

Likewise, here, Ortiz did not mention his obesity in his disability application, and he did not testify that his weight impaired his ability to work. Nothing in the medical records suggests that the ALJ was under an obligation to obtain an updated medical opinion. In fact, the record is devoid of any evidence that Ortiz's weight exacerbated his impairments, let alone that it was, in and of itself, a severe impairment.[6] I find that substantial evidence supports the ALJ's finding at step two that Ortiz's obesity was a non-severe impairment.

For reasons discussed in section (B), the ALJ's error in failing to find Ortiz's fibromyalgia severe at step two is not harmless, and remand is warranted on this ground.

B. The ALJ failed to properly weigh the opinion evidence of Dr. Hazbun.

Ortiz argues that the ALJ failed to accord proper weight to the opinion evidence of Ortiz's treating physician, Dr. Hazbun. Pl. Br. at 12. I agree.

A treating source's opinion is entitled to controlling weight when supported by medically acceptable clinical and laboratory diagnostic techniques and is consistent with

[6] A clinical diagnosis of obesity requires a Body Mass Index (BMI) of a least 30. Ortiz cites to three instances where the medical records reflect a BMI of 32. Ortiz omits those records that demonstrate a BMI below 30. *See e.g.* R. 500; R. 504; R. 508. I find that Ortiz's sporadic BMI measurements that barely meet the obesity threshold do not amount to substantial evidence to support a finding of a severe impairment at step two.

other substantial evidence in the record.[7] *See* 20 C.F.R. § 416.927(c)(2); SSR 96-2p, 1996 WL 374188 (July 2, 1996). A treating source's opinion may be rejected "on the basis of contradictory medical evidence." *Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999); *see Jones v. Sullivan*, 954 F.2d 125, 129 (3d Cir. 1991) (contradictory opinions by state agency physicians was a sufficient basis for refusing to give a treating physician's conclusory opinion controlling weight); *Brown v. Astrue*, 649 F.3d 193, 197 (3d Cir. 2011) (ALJ "clearly explained" why she gave greater weight to the opinion of a medical consultant than to treating physician). So too may an opinion be rejected if there is insufficient clinical data, *see Newhouse v. Heckler*, 753 F.2d 283, 286 (3d Cir. 1985), or if the opinion is contradicted by the physician's own treating notes or the patient's activities of daily living. *See Smith v. Astrue*, 359 F. App'x 313, 316-17 (3d Cir. 2009) (not precedential). The opinion may be accorded "more or less weight depending upon the extent to which supporting explanations are provided." *Plummer*, 186 F.3d at 429 (*citing Newhouse*, 753 F.2d at 286).

Opinions from non-treating sources who have examined a claimant also garner weight.[8] 20 C.F.R. § 416.927(c)(1); *see Chandler*, 667 F.3d at 361. While they do not receive as much consideration as a treating source's opinions, they warrant more weight than the opinion of non-examining medical sources. 20 C.F.R. § 416. 927(d)(1); *see also*

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[7] A treating source is a "physician, psychologist, or other acceptable medical source" who provides a patient with "medical treatment or evaluation," and has an "ongoing treatment relationship with the patient." 20 C.F.R. § 404.1502. A medical source may be considered a treating source where the claimant sees the source "with a frequency consistent with accepted medical practice for the type of treatment . . . required for [the claimant's] condition(s)." *Id.*

[8] Non-treating sources are usually doctors who have examined the claimant, but not in the context of an ongoing treatment relationship. 20 C.F.R. § 416.902. A source is non-treating if a claimant visits a doctor solely to obtain a report in support of his or her claim. *Id.*

Brownawell v. Comm'r of Soc. Sec., 554 F.3d 352, 257 (3d Cir. 2008). Testimony from a non-examining source also must be considered by the ALJ, but is not entitled to deference.[9] 20 C.F.R. § 416.927(f); SSR 96-6p, 1996 WL 374180 at *2. It is error to "credit the testimony of a consulting physician who has not examined the claimant when such testimony conflicts with testimony of the claimant's treating physician." *Franklin v. Barnhart*, No. 05-2215, 2006 WL 1686692, at *11 (E.D. Pa. June 13, 2006) (quoting *Dorf v. Bowen*, 794 F.2d 896, 901 (3d Cir. 1986)).

