IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JACINDA M. BIRCH,

Plaintiff,

v.

ANDREW M. SAUL, Commissioner,
Social Security Administration,

Defendant.

OPINION AND ORDER

19-cv-313-wmc

Plaintiff Jacinda Birch seeks judicial review of a final decision denying her application for Social Security Disability Insurance Benefits under 42 U.S.C. § 405(g). She raises four broad arguments on appeal: (1) the ALJ erred in finding that Birch had a high school education, thus leading to a misapplication of the grid rules; (2) Birch's migraines, fibromyalgia, depression, and her combined impairments meet or equal a listing, and thus she is presumptively disabled; (3) the ALJ did not properly weight the opinion evidence; and (4) the ALJ should have included an off-task and absenteeism limitation. In addition to reviewing the ALJ's decision, the parties' briefing and the record below, the court held oral argument on Tuesday, April 28, 2020. For the reasons that follow, the court will affirm the decision of the Commissioner of Social Security.

BACKGROUND

Birch filed this application for disability and disability insurance benefits on June 30, 2015. Birch had previously worked as a Certified Nursing Assistant ("CNA"), but on November 25, 2014, she was injured while lifting a patient. After her injury Birch continued to work on light duty, but ultimately was terminated on June 11, 2015, her

claimed disability onset date. On May 1, 2016, she returned to work and continued to be employed as a CNA through March 31, 2017. (AR at 27.) Birch was 49 years old when she initially filed her application, but turned 50 three months later on September 12, 2015.

A. Medical Record

In her application, Birch alleged disability due to a combination of physical and mental conditions, including neck and shoulder pain, cervical disc disorder and radiculopathy, fibromyalgia, anxiety/depression, and migraine headaches. (AR at 14, 339.) At the outset, the court observes that while various medical records do indicate that Birch has a *history* of migraines, fibromyalgia, and depression (AR at 353, 355, 364, 416), the record contains only brief mentions regarding actual treatment for, or complaints of, these alleged impairments, all of which are included in the discussion below.

Before Birch's alleged onset date of June 11, 2015, the medical record reflects previous treatment for "cervical strain/cervical disc disease." (AR at 423, 426, 433.) Birch continued to receive periodic treatment for her cervical disc disease and accompanying neck pain through 2015. (*See* AR at 355-58, 353-54, 544-46.) However, on May 6, 2015, Birch's primary care physician, Dr. Jon Radcliffe, "discharged" her "back to work without restriction" (AR at 354), and a month later, on June 18, 2015, he wrote that Birch could return to work on "very light duty," (AR at 515).

Birch was referred by the Disability Determination Bureau to Sandra Frodin, Ph.D., for a mental status evaluation, which was completed on September 16, 2015. (AR at 517.) Frodin found that Birch did not have a psychiatric history, but was "symptomatic for depression and anxiety with sleep disruption and memory issues." (AR at 517.) She

further opined that Birch had: a marked limitation in her ability to maintain concentration, attention, and work pace; a moderate to marked limitation in her ability to understand remember, and carry out simple instructions, her ability to withstand routine work stresses, and her ability to adapt to changes; and a mild to moderate limitation in her ability to respond appropriately to supervisors and co-workers. (AR at 520.)

On January 25, 2016, Birch also underwent a discectomy and interbody fusion of the C5-6 level of her cervical spine. (AR at 548-62.) Immediately following the surgery, she was prohibited from lifting more than ten pounds, pushing or pulling, lifting overhead, bearing weight on her head, neck, or shoulder, and repetitive-type activities. (AR at 564.) Birch's surgeon, Dr. Jerry Davis, further indicated that she would be "totally disabled" until mid March of 2016. (AR at 610.)

On January 20, 2016, psychologist Frodin again examined Birch. (AR at 535.) Her conclusions remained largely unchanged (*compare* AR at 520 *with* AR at 535), except that she found Birch to have a marked limitation in the ability to withstand routine work stresses. (AR at 535.) Next, a state agency psychological consultant, Lisa Fitzpatrick, Ph.D., reviewed Birch's record on January 30, 2016, and found that she had a history of depression and that her depression qualified as a "severe" impairment. (AR at 96.)

In April of 2016, Birch continued to report pain in her neck and right shoulder, which she said was "very limiting and disabling." (AR at 612.) In contrast, Dr. Davis noted that x-rays "show a stable and strong construct at the C5-6" and that the surgery was "technically successful," and he was "unable to explain the ongoing symptoms that she is having." (AR at 612.) Even so, Davis indicated that he would "complete a return-to-

work note stating that she is unable to return to work." (AR at 612.) Later in April, Birch was seen by Dr. Joseph Binegar, who specializes in physical medicine and rehabilitation. (AR at 619.) Birch continued to report "persistent" pain and a variety of symptoms, including headaches, loss of appetite, and impaired thinking. (AR at 619.) Nevertheless, Dr. Binegar found that her "[s]urgical fusion appears to be stable," and ultimately concluded that: "it is reasonable for the patient to work at very light duty with rare mandatory positioning of the cervical spine. She should be allowed to alternate tasks and change positions as needed." (AR at 621.)

Consistent with this diagnosis, Birch began working again as a CNA at light duty on May 1, 2016. (AR at 27.) By August 19, however, she reported continued neck and upper back pain to Dr. Binegar, who adjusted her medications and decreased her work restrictions to "light duty with rare mandatory positioning of the neck." (AR at 724.) Four months later in a follow-up appointment with Dr. Binegar, she reported that her neck and upper back pain continued, although she reported that physical therapy had been "beneficial" and they discussed further treatment options, including trigger point injections. (AR at 739.) At that point, Dr. Binegar ordered a "permanent restriction[] of light duty with rare mandatory positioning of the neck." (AR at 739.)

On December 21, 2016, Birch met again with her primary care physician due to "numerous vague symptoms," including "episodic headaches" and fatigue. (AR at 747.) This time, Dr. Radcliffe wrote that he "suspect[ed] her complaints are related to her fibromyalgia and depression and anxiety," and he recommended a consultation with psychiatry. (AR at 749.) A note subsequently indicated that as of September 2017, Birch

had been placed on a waiting list for treatment at the Behavioral Health Center. (AR at 763.)

Birch stopped working again in March of 2017. (AR at 27, 57.) The next month, Birch reported to Dr. Radcliffe that she felt better, although she still had "some pain" in her neck, particularly in the evening. (AR at 755.) Dr. Radcliffe noted that Birch had stopped fluoxetine (aka Prozac) on her own accord three months earlier. (AR at 755.) Dr. Radcliffe concluded: "Pain is pretty well controlled generally. She has no problems with mood, speech, or depression symptoms. Generally feels well at this time." (AR at 757.) Six months later, in October of 2017, Birch met with Dr. Radcliffe after her neck pain problems "worsened a bit" over the previous few weeks. (AR at 767-69.) He prescribed a short trial of nabumetone. (AR at 769.)

On February 26, 2018, Dr. Radcliffe completed two questionnaires in which he opined in relevant part that:

- Birch would need to be absent more than four days per month due to her impairments. (AR at 778, 783.)
- Birch would likely be off task for 20% of a typical workday. (AR at 783.)
- Birch's physical condition was affected by depression, anxiety, and fibromyalgia. (AR at 776.)
- Birch experienced moderate to severe migraines daily. (AR at 781.) She experienced various symptoms associated with her migraines, including nausea/vomiting, malaise, photophobia, throbbing pain, inability to concentrate, impaired sleep, and visual disturbances. (AR at 781.)
- In the field "Describe treatment and response" for Birch's headaches, Dr. Radcliffe simply wrote: "excedrin, nabumetone, gabapentin." (AR at 783.)
- Birch had chronic pain in her right side neck and shoulder that significantly limited her range of motion. (AR at 774.)

- Birch could not walk more than a block without severe pain or rest. (AR at 776.)
- Birch could only sit, stand or walk for less than 2 hours out of an 8-hour day respectively and she could only rarely lift up to 20 pounds. (AR at 777.)

As to the state agency opinions, after reviewing her medical record, both Mina Khorshidi, M.D., and Syd Foster, M.D., concluded that Birch could perform light work (AR at 87, 103). Dr. Foster additionally opined that Birch could not perform work that involved overhead reaching with her right arm. (AR at 99.) Lastly, in contrast to state agency psychological consultant Lisa Fitzpatrick -- who had previously opined that Birch was moderately limited in her activities of daily living and in maintaining concentration, persistence, and pace, and found her depression to be a "severe" impairment (AR at 97) -- state agency psychological consultant, Esther Lefevre, Ph.D., concluded that Birch's depression resulted in no repeated episodes of decompensation and only mild restriction of activities of daily living, difficulties in maintaining social functioning, and difficulties maintaining concentration, persistence, and pace. (AR at 84.) She accordingly concluded that Birch's depression was not a "severe" impairment. (*Id*.)

B. Educational Records

A variety of records indicate that Birch has a GED. (*See* AR at 215, 87, 104, 518.) Yet the prehearing memo memorandum submitted by plaintiff's counsel to ALJ Giesen provides: "Education: High school dropout at age 16. Claimant attended WWTC and received her certification as a nursing assistant in 2002." (AR at 329.) Similarly, certain medical records indicate that Birch dropped out of high school, although they do not say whether or not Birch thereafter received a GED. (*See, e.g.*, AR at 374.)

Then, after ALJ Giesen issued her decision, plaintiff wrote a letter to the Social Security Appeals Counsel, which provides in relevant part:

> Prior to the hearing on March 22, 2018, before ALJ Deborah M. Giesen, we filed a Pre-Hearing Memorandum on behalf of the claimant . . . . The claimant does not have a high school education and never completed her GED. This is supported by the enclosed fax from Western Technical College wherein they state: "Cindy, we have no record that you passed all five sections of the GED exam . . . ."

(AR at 347.)

C. Hearing

After her claim was denied initially and on reconsideration, Birch requested a hearing before an ALJ. (AR at 25.) On March 22, 2018, ALJ Deborah Giesen conducted a hearing, at which Birch, her counsel, and vocational expert Mitchell Norman appeared. (AR at 25.) During that hearing, the ALJ inquired into Birch's education:

> Q Okay. My records show that you have a high school equivalency diploma, a GED. Is that correct?
> A I have a, I quit school when I was 16, so I don't have no GED that I know of.
> . . .
> Q Okay. I'm looking at Exhibit 1E, a disability report it shows, adult face-to-face with the claimant. . . . It says GED completed 2002. So is that an error?
> A I'm not sure, Your Honor. I went in 2002 and got my CNA license and I thought I got a GED, but I'm not for sure if I got a certificate or not. I've never found one.
> . . .
> Q Okay. So why did you tell the Social Security employee when you filled out this report that you had a GED that you obtained in 2002?
> A Because I thought it all went together with my CNA license. I thought you had to have a GED to get your CNA license.

(AR at 51.)

The ALJ and Birch's attorney also questioned her limitations. At the hearing, Birch testified that she experienced pain in her neck and shoulders if she drove for extended periods. (AR at 60.) Birch further explained that she had been diagnosed with fibromyalgia in 2008 or 2009 for which she took gabapentin, and that the fibromyalgia caused pain throughout her body, making it difficult to walk. (AR at 61, 63, 65, 67.) Birch also reported frequent and severe migraines. (AR at 63, 65, 68.) Finally, she testified that she was diagnosed with depression in 1989 and that she took fluoxetine (aka Prozac), but had not seen a psychiatrist or a counselor since 2015. (AR at 62.)

Ultimately, the ALJ posed the following hypothetical to the VE:

> Please consider an individual who was 49 years of age at the alleged onset date and is currently 52 years of age with a high school education and past work as a certified nursing assistant as you just described who has a capacity for light work as defined in the regulations with no constant static positioning of the neck, essentially where the, you know, neck where the head wouldn't move and occasional reaching overhead with the right upper extremity.

(AR at 71-72.) The ALJ then added the limitation of "simple routine tasks with no more than occasional interaction with the public" to the hypothetical. (AR at 72.) Birch's attorney did not object to this hypothetical as posed by the ALJ. (AR at 74-75.) Based on the hypothetical, the VE concluded that the jobs of mail clerk, inspector of plastic products, and gasket inspector could be performed and existed in sufficient numbers in the national economy. (AR at 72.)

D. ALJ Decision

On April 10, 2018, ALJ Giesen issued her written decision. (AR at 39.) Before

finding Birch not disabled, the ALJ considered Birch's claim under the five-step sequential framework set forth in the regulations. (AR at 25-39.) At step one, the ALJ found that Birch had engaged in substantial gainful activity after her alleged onset date, but that there had been a continuous 12-month period during which Birch did not engage in substantial gainful activity. (AR at 27-28.) At step two, the ALJ found that Birch had the following severe impairments: "degenerative disc disease of the cervical spine status post-surgery; right shoulder bursitis and migraine headaches." (AR at 28.) However, the ALJ found that Birch's major depressive disorder did not cause more than minimal limitations and, therefore, was nonsevere. (AR at 28.) In making this finding, the ALJ considered the four areas of mental functioning set forth in the regulations, concluding that Birch had either a mild limitation or no limitation in each of the four areas. (AR at 28-29.) At step three, the ALJ found that none of Birch's impairments met or equaled the severity of a listing. (AR at 30.)

At step four, the ALJ concluded that Birch had the residual functional capacity ("RFC") to perform light work, except that Birch is "limited to work that does not involve constant static positioning of the neck . . . can occasionally reach overhead with her right upper extremity and . . . is limited to work involving only simple, routine tasks and only occasional interaction with the public." (AR at 30.) In arriving at this RFC, the ALJ discussed Birch's medical records and considered Birch's own statements regarding her limitations. (AR at 30-38.) Before reaching this formulation, the ALJ considered the various opinions in the record. Of particular relevance to this appeal, ALJ Giesen gave Dr. Radcliffe's opinions "very little weight," and she gave Dr. Binegar's and the state agency

medical consultant's opinions "significant weight." (AR at 36-37.)

Finally, at step five, the ALJ made the following findings: Birch could not perform any past relevant work; Birch had at least a high school education and is able to communicate in English; considering Birch's age, education, work experience, and RFC, there existed various jobs in significant numbers in the national economy that Birch could perform. (AR at 38.) The ALJ discussed the Medical-Vocational Guidelines, and noted that "*[i]f* the claimant had the residual functional capacity to perform the full range of light work, a finding of 'not disabled' would be directed by Medical-Vocational Rule 202.21 and Rule 202.14." (AR at 39 (emphasis added).) Ultimately, however, because Birch's ability to perform all of the requirements of light work were "impeded by additional limitations," the ALJ relied on the testimony by the VE, who had concluded that Birch could perform jobs such as mail clerk, inspector of plastic products, or gasket inspector. (AR at 39.) Based on these findings, the ALJ concluded that Birch was not disabled under the regulations. (AR at 39.)

OPINION

The standard by which a federal court reviews a final decision by the Commissioner of Social Security is well settled. Findings of fact are "conclusive," so long as they are supported by "substantial evidence." 42 U.S.C. § 405(g). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). When reviewing the Commissioner's findings under § 405(g), the court cannot reconsider facts, re-weigh the evidence, decide questions of credibility or otherwise substitute its own judgment for that

of the ALJ. *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000). Thus, where conflicting evidence allows reasonable minds to reach different conclusions about a claimant's disability, the responsibility for the decision falls on the Commissioner. *Edwards v. Sullivan*, 985 F.2d 334, 336 (7th Cir. 1993).

At the same time, the court must conduct a "critical review of the evidence" before affirming the Commissioner's decision. *Edwards*, 985 F.2d at 336. If the Commissioner's decision lacks evidentiary support or adequate discussion of the issues, then the court must remand the matter. *Villano v. Astrue*, 556 F.3d 558, 562 (7th Cir. 2009). Indeed, even when adequate record evidence exists to support it, the Commissioner's decision will not be affirmed if it does not build an accurate and logical bridge from the evidence to the conclusion. *Berger v. Astrue*, 516 F.3d 539, 544 (7th Cir. 2008); *Sarchet v. Chater*, 78 F.3d 305, 307 (7th Cir. 2006).

I. Educational Attainment

The Medical-Vocational Guidelines (commonly known as the "grid") can in some circumstances be used by an ALJ to evaluate whether significant number of jobs exists in the national economy that a social security disability claimant can perform. *See Warmoth v. Bowen*, 798 F.2d 1109, 1110 (7th Cir. 1986). When a claimant's RFC, age, education, and work experience coincide with all the criteria of a particular grid rule, the rule directs a conclusion of disabled or not disabled. 20 C.F.R. § 404.1569; 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(b). "Application of the grid is precluded, however, in cases where a claimant's non-exertional limitation restricts the full range of employment opportunities at the level of work that he is physically capable of performing; in such cases, resolution of

the issue generally will require consultation of occupational reference materials or the services of a vocational expert." *Warmoth*, 798 F.2d at 1110 (internal citations omitted).

Plaintiff first argues that a finding of disability is compelled under the grid rules. (Pl.'s Br. (dkt. #8) 10-15.) Specifically, plaintiff contends that the ALJ incorrectly found that Birch had a high school education, when in fact she never completed high school or received a GED. (*Id.* at 10-15.) According to plaintiff, since education is one of the grid rule factors, this error led to the mistaken application of the grid, while proper consideration of Birch's RFC, education, age (or rather, her age three months after her alleged onset date, when she turned 50), and work experience under the grid rules compels a finding of disability. (*Id.* at 13-14.)

The Commissioner primarily contends that plaintiff's argument fails because she misapplies the grid rules. (Def.'s Opp'n (dkt. #12) 7.) The Commissioner points out that plaintiff mistakenly refers to Table 1, which relates to individuals who can perform only sedentary work, can in this case, the ALJ properly found that Birch could perform light work, with some limitations. (*Id.*) Even assuming Birch did not have a high school education, the Commissioner further argues that the grid rules under Table 2, which relate

to light work, would compel a finding of *not* disabled. (*Id.*)[1]

Both parties' arguments are flawed. While the Commissioner is correct that plaintiff's assertion that the grid rules compel a finding of disability depend on a citation to the wrong Table, the Commissioner's argument that a finding of *no* disability is compelled by the grid is also a misapplication of the regulations. The grid may only be employed when the claimant can perform the full range of work at the particular level (sedentary, light, etc.). *See Warmoth*, 798 F.2d at 1110. Here, the ALJ concluded that Birch could *not* perform a full range of light work, and imposed additional neck, reaching, and mental limitations. (AR at 30.) Indeed, the ALJ herself recognized that these additional limitations precluded her use of the grids and, therefore, she relied on testimony from a VE. (AR at 39.)

However, there remains the question of whether the ALJ's conclusion that Birch had a high school education -- an assumption the ALJ then included in her hypothetical to the VE -- amounts to reversible error. The record before the ALJ is murky as to Birch's educational background. Without citation, plaintiff's pre-hearing brief stated: "Education:

[1] In her *reply* brief, plaintiff argues for the first time that the ALJ erred in finding Birch capable of light work and should have limited her to sedentary work. (Pl.'s Reply (dkt. #13) 1-4.) For support, plaintiff points to Birch's testimony that she experienced pain that made it difficult for her to walk and to Dr. Radcliffe's February 2018 opinion. (*See id.* at 3 (citing AR at 31, 777).) At oral argument, plaintiff particularly emphasized the part of Dr. Radcliffe's opinion that indicated Birch could stand for no more than two hours in an eight-hour workday. However, plaintiff failed to raise this line of attack in her initial brief, and "an argument raised for the first time in a reply brief is forfeited." *Narducci v. Moore*, 572 F.3d 313, 324 (7th Cir. 2009). Regardless, this new argument has little substantive merit. As discussed in greater depth below, the ALJ offered numerous, persuasive reasons for giving Dr. Radcliffe's opinion "very little weight." Further, plaintiff's argument that Birch can only perform sedentary work is directly contradicted by the opinion of Birch's own treating physician, Dr. Binegar, as well as the opinions of both state agency consultants, all of whom found Birch capable of "light work." (*See* AR at 87, 103, 739.)

High school dropout at age 16. Claimant attended WWTC and received her certification as a nursing assistant in 2002." (AR at 329.) However, various other records -- including some apparently relying on claimant's input -- noted that Birch had received a GED. (*See* AR at 215, 87, 104, 518.) Moreover, when questioned about her education during the hearing, Birch's answers were equivocal. (*See* AR at 51.) While she initially stated "I don't have no GED that I know of," she later stated "I went in 2002 and got my CNA license and I thought I got a GED, but I'm not for sure if I got a certificate or note." (AR at 51.) Further, although represented by counsel at the hearing, Birch's attorney chose not to further clarify this factual issue. Nor did her attorney object when the ALJ assumed that Birch had a high school education when posing the hypothetical to the VE.

It is the *claimant's* responsibility to inform the Commissioner about his or her education if asked. 20 C.F.R. § 404.1412(a)(1)(iii). If such information is not produced, then the Commissioner must "make a decision based on information available." 20 C.F.R. § 404.1516. In addition, when a claimant is represented by counsel, an ALJ "is entitled to assume that the applicant is making his strongest case for benefits." *Ray v. Bowen*, 843 F.2d 998, 1006 (7th Cir. 1988) (quoting *Glenn v. Secretary of Health and Human Services,* 814 F.2d 387, 391 (7th Cir. 1987)). While "the ALJ also has a duty to ensure that the record is fully and fairly developed, even when the claimant is represented by counsel," *Elbert v. Barnhart*, 335 F. Supp. 2d 892, 905 (E.D. Wis. 2004) (citing *Hawkins v. Chater*, 113 F.3d 1162, 1164, 1168 (10th Cir. 1997), the ALJ here *did* inquire into Birch's education during the hearing. Given the multiple records indicating that Birch had a GED, her testimony during the hearing that she "thought [she] got a GED," and her counsel's failure to object

when the ALJ asked the VE to assume Birch had a high school education, the ALJ's finding that Birch had the equivalent of a high school education was reasonable or, more to the point, this court cannot say that it was *un*reasonable. *See Diaz v. Chater*, 55 F.3d 300, 305-06 (7th Cir. 1995) (court cannot reevaluate facts, and must uphold a decision so long as it is supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion") (quoting *Richardson v. Perales,* 402 U.S. 389, 401 (1971)).

Although *after* the hearing, plaintiff produced more persuasive evidence demonstrating that Birch did not receive a GED (*see* AR at 347), that evidence "cannot now be used as a basis for finding reversible error." *Rice v. Barnhart*, 384 F.3d 363, 366 n.2 (7th Cir. 2004). Accordingly, the court concludes that the ALJ did not err in finding that Birch had the equivalent of a high school education.

II. Listings

At step three, an ALJ considers whether the claimant's impairments are "equivalent to one of a number of listed impairments that the Secretary acknowledges are so severe as to preclude substantial gainful activity." *Bowen v. Yuckert*, 482 U.S. 137, 141 (1987) (citing 20 C.F.R. §§ 404.1520(d), 416.920(d); 20 CFR pt. 404, subpt. P, App. 1)). A claimant bears the burden to show that her impairments meet a listing and that her impairments satisfy all criteria of the listing. *Ribaudo v. Barnhart*, 458 F.3d 580, 583 (7th Cir. 2006). "If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled." *Id.* However, an impairment "must meet *all* of the specified criteria" to meet a listing, *Sullivan v. Zebley*, 493 U.S. 521 (1990) (emphasis in original), and an impairment "cannot meet the criteria of a listing based only on a

diagnosis." 20 C.F.R. § 404.1525(d).

Here, plaintiff argues that the "uncontroverted medical evidence" establishes that Birch's migraine headaches, fibromyalgia, and depression met or medically equaled a listing level impairment and that she is therefore presumptively disabled. (Pl.'s Br. (dkt. #8) 15.) In her written opinion, the ALJ wrote that she "considered all of the listings found in 20 CFR Part 404, Subpart P, Appendix 1, paying particular attention to listings 1.02 [major disfunction of a joint] and 1.04 [disorders of the spine]." (AR at 30.) She ultimately concluded that none of Birch's impairments met or equaled a listed impairment, explaining that "[t]he medical evidence does not document listing-level severity and no acceptable medical source has mentioned findings equivalent in severity to the criteria of any listed impairment, individually or in combination." (AR at 30.) She further noted that her conclusion was "supported by the opinions of the state agency medical consultants." (AR at 30.)

The Seventh Circuit has held that "an ALJ should mention the specific listings he is considering and his failure to do so, if combined with a 'perfunctory analysis,' may require a remand." *Ribaudo v. Barnhart*, 458 F.3d 580, 583 (7th Cir. 2006) (quoting *Barnett v. Barnhart,* 381 F.3d 664, 668 (7th Cir. 2004)). Here, the ALJ failed to even mention the listings for migraines, fibromyalgia, or depression. (*See* AR at 30.) Even if the ALJ erred in failing to specifically address the applicability of these listings, however, the error was harmless because plaintiff cannot show that any of the listings are satisfied. *See Lloyd v. Berryhill*, 682 F. App'x 491, 496 (7th Cir. 2017) (even where ALJ erred in failing to address the applicability of a listing, the error was harmless as plaintiff could not show that the

listing was met); *Zellweger v. Berryhill*, 354 F. Supp. 3d 921, 928 (N.D. Ill. 2018) ("[W]hen an ALJ's listing analysis is inadequate, there is a limited opening for the harmless error doctrine.") (internal quotations omitted).

First, as to Birch's migraines, plaintiff correctly points out that while there is no specific migraine listing, the Social Security Administration generally considers this impairment under Listing 11.02, which is the listing for epilepsy. *See Snow v. Berryhill*, 2019 WL 1873551, at *3 (N.D. Ind. Apr. 26, 2019); *Melissa G. v. Saul*, 2019 WL 4392995, at *6 (N.D. Ill. Sept. 13, 2019). The criteria for Listing 11.02B is: "Dyscognitive seizures, occurring at least once a week for at least 3 consecutive months despite adherence to prescribed treatment." § 11.02B (internal citations omitted). Therefore, if a claimant suffers from "more than one medically severe migraine headache per week despite at least three months of prescribed treatment" she may demonstrate equivalence to this listing. *Kwitschau v. Colvin*, 2013 WL 6049072, at *3 (N.D. Ill. Nov. 14, 2013) (citing Listing 11.02).

As previously noted, the medical records regarding Birch's migraine condition are sparse. Birch complains of "headaches" in three treatment notes, but none indicate the severity of the headaches or suggest that she received treatment for them. (*See* AR at 380, 620, 747.) As to frequency, one of the records suggests that she had experienced headaches (along with a litany of other symptoms) for five days in a row (AR at 380), and another indicated that her headaches were "episodic" (AR at 747). Plaintiff points to a number of records that include "migraines" as a historical diagnosis (*see* Pl.'s Br. (dkt. 38) 17), but a diagnosis alone cannot establish a listing-level impairment, *see* 20 C.F.R. § 404.1525(d).

The questionnaires completed by Dr. Radcliffe on February 26, 2018, do indicate that that Birch suffered daily migraines, the symptoms of which included nausea/vomiting, malaise, photophobia, throbbing pain, inability to concentrate, impaired sleep, and visual disturbances. (AR at 781.) Moreover, Dr. Radcliffe wrote that Birch was treated with excedrin, nabumetone, and gabapentin. (AR at 783.) However, there is no indication as to when this treatment began or ended, and plaintiff points to no medical record demonstrating that Birch experienced these symptoms "for at least 3 consecutive months despite adherence to prescribed treatment," as is required under Listing 11.02B. Moreover, the ALJ determined that Dr. Radcliffe's opinion was owed "very little weight," in part because "there is no indication in [Dr. Radcliffe's] treatment notes that the claimant reported migraine headaches that occurred with the frequency that his statement suggested." (AR at 36.)[2] Because plaintiff has failed to point to *any* evidence demonstrating that Birch's migraines continued for three months despite adherence to prescribed treatment, and also because the ALJ gave little weight to the only evidence on the record indicating that Birch's migraines occurred at least once per week, remand as to this issue is not warranted.

Second, plaintiff argues that her fibromyalgia medically equals a listing and that she should have been found to be presumptively disabled. (Pl.'s Br. (dkt. #8) 19.) As with migraines, fibromyalgia has no specific medical listing, and so a plaintiff must demonstrate

[2] Although this statement was located in the ALJ's discussion on Birch's RFC, the Seventh Circuit has held that "when an ALJ explains how the evidence reveals a claimant's functional capacity, that discussion may doubly explain how the evidence shows the claimant's impairment is not presumptively disabling under the pertinent listing." *Jeske v. Saul*, WL 1608847, at *5 (7th Cir. Apr. 2, 2020).

that she meets the criteria of an equivalent listing. *See* SSR 12-2p ("FM cannot meet a listing in appendix 1 because FM is not a listed impairment. At step 3, therefore, we determine whether FM medically equals a listing (for example, listing 14.09D in the listing for inflammatory arthritis)."). As the Commissioner points out, plaintiff fails to identify a medically equivalent listing, but inexplicably cites instead to the criteria for establishing fibromyalgia as a medically determinable impairment. (*See* Pl.'s Br. (dkt. #8) 20.) As the Commissioner further points out, plaintiff has failed to produce sufficient evidence to establish her fibromyalgia as a medically determinable impairment, much less one that is a presumptively disabling listing-level impairment.

To establish fibromyalgia as a medically determinable impairment, a plaintiff must produce medical evidence of: (1) a history of widespread pain -- that is, pain in all quadrants of the body -- for at least three months; (2) repeated manifestations of six or more fibromyalgia symptoms; and (3) evidence that other disorders that could cause these symptoms were excluded. SSR 12-2p. Under the regulations, an ALJ "cannot rely upon the physician's diagnosis alone." SSR 12-2p.

To support the claim that fibromyalgia is a medically determinable impairment in her case, plaintiff cites to a reference to Birch presenting with "numerous vague symptoms" in her medical records, which doctor "suspected" were related to fibromyalgia, depression, and anxiety. (*See* Pl.'s Br. (dkt. #8) 20-21 (citing AR at 747).) She also cites to a number of other records indicating Birch's historical diagnosis of fibromyalgia, but which otherwise do not relate to that condition. (*See id.* (citing various records).) Finally, plaintiff points to Birch's testimony that her fibromyalgia causes her pain that makes it difficult to walk.

(*See id.* (citing AR at 30-31).)

These records do not come close to establishing fibromyalgia as a medically determinable impairment, and certainly fall short of a listing-level impairment. In particular, plaintiff produced: no evidence demonstrating the exclusion by a medical provider of other disorders that may have caused her symptoms; no specific evidence of fibromyalgia symptoms; no evidence that her pain was in all quadrants of her body, nor that her pain had persisted for at least three months. Once again, that plaintiff was diagnosed with fibromyalgia by her doctors is not sufficient to establish the condition as a medically determinable impairment, let alone a listing-level impairment. *See* SSR 12-2p; 20 C.F.R. § 404.1525(d). Therefore, any error in the ALJ's discussion regarding fibromyalgia as a listing-level impairment is plainly harmless.

Third, plaintiff argues that her depression qualifies as a listing-level impairment.[3] As plaintiff acknowledges, Listing 12.04 provides:

> 12.04 Depressive, bipolar and related disorders (see 12.00B3), satisfied by A and B, or A and C:
>
> A. Medical documentation of the requirements of paragraph 1 or 2:
>
> 1. Depressive disorder, characterized by five or more of the following:
>
> a. Depressed mood;
> b. Diminished interest in almost all activities;
> c. Appetite disturbance with change in weight;
> d. Sleep disturbance;
> e. Observable psychomotor agitation or retardation;
> f. Decreased energy;
> g. Feelings of guilt or worthlessness;

[3] In her reply brief, plaintiff also argues for the first time that the ALJ's decision not to find Birch's depression a "severe" impairment was error. (*See* Pl.'s Reply (dkt. #13) 10.) Again, "an argument raised for the first time in a reply brief is forfeited." *Narducci*, 572 F.3d at 324.

h. Difficulty concentrating or thinking; or
i. Thoughts of death or suicide.

. . .

AND

B. Extreme limitation of one, or marked limitation of two, of the following areas of mental functioning (see 12.00F):
   1. Understand, remember, or apply information (see 12.00E1).
   2. Interact with others (see 12.00E2).
   3. Concentrate, persist, or maintain pace (see 12.00E3).
   4. Adapt or manage oneself (see 12.00E4).

   OR

C. Your mental disorder in this listing category is "serious and persistent;" that is, you have a medically documented history of the existence of the disorder over a period of at least 2 years, and there is evidence of both:
   1. Medical treatment, mental health therapy, psychosocial support(s), or a highly structured setting(s) that is ongoing and that diminishes the symptoms and signs of your mental disorder (see 12.00G2b); and
   2. Marginal adjustment, that is, you have minimal capacity to adapt to changes in your environment or to demands that are not already part of your daily life (see 12.00G2c).

While the listing expressly requires medical documentation of *five or more* symptoms of depression, as the Commissioner correctly notes, plaintiff only asserts the presence of four such symptoms. (*See* Pl.'s Br. (dkt. #8) 23 (citing to records that purport to show depressed mood, sleep disturbance, decreased energy, and difficulty concentrating or thinking).) Thus, even taking plaintiff's assertions at face value, she has not demonstrated that her depression rises to a listing-level impairment. Accordingly, even assuming the ALJ erred in failing to specifically mention her consideration of Listing 12.04 in her step 3

discussion, any alleged error was again harmless.[4]

Fourth and finally, plaintiff argues generally that all of these conditions, at least when considered in combination, meet a listing level impairment. (*See* Pl.'s Br. (dkt. #8) 19, 24.) However, plaintiff again fails to identify specifically what listing she believes is met or how the evidence would support that finding. (*See id.*) "A claimant cannot qualify for benefits under the 'equivalence' step by showing that the *overall functional impact* of his . . . combination of impairments is as severe as that of a listed impairment." *Sullivan v. Zebley*, 493 U.S. 521, 531 (1990) (emphasis added). Rather, she must specifically demonstrate that her combined impairments satisfy the criteria of a particular listing. 20 C.F.R. § 404.1426(a)(3). Plaintiff has not done so here, and so once again, her argument necessarily fails.

III. Opinion Evidence

Plaintiff next argues that the ALJ did not give proper weight to the medical opinions from Birch's treating sources. (Pl.'s Br. (dkt. #8) 27-29.) An ALJ is required to evaluate every medical opinion in the record. 20 C.F.R. § 404.1527(c). The rules that govern plaintiff's claim provide that a treating source's medical opinion is entitled to "controlling

[4] The ALJ included a detailed discussion of the paragraph B criteria in her earlier, step 2 discussion regarding whether plaintiff's depression qualified as a "severe" impairment, ultimately concluding that she had no more than "mild" limitations in any of the four areas of mental functioning. (AR at 28-29.) If the court accepts her findings at step 2, this would also preclude a listing-level impairment at step 3. However, plaintiff challenges the ALJ's discussion on substantive grounds, one of which a state agency consultant agreed, while another state agency consultant and the examining psychologist both found greater limitations. Since plaintiff's argument fails even if she had more substantial limitations in all four areas of mental function, the court need not resolve this factual dispute.

weight" if, and only if, it is: (1) "well supported by medically acceptable clinical and laboratory diagnostic techniques" and (2) "not inconsistent with the other substantial evidence in the case." § 404.1527(c).[5] Even if a treating source's opinion is not given controlling weight, the ALJ must still consider the following factors in deciding what weight to give to the opinion: the length, frequency, nature and extent of the treatment relationship; the source's area of specialty, the degree to which the opinion is supported by relevant evidence; and the degree to which the opinion consistent with the record as a whole. § 404.1527(c). A court must uphold "all but the most patently erroneous reasons for discounting a treating physician's assessment." *Stepp v. Colvin*, 795 F.3d 711, 718 (7th Cir. 2015) (quoting *Luster v. Astrue*, 358 Fed. Appx. 738, 740 (7th Cir. 2010)). Even so, an ALJ must provide "good reasons" for discounting or rejecting a treating source's opinion. 20 C.F.R. § 404.1527(d)(2); *Mandella v. Astrue*, 820 F. Supp. 2d 911, 922 (E.D. Wis. 2011) (citing § 404.1527(d)(2)).

At the outset, plaintiff's argument must be clarified. Although plaintiff argues in general terms that the ALJ failed to give deference to Birch's "treating physicians," she only specifically discusses the ALJ's treatment of *one* of Birch's treating physicians -- Dr. Jon Radcliffe, her primary care physician. (Pl.'s Br. (dkt. #8) 27-29.) Plaintiff does not appear to take issue with the ALJ's treatment of the opinion of Dr. Joseph Binegar, a rehabilitation

[5] Three years ago, the Social Security Administration modified this rule to eliminate the "controlling weight" instruction. *See* 82 Fed. Reg. 5867-68 ("We will not defer or give any specific evidentiary weight, including controlling weight, to any medical opinion(s) . . ."). However, the new regulations apply only to disability applications filed on or after March 27, 2017. Plaintiff's application in this case was filed on August 17, 2015. Accordingly, the ALJ was required to apply the original treating physician rule when deciding plaintiff's application.

specialist, who also treated Birch. (*See id.*) Indeed, the ALJ gave "significant weight" to Dr. Binegar's opinion (AR at 37), a fact that undermines plaintiff's overbroad assertion that the ALJ "disregarded numerous severe limitations documented by Birch's treating physicians and concluded that the only credible opinions were from non-treating sources." (Pl.'s Br. (dkt. #8) 28).

Regardless, the ALJ properly considered Dr. Radcliffe's opinions under the regulatory factors and offered "good reasons" for discounting them. Specifically, the ALJ acknowledged that Dr. Radcliffe treated Birch during the relevant period, but she discounted his opinions for the following reasons:

- His opinions were "inconsistent with his own treatment notes and the medical record as a whole." (AR at 36.)
- He concluded that Birch's 2015 neck and shoulder pain would preclude her from completing a normal workday without interruption, but Birch's earning record indicates that he was able to return to full time work as a CNA for eight months between 2016 and 2017. (AR at 36.)
- Dr. Radcliffe's own exams "indicate that there were no abnormalities in the claimant's extremities, her motor strength was normal and her sensation was normal." (AR at 36.)
- There was "no indication in his treatment notes that the claimant reported migraine headaches that occurred with the frequency that his statement suggested." (AR at 36.)
- While Dr. Radcliffe opined that Birch could only reach for 10% of the work day and use her hands less than 50% of a day, "as late as October 2017, his exam notes indicate the claimant had five out of five grip strength bilaterally and no abnormalities were noted in the claimant's extremities." (AR at 36.)

- Dr. Radcliffe's "opinion that the claimant's impairments left her unable to sustain full time work are inconsistent with the opinion provided by Dr. Joseph Binegar, who concluded the claimant could perform work at the light level of exertion with only rare positioning of her neck." (AR at 36.) Moreover, the ALJ expressly accorded more weight to Dr. Binegar's opinion because "he is a specialist and he treated the claimant for her cervical impairment during the relevant period." (AR at 36.)

To be upheld, an ALJ need only "minimally articulate" his or her reasons for discounting a treating source's opinions. *Schmidt v. Astrue*, 496 F.3d 833, 842 (7th Cir. 2007) (quoting *Skarbek v. Barnhart*, 390 F.3d 500, 503 (7th Cir. 2004)). As summarized above, the ALJ did much more than that. Plaintiff also suggests that the ALJ's asserted reasons for discounting Dr. Radcliffe's opinions are "contradicted by years of treatment records," but none of the records actually cited by plaintiff are inconsistent with the ALJ's analysis or otherwise provide a new line of evidence that the ALJ failed to discuss.[6] Indeed, as detailed in footnote 6, three of the records cited by plaintiff indicate that Birch *could*

[6] Plaintiff cites to AR at 385, 380, 376, 374, 372, 598, 620, and 747, but none of these records contradict the ALJ's analysis, and many are fully inapposite to the question of Birch's disability. (*See* AR at 385 (a record of a gynecological exam conducted by Dr. Jeffrey Rodzak on August 11, 2014) AR at 380 (an October 2014 treatment note from APNP Susanne Mlsna in which Birch complained of "nasal congestion, clear rhinorrhea, sore threats, foul breath, frequent clearing of the throat, headaches, facial pain, puffiness of the eyes, spitting/vomiting mucous and bleeding from her gums when she brushes her teeth," for which she was assessed with sinusitis and gingivitis) AR at 376 (a treatment note by Dr. Radcliffe from December 15, 2014, which indicates that Birch had persistent shoulder pain, but that "[f]unction has been good").) Even Dr. Radcliffe wrote, "I did provide her with work restrictions such that she could return to work," indicating that her impairment was not disabling. (AR at 377.) Similarly, a consultation with Dr. Joseph Binegar placed Birch on "very light duty" with some restrictions, indicating that she could return to work and was not disabled. (AR at 374-75.) AR at 372 (Birch was treated by Dr. Radcliffe for bronchitis) AR at 598 (psychological report from Dr. Frodin, which does not relate to Birch's physical limitations) Plaintiff also cites a treatment note from Dr. Binegar in which he wrote: "I think it is reasonable for the patient to work at very light duty" with some limitations. (AR at 620-21.) Finally, plaintiff cites to a note indicating that Birch met with Dr. Radcliffe due to "numerous vague symptoms," including "episodic headaches," which he suspected were "related to her fibromyalgia and depression and anxiety." (AR at 747-49.)

return to work given certain restrictions, (*see* AR at 377, 374-75, 620-21), and are therefore inconsistent with her assertion (and Dr. Radcliffe's opinion) that Birch's impairments are disabling. Finally, plaintiff emphasizes the fact that Dr. Radcliffe treated Birch for twenty years (Pl.'s Br. (dkt. #8) 29), but as the Commissioner points out, the length of the relationship is only one of the regulatory factors the ALJ must consider. (Def.'s Opp'n (dkt. #12) 24 (citing 20 C.F.R. § 404.1427(c))). Having done so, the court can find no fault for still discounting that opinion.

IV. RFC

Plaintiff's final argument is that the ALJ erred in failing to include an off-task and absenteeism limitation to Birch's RFC. (Pl.'s Br. (dkt. #8) 24-25.) Specifically, plaintiff argues, the ALJ should have found that she would be off task for 20% of a typical work day and would miss four or more days of work per month. (*Id.*) However, the only record plaintiff cites to support these limitations is found in the opinion by Dr. Radcliffe. (*Id.* at 26.) As discussed above, the ALJ provided good grounds to accord Dr. Radcliffe's opinion very little weight. Further, neither the opinions from Dr. Binegar nor the state agency medical consultants included an off-task or absenteeism limitation. (*See* AR at 85-88, 98-104, 621, 724, 739.) Having given these opinions "significant weight," again for good, articulated reasons, the ALJ reached a facially reasonable conclusion that plaintiff does not challenge. Accordingly, the ALJ's RFC finding is supported by substantial evidence, and this challenge must also be dismissed.

ORDER

IT IS ORDERED that the decision of defendant Andrew Saul, Commissioner of Social Security, denying claimant Jacinda Birch's application for disability insurance benefits is AFFIRMED. The clerk of court is directed to enter judgment for defendant and close this case.

Entered this 28th day of April, 2020.

BY THE COURT:

/s/

_____

WILLIAM M. CONLEY
District Judge