

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

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J.R., a minor child, by and through  
Carmen Rodriguez Velazquez, her mother,

Plaintiff,

OPINION AND ORDER

v.

20-cv-834-wmc

KILOLO KIJAKAZI, Acting Commissioner of  
Social Security,

Defendant.

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Pursuant to 42 U.S.C. § 405(g) and represented by her mother, Carmen Rodriguez Velazquez, plaintiff J.R.,<sup>1</sup> a minor child, seeks judicial review of a final determination that she was not disabled within the meaning of the Social Security Act. Specifically, J.R. contends that remand is warranted because Administrative Law Judge (“ALJ”) Patricia Witowski Supergan erred in finding unpersuasive the medical opinions of a consultative examiner, Dr. Dennis Elmergreen, and a medical expert, Dr. DiTraglis. For the reasons that follow, the court must affirm the denial of benefits.

FACTS<sup>2</sup>

**A. Background**

Plaintiff J.R. was born on May 19, 2009, and applied for child’s insurance benefits on January 12, 2018, claiming a disability onset date of January 1, 2013, based on autism

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<sup>1</sup> Both the docket and plaintiff’s submissions use plaintiff’s full name. It is this court’s practice, however, to refer to a minor by his or her initials. As such, the court will direct the clerk’s office to modify the docket to reflect the plaintiff’s name as shown in the caption above.

<sup>2</sup> The following facts are drawn from the administrative record, available at dkt. #17.

and attention-deficit/hyperactivity disorder (“ADHD”). (AR 117-18.)

## **B. ALJ Decision**

ALJ Supergan held an evidentiary hearing via videoconference on September 18, 2019, at which J.R. appeared personally and by her parents and counsel. In addition, the ALJ also heard testimony from an impartial medical expert, John DiTraglis, M.D. As of the alleged onset date, the ALJ found that J.R. had the following severe impairments: ADHD, carnitine deficiency<sup>3</sup>, communication disorder, and autism. (AR 22.)

Next, the ALJ considered whether any of plaintiff’s other impairments (or combination of impairments) met or medically equaled one of the listed impairments. The ALJ specifically considered and rejected listings 111.09 (communication impairment) and 112.11 (neurodevelopmental disorders). Plaintiff does not challenge these findings. The ALJ next considered whether plaintiff has a marked limitation in two areas of mental functioning or an extreme limitation in one, concluding that even if she had marked limitations in understanding, remembering and applying information, she had less than marked limitations for: interacting with others; concentrating, persisting, or maintaining pace; and adapting or managing oneself.

The ALJ next considered whether any of plaintiff’s impairments or combinations of impairments functionally equal the severity of the listings. In analyzing this step, the ALJ

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<sup>3</sup> “Carnitine deficiency is when not enough (less than 10%) of the nutrient carnitine is available to cells in the body. This can cause muscle weakness and heart or liver problems.” “Carnitine Deficiency,” Cedars-Sinai, <https://www.cedars-sinai.org/health-library/diseases-and-conditions/w/what-is-carnitine-deficiency.html>. The ALJ noted that J.R.’s carnitine deficiency was found to be most likely diet related in March 2019.

specifically noted that she was evaluating the “whole child,” correctly summarizing the requirements for such an analysis. As such, the ALJ described J.R. as: suffering from autism and ADHD; reportedly being “‘totally unable to talk’ but has speech that can be understood some of the time”; having “limited ability to communicate, progress in learning, engage in physical activities, engage in behavior with other people, help herself and cooperate with others in taking care of personal needs, and pay attention and stick with a task”; and “struggle[ing] with communication, social skills and abilities, physical coordination and balance, and self-care and daily living activities.” (AR 24.) The ALJ also considered J.R.’s own testimony. However, the ALJ concluded that her account was not entirely consistent with the medical and other evidence in record, finding that “the claimant is a ten-year-old child who is developing in an age-appropriate manner.” (*Id.*)

The ALJ then reviewed the record evidence, including school records, describing her as a “very caring and social girl” who “enjoys small-group interactions.” The records also describe improvement in her English speech articulation, having moved to Wisconsin from Puerto Rico in December 2017, following devastating hurricane damage in Puerto Rico. The records also note that she has “great ideas when she writes, especially when given ‘helper words’ and idea,” but the ALJ also acknowledged IEPs and other school documents indicating that J.R. was performing below grade level in several subjects, and she needed a number of accommodations, including modified grading and assignment times.