Pursuant to 20 C.F.R. 416.927(c)(2), when deciding that a treating source's opinion is not entitled to controlling weight, the ALJ must evaluate the opinion by considering certain factors such as: the length of the treatment relationship, the frequency of visits, the nature and extent of the treatment relationship, whether the source has supported his or her opinion with medical evidence, whether the opinion is consistent with the medical record and the medical source's specialization. 20 C.F.R. 416.927(c)(2); *see also* SSR 96-2p, 1996 SSR LEXIS 9, 1996 WL 374188, at *4. "While the ALJ is, of course, not bound to accept physicians' conclusions, he [or she] may not reject them unless he first weighs them against other relevant evidence and explains why certain evidence has been accepted and why other evidence has been rejected." *Cadillac v. Barnhart*, 84 Fed. App'x. 163, 168 (3d Cir. 2003) (not precedential) (quoting *Kent v. Schweiker*, 710 F.2d 110, 115 n.5 (3d Cir. 1983)) (alteration in original, internal quotations omitted). In choosing to reject a treating physician's assessment, an ALJ may not make "speculative inferences from medical reports" and may not reject a treating

[9] A non-examining source is an acceptable medical source who has not examined the claimant, but who provides a medical opinion of the case. 20 C.F.R. § 416.902.

physician's opinion "due to his or her own credibility judgments, speculation or lay opinion." *Morales*, 225 F.3d at 317.

It is imperative that an ALJ provide sufficient detail in his opinion to facilitate judicial review. *See Burnett v. Comm'r of Soc. Sec. Admin.*, 220 F.3d 112, 120 (3d Cir. 2000). As the Court of Appeals observed in *Plummer*, 186 F.3d at 429:

> When a conflict in the evidence exists, the ALJ may choose whom to credit but "cannot reject evidence for no reason or for the wrong reason." *Mason v. Shalala*, 994 F.2d 1058, 1066 (3d Cir.1993). The ALJ must consider all the evidence and give some reason for discounting the evidence she rejects. *See Stewart v. Secretary of H.E.W.*, 714 F.2d 287, 290 (3d Cir.1983).

It is error for an ALJ to fail "to consider and explain his reasons for discounting all of the pertinent evidence before him in making his residual functional capacity determination. . . ." *Burnett*, 220 F.3d at 121.

1. Dr. Hazbun

Dr. Hazbun was Ortiz's treating physician from October 28, 2010 through October 14, 2014. *See generally* R. 321-372; R. 470-523; R. 524-528. Dr. Hazbun diagnosed Ortiz with fibromyalgia on September 30, 2011. R. 360. According to the treatment records, Ortiz's symptoms included diffuse musculoskeletal pain, multiple soft tissue tender points, arthralgias (joint pain) and myalgias (muscle pain), and his symptoms persisted despite medication. *See e.g.* R. 382-384; R. 360; R. 358; R. 343. Ortiz presented to Dr. Hazbun approximately once per month for four years with continued complaints of joint pain related to fibromyalgia. *See generally* R. 321-372; R. 470-523; R. 524-528.

Dr. Hazbun submitted a fibromyalgia residual functional capacity questionnaire on November 10, 2014. R. 524-528. Dr. Hazbun identified the following symptoms: multiple tender points, nonrestorative sleep, chronic fatigue, morning stiffness, muscle

weakness, subjective swelling, numbness and tingling, anxiety, and depression. R. 524. Dr. Hazbun listed the following bilateral pain locations: lumbosacral spine, cervical spine, thoracic spine, chest, shoulders, arms, hands/fingers, hips, legs, and knees/ankles/feet. R. 525. He described Ortiz's pain as daily sharp pain with a severity of seven out of ten. *Id.* Dr. Hazbun opined that Ortiz's impairments are reasonably consistent with the symptoms and functional limitations described in the evaluation. *Id.* He also opined that Ortiz would constantly experience pain or other symptoms severe enough to interfere with attention and concentration needed to perform simple tasks in a typical workday, and that he is incapable of even "low stress" jobs. *Id.*

Dr. Hazbun opined that Ortiz can walk a half block without rest or severe pain. R. 526. He can sit for twenty minutes at a time and less than two hours in a day, and stand for fifteen minutes at a time and less than two hours in a day. *Id.* Ortiz requires five minutes of walking every twenty minutes during an eight-hour working day. *Id.* Ortiz requires a job that permits shifting positions at will from sitting, standing, or walking, and unscheduled breaks every twenty minutes for five minutes where he will need to lie down. *Id.* Ortiz can frequently lift less than ten pounds and occasionally lift up to ten pounds. R. 527. Ortiz can occasionally twist, stoop, and climb stairs. *Id.* He can rarely crouch or squat and he can never climb ladders. *Id.* Ortiz can occasionally look up or down, turn his head to the right or left, and hold his head in a static position. *Id.* On average, Dr. Hazbun opined that Ortiz will be absent from work more than four days per month as a result of his impairments or treatment. *Id.*

The ALJ gave limited weight to Dr. Hazbun's opinion stating, "the undersigned assigned limited weight to the opinions expressed [in] Exhibit B2F (Dr. Reese) and B14F (Dr. Hazbun) as they are inconsistent with the record and indicate far greater

limitations than are evident from day-to-day treatment records." R. 25. The analysis ends there. The ALJ failed to provide any detail that would permit meaningful judicial review. The ALJ did not provide a summary or analysis of Dr. Hazbun's extensive treatment records, and he did not cite to any conflicting evidence or otherwise explain why he rejected Dr. Hazbun's opinion. Because the ALJ did not discuss all of the medical evidence, more particularly the evidence that tended to support Dr. Hazbun's opinion, and explain why he found the doctor's opinion undermined by that evidence, the ALJ's decision to limit the weight assigned to Dr. Hazbun's opinion is not supported by substantial evidence. It is unclear what medical evidence the ALJ relied upon to reach his ultimate conclusions. I can only conclude that the ALJ improperly relied upon his own lay judgment to discredit the validity of Dr. Hazbun's medical opinion. This was an error.

In *Dyson v. Astrue*, 2:09-CV-3846, 2010 WL 2640143, at *6 (E.D. Pa. June 30, 2010) the ALJ failed to acknowledge the physician's status as claimant's treating physician which, the court reasoned, made "it impossible to determine whether the ALJ considered the required factors when she decided to give [the physician's] opinion only little weight." The court explained, "even if the ALJ properly considered [the physician's] status as a treating physician, albeit implicitly, the ALJ was still required to consider [the physician's] opinion in light of "all of the factors provided" in 20 CFR 416.927." *Id.* at *7. The Court held that the ALJ's opinion was not capable of meaningful review because "[i]t [was] impossible to determine whether the ALJ properly considered all of the required factors because the ALJ did not state explicitly whether and how she did so." *Id.*

Here too the ALJ failed to determine whether Dr. Hazbun is Ortiz's treating physician. *Id*. It is impossible for me to determine whether the ALJ considered the required factors in his decision to give Dr. Hazbun's opinion limited weight. Even if the ALJ implicitly considered Dr. Hazbun's status as a treating physician, the opinion is not capable of meaningful review. The ALJ failed to expressly analyze other factors necessary to evaluate the opinion of a treating physician, including the length of the treatment relationship, the frequency of visits, and the nature and extent of the treatment relationship. *See* 20 C.F.R. § 416.927(c). Based upon the length of their relationship (over four years), and the frequency with which Ortiz treated with Dr. Hazbun (approximately once per month), the § 416.927(c) factors weigh in favor of giving Dr. Hazbun's opinion greater weight. The ALJ must consider all evidence and provide a reason for discounting the evidence he rejects. *Adorno v. Shalala*, 40 F.3d 43, 48 (3d Cir. 1994) (citing to *Stewart v. Secretary of H.E.W.*, 714 F.2d 287, 290 (3d Cir.1983)). Here, I have no way of knowing if the ALJ considered the § 416.927(c) factors,[10] what weight he assigned those factors, or whether any of those factors had an impact on his decision to give limited weight to Dr. Hazbun's opinion.

[10] The RFC assessment includes the following language: "The undersigned has also considered opinion evidence in accordance with the requirements of 20 CFR 404.1527 and 416.927 . . . ." The Commissioner argues that this suffices under the statute because "[t]he ALJ has . . . given his word that he did consider the regulatory factors" reasoning that an ALJ is not required to discuss each factor and that the failure to do so does not mean the ALJ did not consider the factors. Def. Br. at 24 (citing *Bense v. Colvin*, 2015 WL 5675238, at *16 (E.D.Mo. Sept. 25, 2015)). I disagree. The Commissioner is correct that the regulations "do not require an ALJ to articulate each of the suggested regulatory factors, but merely direct that the ALJ consider the factors and give "good reasons" for the weight assigned to the treating source's opinion." *Clark v. Astrue*, 2013 WL 2036662, at *7 (E.D.Pa. Mar. 11, 2013). In *Clark*, there was sufficient evidence that the ALJ considered the factors. The Court reasoned that "the ALJ thoroughly outlined [the claimant's] medical history and explained why she discounted [the doctor's] opinion . . . [f]or example, the ALJ addressed the frequency of [claimant's] visits and the nature and

The ALJ's decision to give limited weight to the opinion of Dr. Hazbun is not supported by substantial evidence. The ALJ found at step two of the analysis that Ortiz's fibromyalgia was not severe which, as discussed above, was not supported by substantial evidence and was reversible error. Based on this improper finding, the ALJ did not include an assessment of Ortiz's fibromyalgia in his RFC analysis (other than to include a perfunctory reference to his chronic pain and medications, *see* R. 24). The limitations occasioned by Ortiz's fibromyalgia should have been considered and included, if warranted, in the RFC analysis. At a minimum the ALJ had a duty to explain why they were not included. Had these limitations been taken into account in the hypothetical, they may have changed the vocational expert's opinion about the availability of work in the national economy. The ALJ's failure to explain the reasons for ignoring Ortiz's fibromyalgia when formulating his question for the vocational expert was harmful error and remand is warranted.[11] On remand, the ALJ must consider Ortiz's fibromyalgia and

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extent of the treatment relationship." *Id.* Here, the ALJ failed to provide support for his determination to assign Dr. Hazbun's opinion limited weight. The opinion is bereft of any reference to the factors or any discussion of Ortiz's extensive treatment with Dr. Hazbun. This does not suffice under the regulations.

[11] Ortiz also argues that the RFC is not supported by substantial evidence because the ALJ failed to properly account for his moderate limitations in concentration, persistence or pace. The hypothetical to the vocational expert included the following limitations: "limited to routine repetitive tasks in a stable environment, and required an occupation involving only occasional changes to the routine work setting." R. 50. Ortiz argues that under *Ramirez*, this is insufficient to account for his moderate limitations in concentration, persistence or pace. The Commissioner argues that *Ramirez* is distinguishable and that there is no "per se legal rule that a moderate degree of limitation in concentration, persistence, or pace automatically triggers findings of particular work-related functional impairments." Def. Br. at 14.

"Third Circuit precedent requires an ALJ to include restrictions specific to nonexertional limitations, including concentration, persistence or pace" in the RFC and the hypothetical to the vocational expert. *McCall v. Colvin*, 2015 WL 9302929 (E.D.Pa. Dec. 22, 2015) (citing *Burns*, 312 F.3d at 123-124) (also citing *Ramirez*, 372 F.3d at 554). In *Ramirez*, the Court held that the ALJ's hypothetical limiting a claimant to simple,

the medical evidence supportive of Dr. Hazbun's opinion, and if he chooses to discount Dr. Hazbun's opinion, the ALJ must explain the evidentiary basis for doing so.

C. The ALJ's credibility determination.

Ortiz argues that the ALJ erred in determining that he was not entirely credible. Pl. Br. at 19-21. In explaining how an ALJ must support his credibility findings, the Court of Appeals has noted the following:

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one-to-two steps tasks failed to take into account that the claimant "*often* suffered from deficiencies in concentration, persistence and pace." *See* 372 F.3d at 554 (emphasis in original). Rather, the hypothetical must "specifically convey" limitations in concentration, persistence or pace. *McPherson v. Colvin*, 2016 WL 5404471 (E.D.Pa. Sept. 28, 2016) (citing *Ramirez*, 372 F.3d at 552).

The pertinent regulations at the time *Ramirez* was decided defined limitations in concentration, persistence or pace by frequency using the following terms: never, seldom, often, frequent, and constant. The regulations were since amended to define the limitations by degree: none, mild, moderate, marked, and extreme. 20 CFR 404.1520a(c)(4). Following the amendment to the regulations, there appears to be a split in authority in the Third Circuit. *See McPherson*, 2016 WL 5404471.

Certain courts "found the distinction between a plaintiff who 'often' suffers from deficiencies in concentration, persistence and pace and one who suffers only "moderate" deficiencies dispositive in approving the ALJ's hypothetical limiting the plaintiff to simple, routine tasks." *See Douglas v. Astrue*, No. 09-1535, 2011 WL 482501, at *4 (E.D. Pa. Feb. 4, 2011) (citing *McDonald v. Astrue*, 293 Fed. App'x 941, 946 (3d Cir. 2008)). Under this line of reasoning, an RFC that limits a claimant to "unskilled work" or "simple repetitive tasks" sufficiently accounts for moderate limitations in concentration, persistence or pace. Where, however, a claimant "often" suffers from these limitations, *Ramirez* applies and the RFC must include an explicit limitation.

Other courts in the Eastern District have held that "the change in terminology does not circumvent *Ramirez's* requirement that hypothetical questions accurately convey the limitations the ALJ has found." *Plank v. Colvin*, __ F. Supp.2d __, 2013 WL 6388486 (E.D.Pa. Dec. 6, 2013); *Bunch v. Astrue*, 2008 WL 5055741, *5, n. 4 (E.D.Pa. Nov. 26, 2008). Based on this line of reasoning, the terms "often" and "moderate" denote the same level of limitation discussed in *Ramirez* and both require explicit limitations in the RFC, and not merely a limitation to "unskilled work" or "simple routine tasks." *Id.*

It is not necessary to resolve this conflict at this time because remand is clearly warranted on other grounds. The ALJ, on remand, should take these considerations into account when formulating the hypothetical to the vocational expert.

> When making credibility findings, the ALJ must indicate which evidence he rejects and which he relies upon as the basis for his findings. *See Schaudeck v. Commissioner of Social Sec. Admin.*, 181 F.3d 429, 433 (3d Cir. 1999). Inconsistencies in a claimant's testimony or daily activities permit an ALJ to conclude that some or all of the claimant's testimony about her limitations or symptoms is less than fully credible. *See Burns v. Barnhart*, 312 F.3d 113, 129–30 (3d Cir.2002). Moreover, allegations of pain and other subjective symptoms must be supported by objective medical evidence. *See* 20 C.F.R. § 404.1529; *see also Hartranft v. Apfel*, 181 F.3d 358, 362 (3d Cir.1999). Even "[l]imitations that are medically supported but are also contradicted by other evidence in the record may or may not be found credible—the ALJ can choose to credit portions of the existing evidence." *See Rutherford*, 399 F.3d at 554.

Salles v. Comm'r of Soc. Sec., 229 F. App'x 140, 146 (3d Cir. 2007) (not precedential). The Court of Appeals has acknowledged that an ALJ's credibility assessment "is entitled to our substantial deference." *Szallar v. Comm'r of Soc. Sec.*, 631 Fed. App. 107, 110 (3d Cir. 2015) (citing to *Zirnsak v. Colvin*, 777.F.3d 607, 613 (3d Cir. 2014)).

Here, the ALJ found Ortiz's "statements concerning the intensity, persistence and limiting effects of these symptoms are not entirely credible for the reasons explained in this decision." R. 24. I am bound to give substantial deference to the ALJ's credibility determination. *Szallar*, 631 Fed. App. at 110. Viewing all the evidence of record, and for the reasons described in Sections A and B, above, it is unclear that the ALJ's stated reasons for discarding Ortiz's credibility will survive reevaluation of the medical evidence on remand. Medical opinions that are supportive of Ortiz's subjective complaints were improperly ignored. I have recommended remand because of this. On remand, the ALJ may consider whether his credibility determination stands in light of his re-evaluation of Ortiz's RFC assessment.

RECOMMENDATION

Based upon the discussion above, I respectfully recommend that Ortiz's Request for Review be granted, and the final decision of the Commissioner be reversed and

remanded for further proceedings consistent with this report and recommendation. The Petitioner may file objections to this report and recommendation within fourteen days of being served with a copy thereof. *See* Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. *See Leyva v. Williams*, 504 F.3d 357, 354 (3d Cir. 2007).

BY THE COURT:

s/Richard A. Lloret
RICHARD A. LLORET
U.S. Magistrate Judge