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

DONNA RAE PECHAN,

Plaintiff,

v.

KILOLO KIJAKAZI, Acting Commissioner of Social Security,[1]

Defendant.

OPINION AND ORDER

19-cv-0034-wmc

Plaintiff Donna Rae Pechan seeks judicial review of the final decision of the Commissioner of the Social Security Administration denying her claim for a period of disability and disability insurance benefits under the Social Security Act, 42 U.S.C. § 405(g). For the reasons discussed below, as well as those discussed with the parties' counsel during oral argument, the court will remand the decision of the Commissioner of Social Security.

BACKGROUND[2]

A. Procedural History

Plaintiff Pechan is a college-educated, former administrative assistant and social services aide. With a long history of neck and back pain, as well as depression and PTSD arising out of a sexual assault, Pechan stopped working in April 2013 and applied for

[1] Consistent with defense counsel's recent practice of adopting a new caption to reflect Kilolo Kijakazi's appointment as the Acting Commissioner of the Social Security Administration on July 9, 2021, the court has adjusted the caption in this case.

[2] The following facts are drawn from the Administrative Record ("AR").

disability benefits on February 19, 2015, at the age of 50.[3] In her application, Pechan alleged disability based on a combination of spinal stenosis, degenerative disk disease, arthritis, fibromyalgia, pain syndrome, post traumatic stress disorder, and depression.

After her application was denied initially and on reconsideration, Pechan requested an administrative hearing, at which she appeared with counsel on January 10, 2018. During that hearing, Pechan testified, as did William Dingess, a neutral vocational expert. On February 7, 2018, the administrative law judge ("ALJ") issued a decision finding that Pechan was not under a disability as defined in the Social Security Act at any time from her alleged onset date of February 19, 2015, through December 31, 2017, which was the last date on which she was eligible for disability insurance benefits. After the Appeals Council denied Pechan's request for review, the ALJ's decision became the final decision of the Commissioner for purposes of judicial review.

B. Overview of Medical Evidence

Pechan's history of neck and back pain has been attributed to spinal stenosis in her cervical and lumbar spine.[4] The evidence also suggests that she has had these conditions and associated pain for at least 10 years. In the main, Pechan's health care providers have treated her pain with medications, including opioids, although Pechan has also undergone

[3] Pechan originally claimed an onset date of January 1, 2014, but later amended her application to claim an onset date of February 19, 2015.

[4]An MRI scan of the cervical spine from April 12, 2013, showed multilevel degenerative disk and facet disease with mild-moderate stenosis at C5-C7. A lumbar MRI scan from June 10, 2014, further showed a bulging disk and annular tear causing moderate left lateral recess stenosis at L4-L5.

physical therapy, epidural steroid injections, and acupuncture. Even so, there are questions raised in the record with regard to Pechan's actual use of opioids to manage pain, including her refilling prescriptions too frequently. At one point in August 2015 in particular, her treating provider terminated Pechan's opioid contract after a drug screening test showed no opioids in her system despite oversubscribing, suggesting that at least at that time, she may not have been using the opioids to manage her pain, although Pechan claimed this test produced a false negative. (AR 422-23.)

Pechan has also been diagnosed with chronic myofascial pain syndrome, for which she takes Lyrica. Although various treating providers have also referred to Pechan's pain syndrome as "fibromyalgia," rheumatologist Michael Walsh, M.D., declined to make that formal diagnosis after evaluating Pechan on August 19 and September 30, 2015, and May 13, 2016. (AR 424-25, 465, 530.) Instead, Dr. Walsh's diagnoses was osteoarthritis, including "[e]arly degenerative arthriti[c] hands," known, multilevel spondylosis in her cervical and lumbar spine, tendinopathy of her left long finger flexor tendon, and chronic pain.[5] (AR 465.) However, x-rays of Pechan's hands showed "no radiographic evidence for degenerative arthritis." (AR 611.)

As alluded to already, Pechan also has a history of mental impairments, including diagnosed depression and post-traumatic stress disorder related to a 2002 sexual assault, for which she received intermittent treatment even before her alleged, amended onset date of February 19, 2015. In addition, in December 2015, Pechan began psychotherapy with

[5] Dr. Walsh also noted that low levels of antinuclear antibodies had been detected in plaintiff's blood, which he thought was likely related to her autoimmune thyroid disorder (Hashimoto thyroiditis) and not to any connective tissue disease. (AR 465.)

Michelle Omeara, whom she saw on 12 occasions between then and June 2017. Beginning in March 2016, Pechan also received regular psychiatric treatment from Elizabeth Lucht, P.A., who prescribed a number of different medications for plaintiff's depression, with varying degrees of success. In particular, Lucht prescribed a trial of Ritalin in April of 2016, a stimulant intended to address plaintiff's vegetative depressive symptoms and fibromyalgia, "along with possible ADHD," although Lucht did not formally diagnose plaintiff with the latter disorder. (AR 737.) On June 7, 2017, after noting that Pechan had tried a wide array of medications without long-lasting success, Lucht also recommended genetic testing to determine whether there was a genetic component to Pechan's history of paradoxical reactions to medications, but the record does not indicate whether Pechan ever underwent this testing. In addition to her regular mental health treatments with Omeara and Lucht, Pechan participated in 90-minute group therapy sessions from January to March 2016 to learn ways to manage her pain. (AR 669.)

Since March 2016, Pechan's primary care has been managed by Ann Stein, M.D., whom she sees on roughly a monthly basis. Stein has prescribed medications for plaintiff's pain, as well as her ongoing psychiatric conditions, and she has also referred plaintiff to specialists.

C. Other Medical Source Opinions

1. Examining Psychologist Michael Goldstein

On May 26, 2015, plaintiff also had a one-time consultative psychological evaluation with Michael Goldstein, Ph.D. (AR 410-15.) Pechan told Goldstein that she was in almost constant pain, and when the pain did subside, she remained in fear of it

returning. Pechan also reported a limited range of motion and pain with any head rotation, pain in all her joints at times, and swelling and tenderness in her hands and fingers. According to Goldstein's notes, Pechan also presented with major depressive disorder and anxiety. Plaintiff described her long history of these conditions, but emphasized that they worsened when her son died 20 years ago, again after she was sexually assaulted and strangled in January 2002, and further when she was carjacked in June 2002.

At the same time, Goldstein also noted that plaintiff had never been hospitalized for any psychiatric problems, nor did she report panic attacks. However, she did sometimes report having flashbacks to the sexual assault and carjacking, along with sleeping poorly because of pain, and never sleeping more than one hour uninterrupted.

After dropping out of high school, plaintiff told Dr. Goldstein that she earned her GED at age 30, then a bachelor's degree, and she was in graduate school until dropping out after being sexual assaulted in 2002. Pechan further told Goldstein that she had last worked answering the phone for a courier company about two years, but quit because of pain. At the time, she was living with her ex-husband, sleeping on a couch expense-free. Plaintiff reported that she also shopped for groceries, drove, cooked, washed dishes, vacuumed, cleaned the bathroom, helped care for two dogs, and did laundry, although she performed her activities slowly and took breaks, spending a lot of time on the couch with a heating pad. Plaintiff also spent an hour or two on the computer, read for pleasure, and was able to concentrate and remember what she read, as well as kept up with her friends via Facebook and supervised her grandchildren at times, although she reported that they helped her more than she helped them. (AR 411-12.)

Although acknowledging that he was not medically trained, Dr. Goldstein's report further included a number of observations about Pechan's physical condition. For example, Dr. Goldstein tested Pechan's grip strength and found it to be 3/5 bilaterally. While Pechan had no difficulties with fine finger movements, she reported to Goldstein having had some recent problems, noting that it was hard to open jars. Finally, Goldstein observed that Pechan's gait was within normal limits, while her static posture was guarded. (AR 411.)

As for her general affect, Goldstein noted that Pechan appeared well-groomed, dressed appropriately, and had "excellent receptive and expressive communication skills" that were consistent with her reported education. Pechan was also cooperative, with no evidence of malingering, irritability or fictitious illness, and was able to complete five serial subtractions of seven from 100 in 25 seconds with one error, spell "world" forward and backward, complete a three-step command, and follow their conversation. Nevertheless, Goldstein found her mood flat and her general affect depressed.

Goldstein next interviewed Pechan's father, who said she maintained her grooming and personal care, and she got along well with others. Her father also reported that: she had developed arthritis in her hands and could not open jars; her neck and back hurt; she had a hard time staying on her feet; and she was constantly on the heating pad. (AR 413.)

As a result, Goldstein diagnosed Pechan with the following, psychological impairments: (1) major depressive disorder, recurrent, of moderate severity; (2) post traumatic stress disorder; (3) pain disorder due to psychological factors and a general medical condition; and (4) a remote history of bulimia. He also noted that plaintiff had

high stress due to chronic pain, homelessness, loss of income and job role, and that her psychiatric prognosis was poor without an improvement in her pain. Assessing Pechan's work capability, Goldstein further opined that she had the following limitations:

- Mild limitations in understanding, remembering, and carrying out simple instructions;
- Moderate limitations responding appropriately to supervisors and co-workers;
- Moderate to marked limitations maintaining concentration, attention, and work pace (especially the latter, due to pain); and
- Moderate limitations in withstanding routine work stresses, and in adapting to change.

(AR 414-15.)

2. State Agency Psychologists Linda Dunaway and Lisa Fitzpatrick

On June 13, 2015, Linda Dunaway, Ph. D, reviewed the medical evidence and reports in the record, including Dr. Goldstein's evaluation, and assessed Pechan's mental impairments. Evaluating Pechan's impairments under "Listing 12.06 Anxiety Disorders," Dr. Dunaway determined that she had mild restriction of activities of daily living, mild difficulties in maintaining social functioning, and moderate difficulties in maintaining concentration, persistence or pace ("CPP"). (AR 108.) With respect to plaintiff's CPP limitations in particular, Dunaway found that Pechan was "not significantly limited" in most areas, but was "moderately limited" in her ability to carry out detailed instructions and to maintain attention and concentration for extended periods. (AR 111-12.) Asked to describe plaintiff's sustained concentration and persistence capacities in narrative form, Dr. Dunaway further wrote:

> The claimant has a diagnosis of PTSD and has severe [degenerative disc disease that] results in a lot of pain for her. She is on heavy pain medications. Depending on her level of pain and amount of medications she is on, she may have difficulty with carrying out detailed instructions and maintaining attention and concentration for extended periods. She claims on her [activities of daily living forms] that she doesn't finish what she starts. These would all be affected due to the level of pain she was in.

(AR 112.)

On October 20, 2015, another state agency psychologist, Lisa Fitzpatrick, Psy.D., reviewed the record and reached largely the same conclusions as Dr. Dunaway. Specifically, Dr. Fitzpatrick opined that, in spite of her moderate limitations in carrying out detailed instructions and maintaining attention and concentration for extended periods, plaintiff was

> [a]ble to maintain attention for two hours at a time and persist at simple tasks over eight- and forty-hour periods with normal supervision; symptoms would preclude persistence at more complex tasks over time.

(AR 125.)

3. State Agency Physicians Mina Khorshidi and George Walcott

Dr. Mina Khorshidi, M.D., also reviewed the medical record for the state agency on June 8, 2015. Based on her review of the medical records and Pechan's reported activities, Dr. Khorshidi determined her capable of meeting the physical demands of light work, except that she should avoid exposure to machinery, heights and hazards because of the narcotic pain medication she was taking. (AR 110.) Dr. George Walcott, M.D., another

state agency consulting physician, affirmed Dr. Khorshidi's findings on October 14, 2015. (AR 122-124.)