The ALJ also reviewed neuropsychological testing performed at the Marshfield Clinic in July 2018. That testing showed J.R. “struggled to remain focused but was easily redirected; she showed ‘squirmy’ or ‘fidgety’ behavior, but it did not interfere with

engagement in the testing process”; while “[v]erbalizations were immature,” she was able to convey thoughts; and “showed good eye contact, affect ranging from appropriate to flat, and worked diligently throughout the session.” (AR 25.) As for intellectual testing, there was “variability,” with J.R. showing strengths in “visual-spatial processing and conceptual problem solving,” but was below-average in “verbal reasoning” and “visual motor processing speed tasks.” (*Id.*) J.R. also showed low to average range of academic testing. The testers noted “[d]ifficulty remaining focused for 20+ minute task, but response time was generally within normal limits.” (*Id.*) She also had average performance in “simple sequencing,” but was in the low range for “more complex sequencing tasks,” and had “fluctuating performance regarding tasks of learning/memory.” (*Id.*) She was diagnosed with cognitive disorder, academic difficulties, social and emotion delay, and ADHD. (*Id.*) Her full-scale IQ was 86, which falls within the 18th percentile. (*Id.*)

The ALJ then turned to the August 2018 treatment notes show that J.R. met the criteria for autism spectrum disorder, exhibiting below average receptive and expressive language skills.<sup>4</sup> J.R. attended occupational therapy and was prescribed psychotropic medications, including Vyvanse. Occupational therapy notes describe “average to below average in prior motor proficiency testing and remaining below age expectations in musculoskeletal activities.” (AR 25.)

The ALJ next considered the report of consultative examiner, Dennis Elmergreen, Psy.D., who saw J.R. in May 2018 for a psychological examination. Dr. Elmergreen

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<sup>4</sup> The record reflects that J.R. was first diagnosed with autism in 2013, at the age of four.

described J.R. as a “pleasant girl with good social skills, without exhibiting symptoms of autistic spectrum disorder or ADHD.” (AR 25.) Dr. Elmergreen described her as “cooperative and friendly,” and her speech as “clear and understandable.” (*Id.*) Dr. Elmergreen also found J.R.’s “[p]sychomotor speed” as “normal” and otherwise “exhibited normal mental processes.” (*Id.*) Dr. Elmergreen administered the Wechsler Intelligence Scale for Children (Fourth Edition), which found that her intellectual functioning fell within the “low average range,” and further found that she had an IQ of 89. (AR 25-26.) Dr. Elmergreen “also noted [J.R.] did poorly on working memory tasks which possibly reflected some attention problems [that] were not clearly observed during the interview since the claimant seemed to make a very diligent effort.” (AR 26.) “Ultimately, Dr. Elmergreen said the previous diagnosis of autistic spectrum disorder and symptoms of ADHD were not observed during the exam, such that he gave no clinical diagnosis.” (*Id.*)

The ALJ also considered the opinions of the state agency psychological and pediatric consultants, finding that the opinions were largely supported by the record, but the ALJ rejected any opinions that J.R.’s impairments were non-severe or had lesser limitations than she found with respect to the six functional areas discussed in her opinion. Instead, she held that the “overall evidence better supports the opinion of John DiTraglis, M.D., the medical expert witness,” who not only testified at the hearing, but based his opinion

on a review of a more comprehensive record and updated evidence. In addition to being an expert familiar with Social Security law and regulations, Dr. DiTraglis had the opportunity to personally hear the testimony provided by the claimant and her father. His opinion is further supported with citations to specific evidence as noted herein with regard to each domain of function.

(AR 26.)

The ALJ then considered the form completed by J.R.'s treating medical source, "Mike Sullivan," which she found unpersuasive because of inconsistencies within the form itself, including: a finding of marked limitation on one page and a finding of moderate limitation on another page for the same functional area; failure to follow the directions on the form indicating that some only apply to patients of at least 18 years of age; and failure to provide any written explanation for the checked boxes. (AR 26.) Plaintiff does not challenge the ALJ's treatment of Sullivan's opinion on appeal either. The ALJ similarly concluded that Dr. Elmergreen's completion of a "Statement of Work Capacity" form was unpersuasive because it has no application in determining whether a ten-year-old child is disabled. (AR 27.) Here, too, plaintiff does not challenge that finding on appeal, other than to argue that this form was also unpersuasive.

The ALJ next considered statements by teachers and school providers, noting that these records at least show "some improvement" generally over time and "significant improvement" with respect to communication. (AR 27.) The ALJ further discounted J.R.'s parents' testimony because it was not consistent with the record as a whole, particularly as discussed in the portion of her opinion detailing specific findings with respect to the six functional areas. In particular, with respect to acquiring and using information, the ALJ found that J.R. had marked limitations, consistent with Dr. DiTraglis's opinion. As for the other five functional areas -- attending and completing tasks, interacting and relating with others, moving about and manipulating objects, caring for yourself, and health and physical well-being -- the ALJ concluded that J.R. had less than marked limitations.

In support of her finding as to J.R.'s attending and completing tasks, which appears to be the focus of plaintiff's challenge on appeal, the ALJ explained that school records show that she has difficulty paying attention and following instructions, but also has shown improvement. (AR 30.) In particular, the ALJ noted that "[h]er providers and consultative examiner noted some difficulty with focus," and "[s]ome teachers reported a serious or very serious problem to some degree in attending and completing tasks," but also that her "special education teacher noted no more than an obvious problem." (*Id.*) The ALJ next noted that the consultative examiner did not find ADHD symptoms during his examination. Consistent with the medical expert witness and state agency consultants, therefore, the ALJ found that J.R. had less than marked limitations in this functional area.

Based on her findings with respect to all functional areas, the ALJ concluded that plaintiff was not disabled under the Social Security Act. This appeal followed.

## OPINION

A federal court's standard of review with respect to 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). 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," *id.*, and insure the ALJ has provided "a logical bridge" between findings of fact and conclusions of law, *Stephens v. Berryhill*, 888 F.3d 323, 327 (7th Cir. 2018).

For individuals under the age of 18, the Commissioner has established a three-step, sequential evaluation process to determine if a claimant is disabled. 20 C.F.R. § 416.924(a). At step one, the ALJ must determine if the claimant is engaging in substantial gainful activity. 20 C.F.R. § 416.972(a). Here, the ALJ concluded that J.R. has not. At step two, the ALJ must determine if the claimant has a "severe" medically determinable impairment or a combination of severe medically determinable impairments. 20 C.F.R. § 416.924(a). Here, the ALJ determined that J.R. had severe impairments, including autism and ADHD. Accordingly, plaintiff's challenge turns on the ALJ's findings at step three, requiring that the ALJ consider whether an impairment or combination of impairments meet or medically equal the severity of a listing or that functionally equals a listing. 20 C.F.R. §§ 416.923, 416.924a(b)(4) and 416.926a(a) and (c).

At step three, a claimant is *presumed* disabled if an impairment or combination of impairments lasting or expected to last for 12 continuous months meets or medically equals the severity of, or functionally equals, a listing. 20 C.F.R. § 416.924(d). To determine whether a claimant functionally equals a listing, the ALJ must consider the claimant's functioning in the six domains as described above. If a claim has "marked" limitations in two domains or an "extreme" limitation in one domain, the claimant is deemed to



functionally equal the listings. 20 C.F.R. § 416.926a(a). As also detailed above, J.R. principally challenges on appeal the ALJ's treatment of Drs. Elmergreen's and DiTraglis's respective medical opinions, particularly with respect to their findings as to J. R.'s ability to attend to and complete tasks. Therefore, the court will address the ALJ's consideration of each doctor's opinions in turn.

### **I. Dr. Elmergreen's Opinion**

As an initial criticism, plaintiff faults Dr. Elmergreen for completing a statement-of-work capacity form. However, as noted above, the ALJ also faulted him for that and found any opinions expressed in that form unpersuasive. What plaintiff does *not* explain is why the ALJ was required to reject all of Dr. Elmergreen's other opinions based his completing one form that was not applicable.

