

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

BECKY E. CHADBOURNE,)
)
 Plaintiff)
)
 v.)
)
 CAROLYN W. COLVIN, Acting)
 Commissioner of Social Security,)
)
 Defendant)

No. 2:14-cv-242-JHR

MEMORANDUM DECISION¹

The plaintiff in this Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal² contends that the administrative law judge unfairly “pre-judged” her claims, wrongly excluded several impairments as not severe at Step 2 of the sequential evaluation process, assigned her a residual functional capacity (“RFC”) that is not supported by substantial evidence, and wrongly rejected the opinions of her treating physicians. I affirm the commissioner’s decision.

In accordance with the commissioner’s sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff suffered from

¹ The parties have consented to have me preside over all proceedings in this case, including the entry of judgment. ECF No. 17.

² This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner’s decision and to complete and file a fact sheet available at the Clerk’s Office, and the commissioner to file a written opposition to the itemized statement. Oral argument was held before me on March 11, 2015, pursuant to Local Rule 16.3(a)(2)(D), requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority, and page references to the administrative record.

fibromyalgia, degenerative joint disease of the left knee, carpal tunnel syndrome, and obesity, impairments that were severe but which, considered separately or in combination, did not meet or medically equal the criteria of any impairment listed in Appendix 1 to 20 C.F.R. Part 404, Subpart P (the “Listings”), Findings 3-4, Record at 22-24; that she had the RFC to perform work at the sedentary exertional level, except that she could stand and/or walk for two hours in an eight-hour workday, could balance, stoop, kneel, crouch, crawl, and climb ramps or stairs only occasionally, and could never climb ladders, ropes, or scaffolds, Finding 5, *id.* at 25; that she was unable to perform any past relevant work, Finding 6, *id.* at 32; that, given her age (38 on the alleged date of onset of disability, December 1, 2006, at least high school education, work experience, and RFC, and using the Medical-Vocational Rules in Appendix 2 to 20 C.F.R. Part 404, Subpart P (the “Grid”) as a framework for decision-making, there were jobs existing in significant numbers in the national economy that the plaintiff could perform, Findings 7-10, *id.*; and that, therefore, she had not been under a disability, as that term is defined in the Social Security Act, at any time from the alleged onset date through the date of the decision, September 12, 2012, Finding 11, *id.* at 33. The Appeals Council declined to review the decision, *id.* at 1-3, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner’s decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge reached Step 5 of the sequential evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain substantial evidence in support of the commissioner’s findings regarding the plaintiff’s RFC to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

The plaintiff’s statement of errors also implicates Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at Step 2, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence “establishes only a slight abnormality or [a] combination of slight abnormalities which would have no more than a minimal effect on an individual’s ability to work even if the individual’s age, education, or work experience were specifically considered.” *Id.* (quoting Social Security Ruling 85-28).

I. Discussion

A. Step 2 Issues

The plaintiff contends that the administrative law judge should have found her irritable bowel syndrome, urinary incontinence, diabetes, unspecified multiple impairments in the weight-bearing joints, unspecified pulmonary impairments, and emotional impairments to be severe. Plaintiff’s Statement of Errors (“Itemized Statement”) (ECF No. 13) at 6-11.

With respect to the irritable bowel syndrome, the administrative law judge said:

The undersigned also finds that the claimant’s irritable bowel syndrome is controlled with proper diet and medication and has no more than a

minimal effect on her ability to perform basic work-related activities on a regular and continuing basis (Exhibits 4F and 23F). Although she reported that she requires ready access to a bathroom, as she has between four and eight bowel movements daily, the treatment records do not reveal this level of severity (Exhibits 5E, pp. 1-2; 23F; 29F; and 32F). Accordingly, this is also a “non-severe” medically determinable impairment.

Record at 23. The plaintiff asserts that this impairment “would interfere with the Plaintiff’s ability to maintain regular attendance and be punctual, and consistently complete[] a normal workday and work week without interruption from physically based symptoms.” Itemized Statement at 7. The only pages of the record cited by the plaintiff to support this assertion are taken from a document entitled “Treating Source Statement-RFC” signed by Eugene Ferguson, M.D. Record at 1344-48. The cited pages establish only that the plaintiff’s fibromyalgia, hip pain, knee pain, diabetes, COPD, bipolar disorder, depression, obstructive sleep apnea, irritable bowel syndrome, obesity and carpal tunnel syndrome, taken together, would cause the plaintiff to be unable to maintain regular attendance and be punctual within customary and usually strict tolerances, to consistently complete a normal workday and workweek without interruption from physically-based symptoms, to consistently complete a typical 8-hour workday or 40-hour workweek without interruption from psychologically-based symptoms, and to perform at a consistent pace without more than the minimum number and length of required rest periods. *Id.* at 1344-45.

With the exception of the limitation due to psychologically-based symptoms, it is not possible to tell which or how many of these limitations are due to the irritable bowel syndrome alone. Nor is there any explanation by Dr. Ferguson of the manner in which the irritable bowel syndrome interacted with the other listed impairments to create the stated limitations. Without such information, the plaintiff cannot establish that the outcome of her claims would be different if her irritable bowel syndrome had been found to be a severe impairment, which is required in

order to qualify for remand on this basis. *E.g., Shedd v. Colvin*, No. 1:14-cv-00086-JAW, 2015 WL 347825, at *3 (D. Me. Jan. 26, 2015).

Particularly in light of the many entries in the plaintiff's medical records noting that the irritable bowel syndrome was under control with medication and diet, as cited by the administrative law judge (Record at 23), *e.g., id.* at 828, 844, 847, 461, 572, 875, 896, 955, the plaintiff cannot establish reversible error with regard to this impairment. I note also that Dr. Hall, a state-agency reviewer who reviewed evidence of the plaintiff's irritable bowel syndrome, did not find it to be a severe impairment. *Id.* at 136, 142. Further, the plaintiff's reference to urinary incontinence in the same sentence with her reference to irritable bowel syndrome is not supported by her citation to Dr. Ferguson's form, which does not mention that impairment. *Id.* at 1344. The court will, therefore, not consider it further.

With respect to her diabetes, the plaintiff asserts that its management "requires unscheduled breaks to test blood sugars, take in food and/or administer additional insulin." Itemized Statement at 7. The sole page of the record cited in support of this assertion, a page of Dr. Ferguson's Treating Source Statement, supports this assertion. Record at 1346. However, there is no explanation of the way in which these needs would necessarily interfere with the plaintiff's work to a degree that would make any particular work impossible. *See, e.g., Webber v. Colvin*, No. 2:13-cv-00236-NT, 2014 WL 3530705, at *4 (D. Me. July 15, 2014) (rejecting claim that diabetes mellitus would require additional breaks during day when unaccompanied by explanation and when record indicated it was well controlled with medication). The administrative law judge wrote the following on this topic:

The undersigned also finds that the claimant's diabetes mellitus is generally well controlled when she is compliant with her treatment regime. On April 12, 2011, she acknowledged that her noncompliance with treatment recommendations, including following a proper diet and

lifestyle changes are the primary reason that her diabetes has not been under control (Exhibit 9F, p.2). Subsequent treatment records reveal steady improvement with proper diet and consistent testing and medication (Exhibits 24F and 32F). Accordingly, the undersigned finds that the claimant's diabetes mellitus has no more than a minimal effect on her ability to perform basic work-related activities, and is therefore[] a "non-severe" medically determinable impairment.

Record at 23. The administrative law judge's evaluation is supported by substantial evidence in the record. *E.g., id.* at 1226, 1228, 1230, 1233. The plaintiff takes nothing from her argument concerning diabetes mellitus.

The plaintiff's failure to identify the joints, and the specific impairments of each, in her next asserted Step 2 error ("multiple impairments in the weight-bearing joints," Itemized Statement at 7), dooms her effort to rely on these impairments. She cites only page 1346 of the record in support of this argument, and that page does not refer at all to impairment of any weight-bearing joints. The plaintiff's general reference to her "pulmonary impairments" with respect to Step 3, Itemized Statement at 7, suffers from the same lack of specificity.

The plaintiff devotes most of her Step 2 argument to her claimed mental impairments, which she contends would "impact many basic non-exertional work functions including, but not limited to concentration, attention, ability to manage stress and adapt and the ability to meet employers' expectations of punctuality and regular reliable attendance." *Id.* The administrative law judge said the following about the severity of the plaintiff's claimed mental impairments:

The undersigned further finds that the claimant's mood disorder/bipolar disorder has no more than a minimal effect on her ability to perform basic work-related mental activities, and is therefore[] a "non-severe" medically determinable mental impairment. In so finding, the undersigned notes that the claimant has the following degree of limitation in the broad areas of functioning set out in the disability regulations for evaluating mental disorders and in the mental disorders listings in 20 CFR, Part 404. Subpart P, Appendix 1: *mild* restriction in activities of daily living, *mild* difficulties in maintaining social functioning, *mild* difficulties in maintaining

concentration, persistence or pace, and *no* episodes of decompensation, each of extended duration.

* * *

In addition to her physical impairments, the claimant also reported a history for depression and bipolar disorder. On April 12, 2011, she presented to Dr. Ferguson reporting worsening depression secondary to multiple psychosocial stressors and requested a referral for a psychiatric evaluation (Exhibits 9F, pp. 8-9; and 15F). Cameron Ives, LCSW (Mr. Ives), the claimant's treating therapist, later diagnosed her with a mood disorder, not otherwise specified and an anxiety disorder, not otherwise specified (Exhibit 21F, p. 20). On June 27, 2011, she presented to the emergency room after attempting suicide by overdosing on her medications (Exhibits 20F, pp 10-22; 21F, pp. 14-15; and 31F, pp. 31-34). Michael E. Kelley, M.D. (Dr. Kelley) based on the claimant's history and his examination diagnosed the claimant with bipolar disorder, depressed without psychotic features (Exhibit 20F, pp. 10, 14). Kr. Kelley, on discharge, recommended that the claimant follow up with an intensive outpatient program (Exhibit 20F, p. 11).

On August 5, 2011, the claimant presented to psychiatrist Kevin Kavookjian, M.D. (Dr. Kavookjian) for medication management after completing her outpatient program (Exhibit 31F, pp. 31-34). Dr. Kavookjian, based on his examination, diagnosed the claimant with bipolar disorder and continued her medications (Exhibit 31F, p. 34). Thereafter, the claimant reported that she continues to be irritable with frequent mood swings (Exhibit 31F, pp. 20-34). However, Dr. Kavookjian, on examination, noted the claimant as euthymic with expressive and appropriate affect, and intact attention, concentration, and memory (Exhibit 31F, pp. 21-22, 24-25, 28-29). Although subsequent treatment records reveal a waxing and waning of her symptoms, after Dr. Kavookjian added Lithium to her medication regime, the claimant reported feeling less depressed and less agitated (Exhibit 31F, pp. 1-19). For example, [o]n January 6, 2012, she reported to Maylene Peralta, M.D. (Dr. Peralta), that she is feeling less depressed on Lithium (Exhibit 24F, p.1). On February 23, 2012, she reported to Dr. Ferguson that her mood is well controlled with her medications (Exhibit 32, p.12). On March 2, 2012, she reported to Dr. Kavookjian that she feels as if a weight has been lifted off her shoulders after separating from her husband and moving out (Exhibit 31F, p. 7). Although she temporarily lived in a shelter, she later reported that she is doing well and making positive choices (Exhibit 31F, pp. 3, 7). Finally, on May 21, 2012, she reported to Dr. Kavookjian that she has moved into a new apartment, is making life changes, and remains positive (Exhibits 31F, p.1 and 32F, p.1).

The undersigned attributes great weight to the psychiatric review technique assessments of Brian Stahl, Ph.D., and Leigh Haskell, Ph.D.,

the State agency psychological consultants, who opined that the claimant's affective disorder is a "non-severe" medically determinable mental impairment (Exhibits 5A and 6A, pp. 6-7, and 6F). Dr. Stahl and Dr. Haskell are thoroughly familiar with the Social Security Administration disability standard and based their opinions on a review of the medical evidence of record. Their opinions are consistent with this record and with the evidence of record as a whole.

Record at 23, 29-30 (emphasis in original) (detailed discussion of "C" listing factors omitted).

The plaintiff argues that the state-agency psychologists' reviews were "materially incomplete" because they were completed before her suicide attempt and her diagnosis of bipolar disorder. Itemized Statement at 8. However, the administrative law judge did not rely on those reports specifically with respect to the plaintiff's bipolar disorder. He carefully cited them only with respect to the plaintiff's diagnosis of an affective disorder, which did predate their reports. In addition, an administrative law judge is only barred from relying on the opinions of state-agency reviewers under these circumstances when the subsequent evidence calls into question those opinions. *See, e.g., Anderson v. Astrue*, No. 1:11-cv-476-DBH, 2012 WL 5256294, at *4 (D. Me. Sept. 27, 2012). That is not the case here, particularly given the administrative law judge's recitation of the record of improvement in the plaintiff's mental status after the suicide attempt. *See Strout v. Astrue*. Civil No. 08-181-B-W, 2009 WL 214576, at *8-*9 (D. Me. Jan. 28, 2009).

The administrative law judge sufficiently stated his reasons for rejecting Dr. Kavookjian's opinions concerning limitations caused by the plaintiff's mental impairments. Record at 31. In addition, the plaintiff's complaint that the administrative law judge only selected medical evidence to support his findings about the mental health impairments, Itemized Statement at 9, cannot prevail. So long as substantial evidence supports the administrative law judge's conclusions, it is precisely the role of the administrative law judge to choose among conflicting evidence. *E.g., Raymond v. Astrue*, No. 1:12-cv-92-DBH, 2012 WL 6913437, at * 5 (D. Me. Dec. 31, 2012).

Finally, the plaintiff argues that the administrative law judge “should have consulted a medical expert to address the new evidence [about mental impairment] in this case rather than attempt to interpret it as a layperson.” Itemized Statement at 10. As this court has repeatedly stated, the question of whether to consult a medical expert is within the commissioner’s discretion. *Webber*, 2014 WL 3530705, at *2.

B. RFC

The plaintiff next contends that the RFC assigned to her by the administrative law judge is “incomplete” because it does not include limitations on the use of her hands and arms resulting from her carpal tunnel syndrome, the impact of her severe left knee impairment, the fatigue caused by her fibromyalgia, and the postural effects of her obesity. She includes in this section of her itemized statement an attack on the administrative law judge’s alleged failure to consider the testimony of the medical expert, Dr. Webber, “more carefully.” Itemized Statement at 11-14.

The first problem for the plaintiff with this argument is that she does not identify the limitations on the use of her arms and hands resulting from her carpal tunnel syndrome that would change her RFC in a manner that would change the outcome of her claim. The same is true of her reference to the unspecified “impact” of her left knee impairment. In the absence of that information, these criticisms cannot provide the basis for a remand. *Du Nguyen v. Astrue*, No. 2:11-cv-189-NT, 2012 WL 975674, at *6 (D. Me. Mar. 21, 2012).³

With respect to the plaintiff’s fibromyalgia, the plaintiff mentions only her fatigue, and does not specify how the recognition of that fatigue would necessarily change the RFC assigned

³ The plaintiff contends that the RFC conclusion of Dr. J. B. Hall, a state-agency physician reviewer, is “incomplete and entitled to no weight” because he determined that the plaintiff’s fibromyalgia and obesity were her only severe physical impairments, based on “an incomplete medical record as it existed on June 27, 2011.” Itemized Statement at 12. She does not identify any later-submitted evidence that would necessarily change this opinion, and, in any event, only the effects of the plaintiff’s fibromyalgia and obesity remain to be considered in connection with the plaintiff’s challenge to the administrative law judge’s RFC, which is the section of her itemized statement where this particular contention is raised. *Id.* at 11-14.

to her by the administrative law judge. Again, the lack of that information is fatal to her challenge. Finally, with respect to her obesity, the plaintiff identifies its effect “on her ability to stand, walk, and manage exertional activities such as climbing stairs and sloped surfaces especially in combination with” her other claimed impairments. Itemized Statement at 12. This argument is somewhat puzzling, as the RFC assigned to the plaintiff by the administrative law judge specifies that the plaintiff may only occasionally balance, stoop, kneel, crouch, crawl, or climb ramps or stairs. Record at 25.

In addition, as the defendant points out, Defendant’s Opposition to Plaintiff’s Statement of Errors (“Opposition”) (ECF No. 14) at 16, the administrative law judge relied, Record at 30, on Dr. Hall’s assessment of the effect of the plaintiff’s obesity on her ability to perform work-related functions, *id.* at 138-40; all of Dr. Hall’s obesity-related limitations were included in the RFC. The plaintiff does not identify any other limitations that she contends should have been included in her RFC as a result of her obesity, nor does she suggest any further obesity-related limitation that would exclude the three jobs about which the vocational expert testified, *id.* at 32. Under these circumstances, she is not entitled to remand based on this argument. *Rucker v. Colvin*, Civil No. 2:13-CV-218-DBH, 2014 WL 1870731, at *3 (D. Me. May 8, 2014).

The plaintiff also contends that the administrative law judge “[made] up his own RFC” because the state-agency physicians’ opinions were “not reliable” and the administrative law judge, therefore, should have asked the medical expert who testified at the hearing, Dr. Webber, about the effects of each of the plaintiff’s claimed impairments. Itemized Statement at 13. She complains that the administrative law judge “rejected [Dr. Webber’s] opinions[,] explaining in a summary fashion that he did not believe the Plaintiff’s pain was as severe as the medical experts [opined] and because Dr. Webber’s conclusion that the Plaintiff was not sufficiently functional for

employment was an opinion on an issue that is reserved for the adjudicator[.]” *Id.* As error, she asserts that “Dr. Webber’s opinion was entitled to be more carefully considered.” *Id.*

However, unless the administrative law judge was required to adopt the opinion at issue, his failure to consider that opinion “more carefully” cannot constitute reversible error. In addition, I have already rejected that plaintiff’s thesis that she has shown that the state-agency physicians’ opinions were inherently unreliable. The administrative law judge addressed Dr. Webber’s opinion as follows:

The undersigned attributes little weight to the medical opinion testimony of Peter B. Webber, M.D., an impartial medical expert, who testified—consistent with Dr. Ferguson’s opinion—that the claimant [was] not functional. The undersigned, based on the foregoing, does not find the claimant’s subjective complaints of pain as severe as she alleges. Moreover, Dr. Webber’s opinion, in this respect, is conclusory and touches upon an opinion reserved to the Commissioner.

Record at 31. This statement of the administrative law judge’s reasons for rejecting Dr. Webber’s opinion is minimally sufficient. Dr. Webber’s opinion that the plaintiff was not “very functional,” *id.* at 124, is certainly an opinion on the ultimate issue, which is reserved to the commissioner.⁴

C. Treatment of Treating Source Opinions

The plaintiff next faults the administrative law judge for not “acknowledg[ing] the specific opinions” of her treating physicians. Itemized Statement at 14-18. Without citation to authority, she asserts that a treating physician’s opinion “should be adopted [by the administrative law judge] if supported by substantial evidence” and that an administrative law judge must assess a treating

⁴ At oral argument, the plaintiff’s attorney contended that the administrative law judge “ignored” Dr. Webber’s answer to the following question posed by the plaintiff’s attorney at the hearing. “Q Okay; so taking into account all of these different medical conditions do you have—are there points of disagreement between you and Dr. Ferguson regarding the – A. No. Q RFC?” Record at 125. However, as set out in the next subsection of this decision, I conclude that the administrative law judge did not err in rejecting Dr. Ferguson’s conclusions; thus, any error in failing to discuss Dr. Webber’s concurrence with those opinions could only be harmless.

physician's opinions about work-related functions on a function-by-function basis. *Id.* at 15. As an initial matter, each of these assertions is an incorrect statement of applicable law.

There is no requirement that a treating source's opinion be adopted "if supported by substantial evidence." The applicable regulations, 20 C.F.R. §§ 404.1527 and 416.927, set the requirements for evaluating of opinion evidence. Once a decision is made that a treating source's opinion will not be given controlling weight--a status which the plaintiff in the instant case does not seek for the opinions of her treating physicians--an administrative law judge is directed to consider certain specific factors "in deciding the weight we give to any medical opinion." 20 C.F.R. §§ 404.1527(c), 416.927(c). Courts, including this court, have frequently upheld decisions of administrative law judges that credit the opinions of state-agency reviewing physicians over those of treating physicians, without regard to the question of whether substantial evidence supported the opinions of the treating physicians. *See, e.g., Enman v. Colvin*, Civil No. 2:13-cv-307-DBH, 2014 WL 5394577, at *4-*5 (D. Me. Oct. 21, 2014). The substantial evidence standard applies to the court's review of the findings of the administrative law judge.

Nor is an administrative law judge required to address each of the work-related limitations included in a treating source's opinion individually before rejecting all or part of that opinion. Social Security Ruling 96-8p, cited by the plaintiff in this regard, Itemized Statement at 15, cannot be so read. The Ruling is entitled "Titles II and XVI: Assessing Residual Functional Capacity in Initial Claims." Social Security Ruling 96-8p, reprinted in *West's Social Security Reporting Service Rulings* (Supp. 2014) at 143. It says nothing about the evaluation of opinion evidence.

The plaintiff attacks three "inferences" that she contends were drawn incorrectly by the administrative law judge. Itemized Statement at 16-17. She asserts that other inferences are equally possible to draw. *Id.* That may well be, but the alleged inferences are far from being the

only reasons given by the administrative law judge for rejecting some of Dr. Ferguson's specific limitation opinions. This fact, along with the fact that the inferences allegedly drawn are not implausible, deprives this argument of any force for the plaintiff's desired remand.

D. Basic Fairness

The first ground for remand asserted in the plaintiff's itemized statement, considered last here because it depends upon the resolution of other issues, is an assertion that "[t]he content of the ALJ's Decision in light of the actual evidence indicates that the decision was predetermined." *Id.* at 5. She offers as the basis for this conclusion, which she says requires remand under "standards for basic fairness[,]" *id.* n.1, a list of all of the other grounds for remand discussed later in her itemized statement. She proffers no other evidence in support of this serious allegation. I have rejected the other bases for remand that the plaintiff presents, and this allegation must accordingly be rejected as well.

II. Conclusion

For the foregoing reasons, the commissioner's decision is **AFFIRMED**.

Dated this 21st day of April, 2015.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

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