4. **Consulting Psychologist M. Denise Connelly**

On September 13, 2016, Pechan underwent a clinical interview and psychological testing after expressing interest in donating a kidney to a family member. (AR 548-50.) Pechan told the psychologist, Denise M. Connelly, Ph.D., that she had been living with her ex-husband for the past six years and her father had now moved in with them. She also reported providing childcare for her three-year-old grandnephew five days a week and having her nine-year-old granddaughter every other weekend, although she did not indicate the typical length of time spent with either child per day or week, nor if she had help.

When Connelly specifically asked Pechan whether she understood that the surgery could increase her level of chronic pain, Pechan replied that "pain is pain," and there was "nothing I can do about it." Results of the MMPI-2 test also suggested to Connelly that Pechan was "presenting with an unusual number of psychological symptoms . . . which may suggest either malingering or a plea for help"; she further indicated that Pechan "presents with a mixed pattern of somatic complaints that she may rigidly maintain even when they are challenged," and that she endorsed items suggestive of low morale, a feeling of social alienation, and a depressed mood, with the potential for suicidal thinking.

As part of the evaluation, Dr. Connelly also interviewed Pechan's ex-husband, who said that Pechan had read a lot about kidney donation and seemed to understand its risks. He also said that her chronic pain was better now that she had "gotten off the pain meds,"

though she sometimes had bouts of depression in which she didn't want to get out of bed in the morning. In his view, however, the biggest obstacle to donation would be Pechan's need to stop smoking, which she had tried unsuccessfully to do in the past. Ultimately, Connelly determined that Pechan was a high risk candidate for kidney donation because of the likelihood that the surgery could increase her chronic pain, somatic concerns, and depression.

5. **Treating Physician Ann Stein**

Finally, on January 5, 2018, just a few days before the evidentiary hearing conducted by the ALJ, Dr. Ann Stein, M.D., completed a physical residual functional capacity questionnaire for plaintiff. (AR 1068-72.) Among other things, Dr. Stein stated that she had been treating plaintiff every one to two months since March 20, 2016. She reported that plaintiff had continuous, chronic pain as a result of her cervical spinal stenosis, fibromyalgia, lumbar arthritis, disc disease, and osteoarthritis in her hand. According to Dr. Stein, plaintiff's pain affected her fingers and spine and was manifested by reduced range of motion, impaired sleep, abnormal posture, tenderness, trigger points, swelling in the hands, muscle spasm, muscle weakness, and abnormal gait, and was exacerbated by plaintiff's depression and anxiety. Stein further opined that plaintiff's pain would "constantly" interfere with attention and concentration, and this would pose an "extreme limitation" on her ability to handle the normal stresses of competitive employment.

As a result, Dr. Stein ultimately opined that plaintiff: (1) could sit and stand or walk for less than two hours each during a normal eight-hour work day; (2) would need to lie down for 3-4 hours during an average workday; (3) would need the ability to change positions at will from sitting, standing or walking; (4) should use a cane while standing or walking; (5) could never lift 10 pounds or more and could lift less than 10 pounds only occasionally; (6) had significant limitations in her ability to use her hands and fingers for grasping, turning objects, fine manipulation, or reaching; (7) could bend or twist at the waist occasionally; and (7) would likely be absent from work more than three times a month. At most, Dr. Stein opined, plaintiff could work three to four hours a day, two days a week. When asked the earliest date on which her restrictions applied, Dr. Stein answered, "approximately 2013."

On January 9, 2018, the day before the evidentiary hearing, Dr. Stein also completed a mental RFC questionnaire for Pechan. (AR 1075-82.) Stein endorsed a number of psychiatric diagnoses and symptoms, but left blank the portion of the form asking her to describe clinical findings, including results of mental status examination. When specifically asked to rate Pechan's mental abilities, Stein indicated that she would have little to no ability to: maintain attention for a two-hour period; maintain regular attendance and be punctual; sustain an ordinary work routine without special supervision; work in coordination with or proximity to others without being unduly distracted; complete a normal workday and workweek without interruptions from psychologically based symptoms; or perform at a consistent pace without an unreasonable number of, and length of, rest periods. More specifically, Dr. Stein wrote that Pechan had "focus problems

significant[ly] related to ADHD & pain components;" and would need a "nondistracting environment." Stein further anticipated that Pechan "would miss work 1-3 days/week." Finally, Dr. Stein found that plaintiff had: "moderate" restrictions in activities of daily living; "marked" difficulties in maintaining social functioning; "constant" deficiencies of concentration, persistence or pace; and "continual" episodes of deterioration or decompensation in work or work-like settings.

D. Hearing Testimony and ALJ Decision

At the evidentiary hearing, Pechan testified that she was no longer able to work because of her pain and related psychological problems, as well as the mental health challenges of dealing with a past sexual assault and a carjacking. (AR 67.) Pechan explained that her primary pain was in her neck, but she also reported having some intermittent, severe pain in her left hip and leg, and recently had started losing feeling and function in her right leg. (AR 69-70.) Pechan also testified that she has constant swelling and fluctuating pain in her knuckles on both hands from arthritis, which male it difficult to grip items or perform precise finger movements. (AR 83-84.) In addition, Pechan testified that she could stand for only 10 minutes because of lower back pain and could only walk around the block on a good day. (AR 84-85.) With respect to her mental health issues unrelated to pain management, Pechan reported difficulty organizing her thoughts and communicating with others, as well as panicking when people came in close proximity. (AR 72, 86.) Because of her struggles with depression, she described "trying to figure out who I am now." (AR 74.)

When asked to describe a typical day by the ALJ, Pechan answered vaguely, indicating that she doesn't "successfully get a whole lot done"; she had a tendency to be "extremely tired for a few days, and then . . . awake for a couple days"; and it "took her awhile to get moving." (AR 75.) Still, Pechan acknowledged preparing meals, showering and dressing on her own, and performing light chores around the house, like laundry and washing dishes. (AR 76.) Although indicating that her ex-husband did the grocery shopping, Pechan also acknowledged going to the store at times. (AR 91-92.)

William Dingess also testified live as an impartial vocational expert ("VE") at the hearing. The ALJ specifically asked the VE whether any jobs existed that could be performed by a person of Pechan's age (53 on her last insured date), education, and past work, who was limited to work performed at the light exertional level that did not involve exposure to unprotected heights or moving mechanical parts; and who was further limited to performing simple, routine tasks. (AR 95-96.) In response, the VE testified that such a person could perform the job of cashier, office helper, and housekeeping/cleaner, and that such jobs existed in large numbers in the national economy. (AR 96.)

On cross-examination, however, the VE acknowledged that the jobs he identified required "frequent" handling and fingering, and therefore, could not be performed by someone who was limited to only "occasional" handling and fingering. (AR 97.)[6] The VE further admitted that if Pechan were limited to sedentary work, no jobs would be available because, although she had acquired skills from her past work, those skills were not

[6] Under the SSA's rules, "frequent" means occurring from one-third to two-thirds of the time. *Titles II & XVI: Determining Capability to Do Other Work-the Med.-Vocational Rules of Appendix 2*, SSR 83-10 (S.S.A. 1983).

transferable because the court limited her to simple, routine work. (Id.) *See also* 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.14 (individual "closely approaching advanced age" who lacks transferable work skills and is limited to sedentary work is disabled).

E. ALJ's Decision

Applying the Commissioner's five-step sequential evaluation for disability claims, 20 C.F.R. § 404.1520, the ALJ found that: (1) Pechan had not engaged in substantial gainful activity after her alleged onset date through her last-insured date of December 31, 2017; (2) she had severe impairments of degenerative disk disease, degenerative joint disease, depression, and anxiety; (3) none of her impairments, singly or in combination, were severe enough to meet the criteria of any impairment listed in 20 C.F.R. Part 404, Subpart P, App. 1; (4) Pechan was unable to perform her past, relevant work, which was skilled; and (5) considering Pechan's age, education, work experience, and residual functional capacity, there were jobs existing in significant numbers in the national economy that she could perform, including cashier, office helper, and housekeeper/cleaner.

As a predicate to her findings at steps four and five, the ALJ next assessed Pechan's residual functional capacity ("RFC"), determining that Pechan had the ability to perform light work (that is, she could sit, stand, and walk (each) for six hours (each) for an eight-hour workday) and could lift, carry, push, or pull up to 20 pounds occasionally and 10 pounds frequently. Because of the medications she was taking, the ALJ also agreed with the consensus of medical providers that as a precautionary measure, Pechan should not be exposed to workplace hazards, such as unprotected heights or dangerous moving of

machinery. Finally, the ALJ found that Pechan was limited to performing simple, routine work tasks.

In reaching these conclusions, the ALJ expressly rejected the opinions offered by Pechan's treating physician Stein and psychologist Goldstein, but adopted the opinions of the state agency physicians and psychologists, whose opinions she found "consistent with the great weight of the evidence." (AR 43.) The ALJ further rejected plaintiff's complaints of disabling pain and mental impairments, finding that plaintiff's statements "concerning the intensity, persistence and limiting effects of these symptoms are not entirely consistent with the medical evidence and other evidence in the record[.]" (AR 43.) In support of this conclusion, the ALJ noted that: plaintiff engaged in "wide and varied activities," including supervising her grandchildren at times and a three-year-old grandnephew five days a week while his mother was at work; on one occasion, plaintiff engaged in "symptom exaggeration"; there was evidence in the record suggesting narcotics abuse; numerous progress notes described plaintiff as being "in no acute distress," notwithstanding her complaints of disabling pain; and there was some evidence suggesting treatment noncompliance, including plaintiff's continued smoking against the advice of several health care providers. The ALJ further reviewed plaintiff's medication history, noting that plaintiff reported a positive response to Lyrica and to stimulants prescribed for her ADHD symptoms, and that Dr. Stein had complied with plaintiff's request to be restarted on opioids after a previous provider had refused.

Although Pechan appealed the ALJ's decision to the Appeals Council, it declined review, meaning that the ALJ's decision is the "final decision" of the Commissioner for

purposes of judicial review under 42 U.S.C. § 405(g). *Jones v. Astrue*, 623 F.3d 1155, 1160 (7th Cir. 2010).

OPINION

An ALJ's findings of fact are considered "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). In reviewing the Commissioner's findings, therefore, 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). Still, the Seventh Circuit instructs that a "critical review of the evidence" must be conducted before affirming the Commissioner's decision. *Edwards v. Sullivan*, 985 F.2d 334, 336 (7th Cir. 1993). Moreover, an ALJ must articulate his or her analysis of the evidence in order to allow the reviewing court to trace the path of their reasoning and assure that the ALJ considered the important evidence. *See Scott v. Barnhart*, 297 F.3d 589, 595 (7th Cir. 2002); *Diaz v. Chater*, 55 F.3d 300, 307 (7th Cir. 1995). If the Commissioner's decision lacks evidentiary support or adequate discussion of the issues, then the court must remand the matter for further proceedings. *Villano v. Astrue*, 556 F.3d 558, 562 (7th Cir. 2009).

In seeking judicial review in this case, all of plaintiff's challenges to the ALJ's decision are directed at her RFC assessment. Specifically, plaintiff argues that the RFC assessment fails the substantial evidence test because the ALJ: (1) improperly weighed the medical source opinions; (2) failed to account for her own finding that plaintiff had

moderate limitations in concentration, persistence, or pace ("CPP"); (3) drew adverse conclusions about the credibility of plaintiff's subjective complaints that were unreasonable or unsupported; and (4) failed to adequately account for plaintiff's fibromyalgia diagnosis. Because this court agrees that plaintiff's first argument warrants a remand, the court's opinion below will focus on that issue, although touch on the other issues as guidance to the Commissioner.