Next, plaintiff complains that Dr. Elmergreen did not perform a test of variable of attention ("TOVA"), which plaintiff contends is *the* test necessary to diagnose ADHD. Here, plaintiff seems to misunderstand Dr. Elmergreen's role as a consultative examiner in her case. Specifically, there is no indication that his meeting with J.R. was for any diagnostic purpose; rather, the intended purpose was to assess her functional limitations. Indeed, the ALJ relied on the medical records in finding that J.R. has ADHD. Moreover, the ALJ found this condition and there is no indication in the ALJ's opinion that she ever questioned that diagnosis. On the contrary, the ALJ found ADHD was among J.R.'s severe impairments. However, this finding in and of itself does *not* necessarily mean that J.R. has marked limitations in attending and completing tasks, nor did plaintiff develop any argument or provide evidentiary support that such a conclusion was required here.

Regardless, while Dr. Elmergreen noted attention shortcomings in J.R.'s examination, which the court addresses below in evaluating the ALJ's treatment of Dr. DiTraglis's opinion, the ALJ was entitled to rely on his not seeing other signs of ADHD.

Finally, plaintiff faults Dr. Elmergreen for not performing the Autism Diagnostic Observation Schedule ("AODS"), but again this misunderstands Dr. Elmergreen's role. As explained above, the ALJ *accepted* the medical records from treatment providers and neuropsychological testers diagnosing J.R. with autism, and concluded that it was a severe impairment. Dr. Elmergreen's only role was to assess the functional limitations of that condition on J.R.'s day-to-day activities.

Overall, if one were to read plaintiff's criticisms without reading the ALJ's opinion, one would assume that the ALJ *rejected* J.R.'s diagnoses of autism and ADHD, which she clearly did not. As a result, counsel's briefing fails to confront the ALJ's actual opinions. In any event, the court rejects this basis for remand.

## **II. Treatment of Dr. DiTraglis's Opinion**

Plaintiff also contends that the opinion of medical expert, Dr. DiTraglis, is not consistent with the record and, therefore, should not have been found persuasive by the ALJ. First, plaintiff criticizes Dr. DiTraglis's opinion that J.R.'s intelligence falls within the "normal range" as not supported by the record. (AR 102, 103.) However, in support, plaintiff cites only to Dr. Elmergreen's finding that J.R.'s IQ was in the "low average range." (AR 574.) The problem with plaintiff's reliance on this finding is that Dr. DiTraglis's characterization of J.R.'s IQ as within the "normal range" actually inconsistent with Dr. Elmergreen's finding that her IQ was in the "low average range." Regardless, the ALJ

correctly noted Dr. Elmergreen's note that her IQ was in the "low average range," as well, and nothing in her opinion suggests she did not operate on that assumption.

Second, plaintiff correctly observes that Dr. DiTraglis misstates Dr. Elmergreen's opinion as finding that J.R. did not have ADHD or autism. This is a fair criticism, but again not one that can be laid at the feet of the ALJ, who not only did not question these diagnoses, but concluded that both constituted severe impairments for J.R. Certainly, this *might* have been a basis for the ALJ discounting Dr. DiTraglis's opinions, but it is not a basis for overturning the ALJ's partial reliance on them. And, again, the diagnoses of ADHD and autism did not render J.R. disabled within the meaning of the SSA. Instead, the ALJ appropriately considered J.R.'s limitations with respect to the functional areas in determining that she only had one area of marked limitations, and, thus, her impairments did not meet or medically equal the listings.

Third, and finally, plaintiff faults Dr. DiTriglis's treatment of the speech pathologist's records, but also fails to develop any argument as to how this error impacted the ALJ's findings in any material respect. In particular, plaintiff fails to explain how Dr. DiTrigalis's findings with respect to J.R.'s speech would have warranted the ALJ finding marked limitations in attending and completing tasks, much less have been a basis to *overturn* the ALJ's weighing of all the evidence differently.

Having rejected plaintiff's arguments on appeal, the court will affirm the denial of benefits.

ORDER

IT IS ORDERED that:

- 1) The decision of defendant Kilolo Kijakazi, Acting Commissioner of Social Security, denying plaintiff J.R.'s application for disability insurance benefits is AFFIRMED.
- 2) The clerk's office is directed to enter judgment in defendant's favor and close this case.

Entered this 11th day of July, 2022.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge