

spondylolisthesis of the lumbar spine, depression, anxiety disorder, and substance abuse disorder. (ALJ Decision ¶¶ 3-4.) The ALJ further determined that Plaintiff retained the residual functional capacity to engage in light work, to sit for six hours in a workday, to stand or walk for six hours in a workday (subject to certain uncontested postural and environmental limitations), to understand, remember and carry out simple, repetitive instructions, to persist at that level of complexity consistently for eight hours each day, five days per week, and to adapt to routine changes in the work setting; provided that Plaintiff does not interact with the public and has no more than occasional contact with coworkers and supervisors. (*Id.* ¶ 5.) Based on this residual functional capacity (RFC), Plaintiff’s vocational profile, and the testimony of a vocational expert, the ALJ determined that Plaintiff can perform occupations existing in significant numbers in the national economy, including in the occupations of linen grader, shaker of wearing apparel, and bottling line agent. (*Id.* ¶ 10.) The ALJ thus concluded that Plaintiff was not disabled from the alleged onset date through the date of decision. (*Id.* ¶ 11.)

Plaintiff requested review by the Appeals Council and sought to introduce a report of a neuropsychological evaluation obtained by Plaintiff two days after the ALJ issued her decision. The Appeals Council denied the request, concluding that Plaintiff failed to show a reasonable probability that the report, alone or in combination with other record evidence, would result in a different administrative decision. (Notice of Appeals Council Action, ECF No. 9-2.) Plaintiff challenges the decision to deny the introduction into evidence of the neuropsychological report.

STANDARD OF REVIEW

When a claimant submits additional evidence after the ALJ makes a determination, the Appeals Council will consider the evidence “only where it relates to the period on or before the date of the hearing decision, and only if [the claimant shows] that there is a reasonable probability

that the evidence, alone or when considered with the other evidence of record, would change the outcome of the decision.” 20 C.F.R. § 405.401(c). In addition, the claimant must demonstrate that the late filing was caused by (1) Social Security Administration action that misled the claimant; (2) impairment that prevented the claimant from making an earlier submission; or (3) an “unusual, unexpected, or unavoidable circumstance” beyond the claimant’s control. *Id.*²

Where the Appeals Council concludes that a claimant has not established a reasonable probability that the late evidence would change the outcome, a court may direct the ALJ to accept and consider the evidence only upon a finding that the Appeals Council’s assessment was based on “an explicit mistake of law or other egregious error.” *Mills v. Apfel*, 244 F.3d 1, 5 (1st Cir. 2001). Although the standard is high, the law recognizes that situations exist where “the Appeals Council may have ‘made a mistake’ in refusing to consider new evidence presented to it, depending on the ground it gave” and it permits the courts to correct mistakes that “can be readily discerned” when “no other means of relief exists.” *Id.* In other words, if the Appeals Council’s reasoning amounts to an egregiously erroneous assessment, a court should declare the error and remand for further proceedings. *Id.* at 6.³

² See also Social Security Administration, Hearings, Appeals, and Litigation Law Manual (HALLEX) I-3-3-6 (Dec. 27, 2012) (stating that the cause requirements apply in Region 1 (New England region)). As Defendant observes in her Response, apart from the regulations, the Social Security Act authorizes a reviewing court to “order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.” 42 U.S.C. § 405(g).

³ The First Circuit also noted that while the Appeals Council “is free to consider new material evidence regardless of whether there was good cause for not producing it earlier; the court is not free to order a remand absent such good cause.” *Mills*, 244 F.3d at 5 – 6. *Mills* has been interpreted as setting forth two circumstances that would support a remand order: “(i) when that evidence is new and material *and* a claimant demonstrates good cause for its belated submission and (ii) when, regardless of whether there is such good cause, the Appeals Council has given an ‘egregiously mistaken ground’ for its action in refusing review in the face of such late-tendered evidence.” *Alley v. Astrue*, No. 1:09-cv-636, 2010 WL 4386516, at *3, 2010 U.S. Dist. Lexis 115868, at *8 (D. Me. Oct. 28, 2010) (Mag. J. Recommended Decision, adopted Nov. 16, 2010).

Discussion

Plaintiff asserts that the February 17, 2013, Report of Neuropsychological Evaluation of Leah Baer, Psy. D. (ECF No. 13) establishes that Plaintiff has an extremely low level of cognition that is disabling, or at the very least would require further restrictions in the RFC finding. (Statement of Errors at 4-7.) Defendant contends that the Appeals Council did not err when it concluded that Plaintiff failed to establish a reasonable probability that the new evidence would result in a different conclusion on Plaintiff's disability applications. (Response at 5-6.) Additionally, Defendant argues that Plaintiff has failed to demonstrate "good cause" for the belated introduction of the evidence. (Response at 6-7.)

A review of the record reveals that Plaintiff has not demonstrated "good cause" for his failure to obtain the evaluation and report sufficiently in advance of the hearing in order to present the report at the hearing. First, Plaintiff's current applications for social security benefits had been pending for nearly 22 months as of the date of the ALJ's decision. Plaintiff, therefore, had a significant period of time within which to secure the evaluation during the course of the administrative proceeding. In addition, insofar as Plaintiff was in counseling during the pendency of his applications, he had access to professionals who could assist Plaintiff in arranging for the testing. Plaintiff's assertion that there is a limited availability of providers to conduct the tests is unavailing. The record lacks evidence to support the conclusion that Plaintiff's late submission is the result of the limited availability of providers to conduct the tests over a 22 – month period.

Plaintiff has also failed to demonstrate that the Appeals Council committed "egregious error" in its assessment of Plaintiff's request to present the additional evidence. In its denial of Plaintiff's request for review, the Appeals Council stated that it considered, *inter alia*, Dr. Baer's report, but concluded that "this information does not show a reasonable probability that, either

alone or when considered with the other evidence of record, would change the outcome of the decision.” (R. 2.) The decision is logical and consistent with the record evidence. While the ALJ noted the absence of intelligence testing and academic information when she determined that Plaintiff’s learning disability was not severe, the ALJ also relied upon some of Plaintiff’s demonstrated abilities in making the assessment. Furthermore, and perhaps more importantly, the ALJ considered Plaintiff’s education level, the nature of his education curriculum, and his ability to read, write and perform math as part of her assessment of Plaintiff’s RFC. (R. 26-32.) Given that the ALJ acknowledged and considered Plaintiff’s learning challenges, and given that upon assessment of Plaintiff’s overall capabilities the ALJ concluded that Plaintiff had the ability to perform simple tasks, the Appeals Council did not err when it determined that there was not a reasonably probability that the late evidence would produce a different result.

CONCLUSION

Based on the foregoing analysis, the Court affirms the administrative decision.

/s/ John C. Nivison
U.S. Magistrate Judge

Dated this 2nd day of July, 2015.

BOIS v. SOCIAL SECURITY ADMINISTRATION
COMMISSIONER
Assigned to: MAGISTRATE JUDGE JOHN C.
NIVISON
Cause: 42:405 Review of HHS Decision (DIWC)

Date Filed: 09/16/2014
Jury Demand: None
Nature of Suit: 863 Social Security:
DIWC/DIWW
Jurisdiction: U.S. Government
Defendant

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