I. Weighing of Medical Source Opinions

On appeal, plaintiff challenges the ALJ's decision to give more weight to the state agency physicians, Drs. Khorshidi and Walcott, than to Dr. Stein, plaintiff's treating physician. An ALJ is required to evaluate every medical opinion in the record, 20 C.F.R. § 404.1527(c), and "[t]he regulations provide progressively more rigorous tests for weighing opinions as the ties between the source of the opinion and the individual become weaker." SSR 96-6p. When evaluating a claimant's medical record, an ALJ "is required to determine which treating and examining doctors' opinions should receive weight and must explain the reasons for that finding." *Craft v. Astrue*, 539 F.3d 668, 676 (7th Cir. 2008) (citing 20 C.F.R. § 404.1527(d), (f)).

In general, opinions from medical sources who have regularly treated the claimant are entitled to more weight than non-treating sources. 20 C.F.R. § 404.1527(c), SSR 96-2p. Additionally, an ALJ must "offer good reasons for discounting a treating physician's opinion." *Campbell v. Astrue*, 627 F.3d 299, 306 (7th Cir. 2010) (internal quotation marks and citations omitted); *see also Walker v. Berryhill*, 900 F.3d 479, 485 (7th Cir. 2018). Those reasons must be "supported by substantial evidence in the record; a contradictory opinion

of a non-examining physician does not, by itself, suffice." *Gudgel v. Barnhart*, 345 F.3d 467, 470 (7th Cir. 2003). "If an ALJ does not give a treating physician's opinion controlling weight," the regulations controlling at the time of plaintiff's application for disability benefits require the ALJ to consider the length, nature, and extent of the treatment relationship, frequency of examination, the physician's 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). If the ALJ discounts the treating physician's opinion after considering these factors, the court must give deference to the ALJ's decision so long as he "minimally articulate[d] his reasons." *Elder v. Astrue*, 529 F.3d 408, 415 (2008) (internal quotations omitted).

Here, the ALJ gave the following reasons for discounting the physical residual capacity assessment provided by Dr. Stein as plaintiff's treating physician:

> On January 5, 2018, Dr. Stein completed an assessment (Exhibit 8F), noting that her restrictions applied since "approximately 2013." The undersigned, however, finds this problematic, as the evidence demonstrates that Dr. Stein did not begin treating the claimant . . . until much later on March 20, 2016. Moreover, the undersigned recognizes that Dr. Stein's assessment is far too extreme, as she indicates sitting/standing/walking limitations that would preclude the claimant from even working a regular 8-hour workday. Although she suggests that the claimant needs to use a cane for hip pain, there is no evidence that the claimant was using a cane during the period at issue in this case . . .While Dr. Stein suggests that the claimant would need to be absent from work more than three times each month (Exhibit 8F, page 5), the undersigned recognizes that this is speculative at best. Moreover, as Dr. Stein only examines the claimant once every month or two, there is little basis to support an assessment that the claimant would be unable to demonstrate regular attendance, as the evidence demonstrates the claimant was punctual for her scheduled appointments (see Exhibit 7F).

> Indeed, the undersigned notes that the speculative component of this restriction is underscored by Dr. Stein's notation that she would "anticipate" that the claimant would need to miss work "1-3 days" each week, which she offered in a different questionnaire completed on January 9, 2018. (Exhibit 9F, page 7.) As stated above, the undersigned assigns great weight to the conclusions reached by state disability medical consultants Drs. Khorshidi and Walcott when limiting the claimant to light exertion.

(AR 44.) As for the state agency physicians, the ALJ also observed that in addition to having "specialized Social Security disability knowledge," their "assessments [were] sound, and consistent with the evidence as a whole." (AR 43.)

Consistent with a change in the regulations, plaintiff does not contend that Dr. Stein's opinion was entitled to "controlling weight," but she argues that the ALJ failed to provide good reasons for discounting it. The court agrees. As an initial matter, the first three regulatory factors -- the length, frequency, and nature/extent of the treatment relationship -- all favor giving greater weight to Dr. Stein than the state agency physicians, who never examined plaintiff. The fourth factor is neutral, as Dr. Stein is a general practitioner, but so is Dr. Khorshidi and Dr. Walcott's specialty is unclear on this record.[7]

The fifth and final factor of "supportability" is where the ALJ placed the greatest emphasis in discounting Dr. Stein's opinion and where the court's review must focus. Some of the ALJ's findings as to supportability were reasonable. For example, the ALJ reasonably questioned the basis for Dr. Stein's statement that her restrictions applied to plaintiff since "approximately 2013" given that she had not treated plaintiff until March

[7]*See* https://health.usnews.com/doctors/mina-khorshidi-605561 (last visited November 4, 2021) (listing Dr. Khorshidi as a general internist).

of 2016. Also worthy of skepticism was Dr. Stein's opinion that plaintiff needed a cane, given the absence of any evidence that plaintiff had used or been advised to use a cane before that date. As plaintiff points out, however, the ALJ did not explain why she rejected other, potentially dispositive restrictions found by Dr. Stein. *First*, the ALJ failed to provide *any* explanation, much less a faulty one, for rejecting Dr. Stein's conclusion that plaintiff had "significant" limitations in using her hands and fingers. As plaintiff points out, there is objective support in the record for hand and finger limitations: Dr. Walsh noticed swelling in the joints in plaintiff's hands; Dr. Stein described plaintiff's hands as "mildly arthritic" (although without redness or inflammation) on August 30, 2017 (AR 1022), and endorsed joint swelling on her RFC questionnaire; as well as both doctors diagnosed plaintiff with early osteoarthritis in her hands. In addition, Dr. Goldstein found that plaintiff had reduced grip strength when he tested her in May 2015.

The Commissioner argues that the ALJ was not required to give any weight to Dr. Stein's opinion about hand limitations because she noted earlier in her decision that x-rays of plaintiff's hands showed no evidence of arthritis. So far as it appears, however, Dr. Stein and Dr. Walsh, a rheumatologist, concluded from their physical examinations of plaintiff that she was developing arthritis in her hands *notwithstanding* the absence of confirmatory x-ray evidence. Further, plaintiff had consistently reported difficulty using her hands in her medical exams. Although the absence of corroborating x-ray evidence tends to undermine plaintiff's allegation that her hand limitations are *disabling*, the court is not persuaded that it supports the ALJ's failure to discuss Dr. Stein's prescribed hand

limitations *at all*, particularly where her diagnosis of osteoarthritis had earlier been made by Dr. Walsh as a specialist in rheumatology.

At oral argument, counsel for the Commissioner further pointed out that neither of the state agency physicians found plaintiff had any limits on manipulation, arguing that the ALJ could have reasonably relied on these opinions as a basis for discounting plaintiff's alleged hand limitations. However, Dr. Khorshidi's opinion can be discounted from the outset because she reviewed the record *before* plaintiff was diagnosed with arthritis in her hands by Dr. Walsh. As for Dr. Walcott, he does *mention* Walsh's August 19, 2015, progress note and his observation of early degenerative changes in the hands, but fails to explain why those observations by a rheumatologist warranted no hand manipulation restrictions.

Thus, at best, Dr. Walcott's opinion appears no more "supported" by the evidence than Dr. Stein's.[8] Further, although the ALJ found Drs. Khorshidi and Walcott's opinions were "consistent with the record as a whole," the ALJ did not describe any evidence in the

[8]Plaintiff also argues that the ALJ should have disregarded the state agency consultants entirely because they reviewed the record only through August 2015. However, the Seventh Circuit has recognized that "a case might never end" if the ALJ were required to update the record any time a claimant continued to receive medical treatment. *Keys v. Berryhill*, 679 F. App'x 477, 480–81 (7th Cir. 2017) (citation omitted). Accordingly, the Seventh Circuit has held that only where the plaintiff presents "later evidence containing new, significant medical diagnoses [that] reasonably could have changed the reviewing physician's opinion," should the ALJ decline to rely on a reviewing physician's earlier opinion as outdated. *Moreno v. Berryhill*, 882 F.3d 722, 728 (7th Cir. 2018). Having reviewed the evidence cited by plaintiff in her brief (Plt.'s Br. (dkt. #14) 19), the court is not persuaded that any of the post-August 2015 reports rises to that level. In the main, the post-August 2015 record shows continued treatment for depression, degenerative disc disease, arthritis, and myofascial pain, without significant change or worsening in plaintiff's underlying conditions or symptoms.

record—apart from the negative x-rays—which was consistent with their finding that plaintiff had no manipulative restrictions whatsoever.

To be sure, the evidence supporting Dr. Stein's finding of hand limitations is not robust, nor would it necessarily establish that plaintiff cannot perform handling and fingering up to two-thirds of the day, as demanded of the jobs identified by the vocational expert. (Dr. Stein was not asked to estimate what portion of the day plaintiff could use her hands.) However, "[i]n determining an individual's RFC, the ALJ must evaluate all limitations that arise from medically determinable impairments, even those that are not severe, and may not dismiss a line of evidence contrary to the ruling." *Villano v. Astrue*, 556 F.3d 558, 563 (7th Cir. 2009) (citing S.S.R. 96-8p; *Golembiewski v. Barnhart*, 322 F.3d 912, 917 (7th Cir. 2003)). Given the objective evidence and a rheumatologist's expert opinion in this record supporting Dr. Stein's opinion that plaintiff had problems using her hands, the ALJ was at least obliged to discuss it, especially given that all of the jobs identified by the VE required frequent handling and fingering. *See Zurawski v. Halter*, 245 F.3d 881, 887 (7th Cir. 2001) (although ALJ need not discuss every piece of evidence, she may not ignore an entire line of evidence that is contrary to her findings).

Second, the court finds the ALJ's rationale for rejecting Dr. Stein's opinion regarding work absences insufficient, although for slightly different reasons than plaintiff argued in her brief. (Br. in Supp. (dkt. #14) 21.) To begin, describing Dr. Stein's opinion about plaintiff's absences as "speculative" was not a sufficient reason to dismiss it altogether. Admittedly, Dr. Stein did not see plaintiff every day, and plaintiff was no longer employed, so the best Dr. Stein could do was provide a reasoned estimate of how many days a month

plaintiff would be absent. In fact, the physical residual functional questionnaire to which Dr. Stein responded specifically *asked* for a prediction, insofar as it asked the responder to state "on the average," how often the responder "anticipated" the claimant's impairments or treatment would cause her to be absent. (AR 1071.) Again, at most, Dr. Stein's prediction about plaintiff's ability to attend work on a regular basis was no more "speculative" than that of the state agency consultants, who did not even examine plaintiff, much less treat her on a regular basis.

That said, the ALJ did cite two pieces of evidence that she seemed to think established plaintiff's ability to attend work on a regular basis: (1) her ability to attend her medical appointments as scheduled; and (2) her "regular responsibilities" babysitting young children.[9] (AR 44.) Again, however, these were insufficient "good reasons" for rejecting Dr. Stein's opinion outright. In particular, the ability to attend sporadic appointments does not equate to an ability to attend work 8 hours a days, five days a week. While plaintiff's babysitting responsibilities get closer to the mark -- at least insofar as records reflect that she was taking care of her three-year-old grand-nephew five days a week -- the record is silent as to how many hours a day she actually provided care, what that care entailed, or whether she had help, including from her ex-husband with whom she resided.

[9]The ALJ cited this evidence as a basis for discounting Dr. Stein's responses to the psychological questionnaire, on which she indicated that plaintiff had poor or no ability to maintain regular attendance, sustain an ordinary routine without supervision, or complete a normal workday and workweek without interruptions from psychologically based symptoms. (AR 44, 1079.) As a result, it is reasonable to infer that the ALJ relied on this same evidence to discount Dr. Stein's opinion on the physical RFC questionnaire concerning plaintiff's work absences.

The Seventh Circuit has "urged caution in equating [daily] activities with the challenges of daily employment in a competitive environment, especially when the claimant is caring for a family member." *Beardsley v. Colvin*, 758 F.3d 834, 838 (7th Cir. 2014) (citations omitted). As the court has recognized, "[t]he critical differences between activities of daily living and activities in a full-time job are that a person has more flexibility in scheduling the former than the latter, can get help from other persons . . . and is not held to a minimum standard of performance, as she would be by an employer." *Bjornson v. Astrue*, 671 F.3d 640, 647 (7th Cir. 2012); *see also Mendez v. Barnhart*, 439 F.3d 360, 362 (7th Cir. 2006) ("The pressures, the nature of the work, flexibility in the use of time, and other aspects of the working environment as well, often differ dramatically between home and office."); SSR 16-3p (claimants may sometimes have structured daily activities to minimize symptoms and avoid physical and mental stressors). In this case, the mere fact that plaintiff was able to watch a small child "five days a week," is not enough to establish that she could reliably attend *competitive* employment eight hours a day, five days a week, much less to dismiss Dr. Stein's conclusion to the contrary.

Third, the ALJ engaged in more faulty reasoning by dismissing Dr. Stein's sitting, standing, and walking limitations as "far too extreme," solely for the reason that such limitations "would preclude the claimant from even working a regular 8-hour workday." (AR 43.) If the court were to accept this reasoning as adequate, then an ALJ could reject the opinion of *any* treating doctor that her patient was incapable of working a full eight-hour day. Not only is there no support for this in the Commissioner's rules or regulations,

this remark raises a legitimate concern that the ALJ was engaging in circular reasoning and determining plaintiff's RFC *before* evaluating the evidence.

Indeed, at least twice in the decision, the ALJ wrote that certain evidence was "not inconsistent" with the RFC. (AR 39 (referring to plaintiff's activities) and AR 44 (referring to opinions of state agency consulting psychologists)). As the Seventh Circuit has explained: "These statements put the cart before the horse: 'the determination of [an RFC] must be based on the evidence'; medical opinions should not be forced into a 'foregone conclusion.'" *Pytlewski v. Saul*, 791 F. App'x 611, 617 (7th Cir. 2019) (quoting *Filus v. Astrue*, 694 F.3d 863, 868 (7th Cir. 2012)). Although such remarks on their own may not warrant remand, the totality of the ALJ's explanations for rejecting outright or failing to consider relevant evidnece in this case leaves the impression that she might have been striving to make the evidence fit a predetermined RFC, rather than the other way around.

Finally, apart from these flaws, the court is troubled by the evidentiary gap that exists between the ALJ's decision to reject Dr. Stein's opinions on the one hand, and the ALJ's decision to adopt the conclusion of the state agency physicians, on the other. In giving great weight to the state agency consulting physicians' conclusion that plaintiff could meet the exertional demands of light work, the ALJ offered only conclusory statements that their opinions were "sound" and "consistent with the record as a whole." In particular, the ALJ offered little in her decision as to actual *evidence* in the record supporting the state agency physicians' opinion that plaintiff was capable of lifting 10 pounds frequently, 20 pounds occasionally, and sitting, standing, or walking each for up to 6 hours a day.

For example, even if the court were to find that plaintiff's apparent ability to provide some childcare five days a week suggests she can attend work on a regular basis, as did the ALJ, it still does *not* show that she can perform *light* work on a regular basis, at least without more information about the amount of sitting, standing, walking, and lifting her childcare duties entailed. The same goes for plaintiff's ability to engage in household chores, which is another factor that appeared to bear heavily on the ALJ's conclusion. As with the evidence concerning plaintiff's childcare responsibilities, the ALJ did not explain *why* the ability to perform sporadic household chores, at her own pace, with breaks, and with some assistance, showed plaintiff could regularly perform a job requiring "a good deal of walking or standing," or "sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. § 404.1567(b) (defining light work). Thus, it is one thing to say that plaintiff's claim of a complete inability to work, although supported by Dr. Stein and other material evidence is not sufficiently supported by the record, but it is quite another to say that plaintiff is able to perform light, as opposed to sedentary, work. On this record, the ALJ has not provided an adequate and logical bridge for the latter finding, particularly since it depends largely on her unexplained reasons for giving more weight to the state agency physicians' opinions about plaintiff's physical capacities over that of plaintiff's treating physician. Accordingly, remand is required.

II. Other Errors

Having already found legitimate grounds for remand, the court need not address plaintiff's remaining challenges to the ALJ's decision. *See Scott v. Astrue*, 647 F.3d 734, 741 (7th Cir. 2011) ("These flaws are enough to require us to remand [and] [w]e therefore

needn't decide whether the reasons the ALJ gave in support of her adverse credibility finding . . . were so 'patently wrong' as to separately require remand.") Nevertheless, because some of these issues may resurface on remand, the court offers the following, limited observations.

As for plaintiff's assertion that the ALJ erred by failing to consider evidence of plaintiff's fibromyalgia diagnosis "at any step of the evaluation process" (Pl.'s Br. (dkt. #14) 9), the diagnosis of fibromyalgia appears in plaintiff's medical record as discussed above, although the term may have been used loosely to identify her myofascial pain syndrome. In particular, Dr. Walsh (again, the only rheumatologist who examined plaintiff) did not make that diagnosis. *See Sarchet v. Chater*, 78 F.3d 305, 307 (7th Cir. 1996) ("Fibromyalgia is a rheumatic disease and the relevant specialist is a rheumatologist."). And even if plaintiff does have fibromyalgia, it is well-settled that the ALJ's failure to find fibromyalgia as a severe impairment at step two of the sequential evaluation is harmless so long as the ALJ found at least one of plaintiff's impairments to be severe and went on to consider the combined effect of all of plaintiff's impairments at step four. *Ray v. Berryhill*, 915 F.3d 486, 492 (7th Cir. 2019). Here, the ALJ did find that plaintiff had severe impairments that caused pain, then proceeded to evaluate whether plaintiff's subjective complaints could be reconciled with the medical evidence and other evidence of record. Accordingly, the court does not find that the ALJ's failure to recognize plaintiff as having fibromyalgia, in and of itself, is an error warranting remand. However, the ALJ should take care on remand to consider plaintiff's diagnosed pain syndrome and

the waxing and waning nature of her symptoms in reevaluating the objective evidence, medical opinions and plaintiff's subjective complaints.

As for criticism of the ALJ for failing to address plaintiff's subjective complaints, as this court already explained above, the ALJ failed to articulate sufficiently why plaintiff's childcare responsibilities and household activities constituted evidence that she is able to perform light work on a full time basis. In finding plaintiff's subjective complaints inconsistent with the record, the ALJ also relied on the fact that plaintiff was noted at several visits to be in "no acute distress." However, as plaintiff persuasively argues, such notations do not necessarily contradict plaintiff's complaints of pain, just not claims of immediate, debilitating pain. Not only did plaintiff acknowledge that her pain varied from day to day, but without an explanation of what the medical professionals meant by "no acute distress," it was error for the ALJ to assume that these professionals had found Pechan was not periodically experiencing pain to the degree that she claimed. *E.g.*, *Wanserski v. Colvin*, No. 1:14-CV-1033-DKL-JMS, 2015 WL 5692521, at *7 (S.D. Ind. Sept. 28, 2015) (noting that "acute" can refer to a disease, health effect, or symptom having a sudden, abrupt onset and a short, but severe, course, as opposed to a chronic condition or symptom having a slow development and a protracted but mild course; and, for physicians' purposes, "no acute distress" can simply mean that a patient will probably not become unstable in the next five minutes). This is particularly true where several of the records cited by the ALJ involved providers who were treating plaintiff for complaints *unrelated* to her degenerative disc disease, fibromyalgia or other pain. (*See, e.g.*, (AR 473 (gastroenterology consult); AR 797 (dermatology); AR 1034 (optometry).) Moreover, of the three providers

who did see plaintiff for pain complaints, not one questioned her level of reported pain. To the contrary, one physician suggested physical therapy; another administered a cervical injection; and yet another suggested that plaintiff participate in a pain group. (AR 484, 561, 627.)

As the Commissioner points out, however, the ALJ cited other reasons in support of her determination that plaintiff's subjective complaints were not entirely credible, including that: (1) plaintiff reported benefitting from Lyrica and Adderall; (2) one record noted she was using a Wii Fit program for exercise up to three times a week; (3) there was some evidence in the record of treatment noncompliance and narcotic medication abuse; and (4) there was some evidence of symptom exaggeration. Although not overwhelming, there is at least some support in the record for these findings as well. Given that the court may reverse an ALJ's credibility finding only if it is "patently wrong," *Summers v. Berryhill*, 864 F. 3d 523, 528 (7th Cir. 2017), the court would likely not remand this case solely for a new credibility determination. Nevertheless, given the flaws identified above, along with the ALJ's seeming failure to consider the plaintiff's assertions that she was having good and bad days, the ALJ should conduct a more careful analysis of plaintiff's subjective complaints on remand.

Finally, the court finds unpersuasive plaintiff's claim that the ALJ did not properly evaluate her mental impairments, and in particular, her difficulties in the area of concentration, persistence, and pace. The ALJ's conclusion that plaintiff had only moderate limitations in this area was supported by the results of Dr. Goldstein's mental status evaluation and plaintiff's own reported activities --- including her ability to read,

perform computer work, write in her journal, and participate without difficulty in 90-minute group therapy sessions. Similarly, the ALJ's conclusion that plaintiff could perform simple, routine work in spite of these moderate limitations is supported by the state agency psychologists' narrative RFC assessments. *Varga v. Colvin*, 794 F.3d 809, 816 (7th Cir. 2015) (ALJ may rely on state agency psychologist's narrative RFC where it "adequately encapsulates and translates those worksheet observations."); *Dudley v. Berryhill*, 773 F. App'x 838, 843 (7th Cir. 2019) (same); *Capman v. Colvin*, 617 Fed. Appx. 575, 579 (7th Cir. 2015) (ALJ may reasonably rely on psychologist's "bottom line-assessment" in narrative section of residual functional capacity assessment, at least where it is not inconsistent with checklist findings in other section of worksheet); *Milliken v. Astrue*, 397 Fed. Appx. 218, 221 (7th Cir. 2010) (ALJ entitled to rely on medical expert who "effectively translate[s] an opinion regarding the claimant's mental limitations into an RFC assessment.").

That being said, all of the medical sources who opined on plaintiff's mental limitations -- including Dr. Goldstein, Dr. Stein, and the state agency psychologists – all seemed to think that plaintiff's concentration difficulties depended on her degree of pain. Thus, if the ALJ determines on remand that plaintiff has significant issues with pain, the ALJ may have to adjust her formulation of plaintiff's mental RFC determination accordingly.

ORDER

IT IS ORDERED that the decision of the Commissioner of Social Security denying plaintiff Donna Rae Pechan's application for a period of disability and disability insurance benefits under Title II of the Social Security Act is REVERSED AND REMANDED for further proceedings consistent with this opinion.

Entered this 8th day of November, 2021.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge