

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAISY RIVERA, :  
 :  
 Plaintiff, :  
 :  
 v. : CIVIL ACTION  
 : NO. 04-2102  
 :  
 JO ANNE B. BARNHART, :  
 COMMISSIONER OF :  
 SOCIAL SECURITY, :  
 :  
 Defendant. :

Giles, C.J.

March 24, 2005

**MEMORANDUM**

Daisy Rivera brings this action under 42 U.S.C. § 405(g), seeking reversal of the final decision of the Commission of Social Security (“Commissioner”) denying plaintiff’s application for Supplemental Security Income (“SSI”), under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1382f. The parties have filed cross-motions for summary judgment. Both are denied. Because the Administrative Law Judge (“ALJ”) did not consider all of the medical evidence and did not give appropriate weight to the opinions of plaintiff’s treating physicians, this matter is remanded to the Commissioner for further proceedings consistent with this opinion.

**Procedural History**

On May 11, 2001, Ms. Rivera filed an application for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act (“Act”), 42 U.S.C. §§ 1381-1383f (2004). She is **thirty-seven years old**, has a seventh grade education, but no past work experience. She alleged a disability as of June 1, 1995 due to epilepsy, carpal tunnel syndrome, stomach pain, a

heart murmur, bad nerves, and major depression.

Plaintiff has previously filed seven claims for SSI, all of which were denied. The seventh of the previously denied claims did not become final until the Appeals Council (“AC”) reconsidered and affirmed the decision of the Administrative Law Judge (“ALJ”) on August 8, 2001.<sup>1</sup> Therefore, plaintiff is eligible for SSI only for the current eighth claim, the date of application being May 11, 2001. (R. 34.)

The pending claim was initially denied by the Social Security Administration (“SSA”) on October 15, 2001. On December 2, 2002, the ALJ continued a scheduled hearing so that plaintiff could obtain counsel. Following hearings on February 10, 2003 and March 14, 2003, the ALJ issued a decision on July 18, 2003 denying plaintiff’s claim. (R. 13-21.) On March 15, 2004, the AC denied plaintiff’s request for review of the ALJ’s decision. Thereafter, plaintiff appealed to this court, claiming a disabling mental condition, major depression.

On May 11, 2004, plaintiff was granted SSI benefits based on a subsequent application for benefits. Documents relating to that subsequent application are not part of the record of this proceeding.

### **Hearings Before the ALJ**

Plaintiff’s first hearing occurred on February 10, 2003. (R. 33-80, 81-91.) Testifying was plaintiff’s social worker, Pedro Cornel, medical expert, Margret Friel, M.D., and vocational expert, William Housch. (Id.) Plaintiff described her background, medical history, medications,

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<sup>1</sup> Plaintiff originally filed the seventh claim on March 25, 1996. It was denied initially on July 24, 1996 and upon reconsideration on October 3, 1996. The ALJ issued an opinion denying the claim on August 18, 1998, and the AC affirmed on November 19, 1999 and then upon reconsideration on August 8, 2001.

and physical limitations relative to shopping, cooking, house cleaning, and caring for her children (R. 45-64.) Mr. Cornel testified that he has frequent contacts with plaintiff, that he has to remind her continually of medical appointments and to take her medications timely and as prescribed.

(R. 41-45.)

Dr. Friel, board-certified psychiatrist, was called by the ALJ as a medical expert. (R. 35.) She never examined plaintiff, but testified about the medical records as they existed as of February 10, 2003.<sup>2</sup> (R. 65.) Three of the medical records which Dr. Friel considered were Exhibits B-10F, B-11F, and B-13F.

Exhibit B-10F is the report of a neuropsychiatric disability examination by Dr. Martin Goldstein, D.O., performed on August 8, 2001. (R. 203-213.) He diagnosed plaintiff as having an adjustment disorder with depression, and assessed plaintiff's abilities in making occupational, performance, and social adjustments. He opined that plaintiff's abilities were poor to none in understanding, remembering, and carrying out complex job instructions and were only fair in dealing with work stresses, functioning independently, maintaining concentration, understanding and carrying out detailed but not complex instructions, and in demonstrating reliability. (R. 210-211.)

Exhibit B-11F is the "Psychiatric Review Technique" report by the state agency psychiatrist, Dr. J.J. Kowalski, M.D., dated August 27, 2001. (R. 214-227.) Dr. Kowalski, a non-examining physician, concluded that plaintiff had only "mild" limitations **in activities of daily living, social functioning, and concentration, persistence, or pace**, and that she did not have

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<sup>2</sup> The record contained exhibits B-1 to B-2A, B-1 to B-3D, B-1 to B-5E, and B-1 to B-15F. (R. 2-3, 38.)

**repeated episodes of decompensation.** (R. 224.)

Exhibit B-13F is a series of medical records from *Asociación de Puertorriqueños en Marcha, Inc.* (“A.P.M.”), the mental health agency whose physicians treated plaintiff starting in March, 1999. (R. 251.) Those treating physicians included psychiatrists, Dr. Roger Erro, M.D., and Dr. Richard Mufson, M.D. Psychotherapist Josephine Talley reported observations of plaintiff from her various visits to the clinic. (See e.g. R. 242, 251.) Exhibit B-13F contains a “Medical Source Statement of Ability to Do Work Related Activities,” a psychiatric evaluation dated March 23, 1999, **a list of plaintiff’s prescribed medications, and progress notes from April 20, 1999 through March 27, 2002.** (R. 236-249.) Dr. Erro, who appears to have been the primary treating physician, concluded that plaintiff suffered from major depression and prescribed various medications for that level of depression. (R. 251.)

Dr. Friel, nevertheless, opined that plaintiff’s mental impairment was not severe nor was it a listed mental impairment. (R. 67.) She reached this conclusion relying on Exhibits B-10F and B-11F, having rejected several records within Exhibit B-13F. (*Id.*) More specifically, Dr. Friel disagreed with the “Medical Source Statement of Ability to do Work-Related Activities” prepared by **Dr. Erro**. Dr. Erro had opined that plaintiff had “marked” limitations relative to several basic work activities. Dr. Friel dismissed this assessment and testified: “There was nothing that I could find in that, in that other list from that source to support marked limitations. Limitations anywhere.” (R. 67, 69-70.) **Dr. Friel also eliminated from consideration the March 23, 1999 Psychiatric Evaluation in Exhibit B-13F, performed by Dr. Richard Mufson, another of plaintiff’s A.P.M. physicians.** (R. 241-242.) Dr. Mufson, too, had diagnosed plaintiff as having major depression. Dr. Friel chose not to consider this opinion because that evaluation preceded

May 11, 2001, the initial date for which plaintiff was technically deemed disabled for purposes of this claim. (R. 67.)

The ALJ posed a hypothetical question to vocational expert, William Housch. She asked: “Let’s assume an individual of...36, with a seventh grade education and no past work. And let’s assume she can perform work provided it is not near hazardous machinery, not near heights. Standard seizure precautions. What work, if any, could she perform?” (R. 73-74.) Mr. Housch opined that such a person could be employed as a laundry worker, small parts assembler, or light housekeeper, all jobs which exist in significant numbers in the national economy. (R. 73-75.)

During cross-examination, plaintiff’s attorney posed the following hypothetical:

Given that each...includes taking instructions and helping or, or serving others. Could my client be expected to do the jobs of laundry worker, small parts assembler or light housekeeper, if we agree with her psychiatrist that she has marked inability to interact with the public. Marked inability to interact appropriately with supervisors. Marked inability to interact appropriately with coworkers. Marked inability to respond appropriately to work pressures in a usual work setting. And marked inability to respond appropriately to changes in a routine work setting? (R. 77-78.)

Mr. Housch responded: “Well, markings that she’s not, she can’t do it, but it doesn’t preclude it.

But the combination of all of them would **preclude her from employment.**” (R. 78.)

At the second hearing on March 14, 2003, plaintiff offered Exhibits B-17F through B-29F into evidence, and the ALJ admitted them.<sup>3</sup> (R. 3, 83.) Exhibit B-18F consists of progress notes by plaintiff’s primary therapist at A.P.M., Josephine Talley, from March 29, 1999 through

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<sup>3</sup> Plaintiff suggests that the records entitled “Medical Records from 3/22/99 to 2/14/03 from A.P.M.” are within Exhibit B-18F but are marked erroneously in pages 329-384 of the record as B-17F. (Pl.’s Am. Mot. for Summ. J. at 4). Since plaintiff and the ALJ refer to these records as B-18F, for the sake of clarity in this discussion, the contents of the exhibits marked B-17F and B-18F are herein described as B-18F.

February 14, 2003.<sup>4</sup> (R. 330-383.) The notes include plaintiff's subjective complaints and the therapist's observations of her demeanor and affect. Plaintiff's mother testified during the hearing. She related that plaintiff has had to live in a highly supportive environment for the past twenty years because of her seizure disorder, that plaintiff cannot go into the street alone, cook, or take care of her own children. (R. 84-90.)

### **ALJ's Decision**

For eligibility of supplemental security income under Title XVI of the Social Security Act, a claimant must meet the Act's definition of "disabled." See 42 U.S.C. §§ 1381-1383f (2004). An individual is disabled if a physical or mental impairment<sup>5</sup> prevents the person from engaging in substantial gainful activity, and the impairment is "of such severity<sup>6</sup> that he is unable to do his previous work and cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exist in the national economy. 42 U.S.C. § 1382c(a)(3)(B) (2004).

**The third circuit has summarized five steps that must be applied to determine whether a**

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<sup>4</sup> These notes are legible, although difficult to read and understand as a layperson. The notes were written by Josephine Talley, psychotherapist, but approved by the supervising psychiatrists.

<sup>5</sup> A physical or mental impairment is defined as "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 1382c(a)(3)(D) (2004).

<sup>6</sup> To be severe, an impairment must "be expected to result in death or . . . has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A) (2004); 20 C.F.R. § 416.909 (2005).

claimant is “disabled”:<sup>7</sup>

The Secretary uses a five step process to determine if a person is eligible for Supplemental Security Income benefits. In the first two steps, the claimant must establish (1) that she is not engaged in "substantial gainful activity" and (2) that she suffers from a severe medical impairment. If the claimant shows a severe medical impairment, the Secretary determines (3) whether the impairment is equivalent to an impairment listed by the Secretary as creating a presumption of disability. If it is not, the claimant bears the burden of showing (4) that the impairment prevents her from performing the work that she has performed in the past. If the claimant satisfies this burden, the Secretary must grant the claimant benefits unless the Secretary can demonstrate (5) that there are jobs in the national economy that the claimant can perform.

Jesurum v. Sec’y of the United States Dep’t of Health & Human Servs., 48 F.3d 114, 117 (3d Cir. 1995) (citations omitted). See also 20 C.F.R. §§ 404.1520, 416.920 (2005); Ramirez v. Barnhart, 372 F.3d 546, 550-51 (3d Cir. 2004).

Under Step One, the ALJ concluded that plaintiff had not engaged in substantial gainful employment (R. 20.) The ALJ then considered plaintiff’s impairments singly and in combination, and in Step Two found that plaintiff’s seizure disorder, obesity, carpal tunnel syndrome, and depression were not severe. (Id.) At Step Three, the ALJ held that plaintiff’s seizure impairment did not meet or equal those in the listings. (Id.) Plaintiff had no past relevant work relative to Step Four. Therefore, the burden fell upon the ALJ to show that plaintiff had the residual functional capacity to perform work that existed in significant numbers in the national economy. (R. 21.) The ALJ found that plaintiff could not work on unprotected heights or near

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<sup>7</sup> The SSA’s regulations for SSI are equivalent to those for claims of disability insurance benefits (“DIB”) under Title II of the Act; therefore, courts generally refer to the regulations and case law for SSI and DIB interchangeably. See e.g. Burns v. Barnhart, 312 F.3d 113, 119 n.1 (3d Cir. 2002) (comparing 20 C.F.R. § 416.920 with 20 C.F.R. § 404.1520) (“Th[e] test [‘to determine whether a person is disabled for purposes of qualifying for SSI’] is the same as that for determining whether a person is disabled for purposes of receiving social security disability benefits. As a result, we consider case law developed under both SSI and social security disability benefits law.”).

dangerous moving machinery, but she could still be employed in certain jobs existing in the national economy, such as a laundry worker, small parts assembler, or light housekeeper. (Id.) The ALJ concluded that plaintiff has mild limitations in daily activities, social functioning, concentration, persistence, and pace, but that she had no episodes of decompensation. (R. 20.) The ALJ further concluded that plaintiff's allegations of severe physical and mental limitations were not fully credible. (R. 21.)

## Analysis

### A. Standard of Review

When reviewing a Commissioner's denial of a claimant's application for disability benefits, a district court must determine whether the findings are supported by substantial evidence in the record. Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999). See also 42 U.S.C. § 405(g) (2004) and 42 U.S.C. § 1383(c)(3) (2004). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Williams v. Sullivan, 970 F.2d 1178, 1182 (3d Cir. 1992) (citing Kangas v. Bowen, 823 F.2d 775, 777 (3d Cir. 1987)). Furthermore, the third circuit has suggested, "[i]t is less than a preponderance of the evidence but more than a mere scintilla." Jesurum, 48 F.3d at 117 (citing Richardson v. Perales, 402 U.S. 389, 401 (1971)). Evidence is not substantial if it is a single piece of evidence with an unresolved conflict with other evidence, is overwhelmed by other evidence, or it is merely a conclusion rather than supporting evidence. Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983). "Despite the deference due to administrative decisions in disability benefit cases, 'appellate courts retain a responsibility to scrutinize the entire record and to reverse or remand if the [Commissioner]'s decision is not supported by substantial evidence.'" Morales v. Apfel, 225

F.3d 310, 317 (3d Cir. 2000) (quoting Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981)).

**Plaintiff alleges that the ALJ's denial of her claim was in error because the finding that her mental impairments were not severe and the rejection of the treating physicians' opinions were not supported by substantial evidence. In moving for summary judgment, she seeks reversal of the denial of SSI, or alternatively, remand of the matter. Defendants also moved for summary judgment, seeking an order affirming the denial of benefits. Since the court finds that the ALJ's rejection of Dr. Erro's medical opinion of major disabling depression was not based on substantial evidence, the case is remanded so that the ALJ can fully account for all pertinent A.P.M. medical record entries and give appropriate weight to the opinions of plaintiff's treating physicians.**

#### **B. ALJ's Rejection of the Opinions of Plaintiff's Treating Physicians**

In finding that plaintiff was not disabled, the ALJ was obligated to weigh the conflicting opinions of various medical sources. A general framework for determining how much weight to assign to medical opinions appears in 20 C.F.R. § 416.927(d). The examining physician relationship plays an important role in assigning weight because a treating source can best provide a "detailed, longitudinal picture" of a claimant's impairments and can provide information not obtainable from "objective medical findings alone or from reports of individual examinations." Id. at § 416.927(d)(2). See also Fagnoli v. Halter, 247 F.3d 34, 43 (3d Cir. 2001) (explaining why the regulations and case law dictate that the opinions of an applicant's treating physician are "entitled to substantial and at times even controlling weight."). A treating physician's opinion on the nature and severity of a claimant's impairment has controlling weight if it is well-supported by medical evidence and is not inconsistent with other substantial evidence

in the record. 20 C.F.R. § 416.927(d)(2); Fargnoli, 247 F.3d at 43. When a treating physician’s opinion is not given controlling weight, the weight applied will depend on the following factors: (a) length of treatment and frequency of examination;<sup>8</sup> (b) nature and extent of treatment relationship;<sup>9</sup> (c) supportability;<sup>10</sup> (d) consistency;<sup>11</sup> (e) specialization of the physician;<sup>12</sup> and (f) other factors that support or contradict the medical opinion.<sup>13</sup> 20 C.F.R. § 416.927(d). “In choosing to reject the treating physician’s assessment, an ALJ may not make ‘speculative inferences from medical reports’ and may reject ‘a treating physician’s opinion outright only on the basis of contradictory medical evidence’ and not due to his or her own credibility judgments, speculation or lay opinion.” Morales, 225 F.3d at 317-18 (quoting Plummer, 186 F.3d at 429). When there is conflicting evidence, the ALJ is required to state which evidence was considered, which evidence was rejected, and to give a clear explanation of why relevant evidence was rejected. Cotter v. Harris, 642 F.2d 700, 705-706; see also Fargnoli, 247 F.3d at 42-44 (reiterating the Court’s need for clear administrative records when weighing contradicting

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<sup>8</sup> “Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source’s medical opinion,” 20 C.F.R. § 416.927(d)(2)(i).

<sup>9</sup> More weight is given to a treating source who has reasonable knowledge of the impairment. 20 C.F.R. § 416.927(d)(2)(ii).

<sup>10</sup> “The more a medical source presents relevant evidence to support an opinion . . . the more weight we will give that opinion.” 20 C.F.R. § 416.927(d)(3).

<sup>11</sup> “Generally, the more consistent an opinion is with the record as a whole, the more weight we will give to that opinion.” 20 C.F.R. § 416.927(d)(4).

<sup>12</sup> “We generally give more weight to the opinion of a specialist about medical issues related to his or her area of specialty than to the opinion of a source who is not a specialist.” 20 C.F.R. § 416.927(d)(5).

<sup>13</sup> For examples, See 20 C.F.R. § 416.927(d)(6).

evidence), and Burnett v. Comm’r of Soc. Sec. Admin., 220 F.3d 112, 120-22 (3d Cir. 2000) (requiring an ALJ to indicate which evidence he or she rejects and the reasons for discounting it).

### **1. Standard for Determining if a Mental Impairment is Severe**

An impairment or combination of impairments is severe if it substantially limits one’s physical or mental ability to do basic work activities.<sup>14</sup> 20 C.F.R. § 416.921. Specific guidelines for making the severity determination for claims of mental impairments are set out in 20 C.F.R. § 416.920a. The ALJ must first evaluate pertinent symptoms, signs, and laboratory findings to determine whether there exists a mental impairment.<sup>15</sup> 20 C.F.R. § 416.920a(b); see also Plummer, 186 F.3d at 428; 20 C.F.R. § 416.928 (defining symptoms, signs, and laboratory medical findings); and 20 C.F.R. § 404, Subpart P, Appendix 1 § 12.00(C) (2005) [hereinafter “Appendix 1”]. Evidence of symptoms may include plaintiff’s own statements, reports by the treating source, and statements by others about the plaintiff’s medical history, diagnosis, prescribed treatment, daily activities, and efforts to work. 20 C.F.R. § 416.929(a). “A physical or mental impairment must be established by medical evidence consisting of signs, symptoms, and laboratory findings, not only by your statement of symptoms.” 20 C.F.R. § 416.908 (referring to 20 C.F.R. §§ 416.927, 416.928). Evidence of medical signs and laboratory findings

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<sup>14</sup> **Basic work activities are those abilities and aptitudes necessary to do most work, and they include the following: physical abilities, such as walking, standing, and lifting; capacity to see, hear, and speak; ability to understand, carry out, and remember instructions; use of judgment; proper responses to supervision, co-workers, and usual work situations; and coping with changes in routine work settings.** 20 C.F.R. § 416.921.

<sup>15</sup> The plaintiff presents all symptoms, medical signs, and laboratory findings that show a medical impairment which could reasonably be expected to produce the symptoms alleged, and then the ALJ evaluates the intensity and persistence of the symptoms. 20 C.F.R. § 416.929(a); see also Navarro v. Barnhart, No. 01-2059, 2002 U.S. Dist. LEXIS 15947, \*21 (E.D. Pa. 2002).

are referenced as objective medical evidence. 20 C.F.R. § 416.912(b)(1). Signs are anatomical, physiological, or psychological abnormalities shown by observable facts that can be medically described and evaluated, and medically acceptable clinical diagnostic techniques show the abnormalities. 20 C.F.R. § 416.928(b). Examples of signs indicating psychological abnormalities are abnormalities in behavior, mood, thought, memory, and perception. Id. Laboratory findings are similar in that they are “anatomical, physiological, or psychological phenomena” but they can be shown through medically acceptable diagnostic techniques, such as psychological tests. 20 C.F.R. § 416.928(c).

After evaluating the symptoms, signs, and laboratory findings, the ALJ must then consider the claimant’s degree of functional limitations, which relates to the “extent to which [the claimant’s] impairment(s) interferes with [the] ability to function independently, appropriately, effectively, and on a sustained basis.” 20 C.F.R. § 416.920a(c); see also Appendix 1 § 12.00(C). The degree of limitation is based on the following broad functional areas: (1) activities of daily living; (2) social functioning; (3) concentration, persistence, or pace; and (4) deterioration or decompensation in work or work-like settings. 20 C.F.R. § 416.920a(c)(3); see also Ramirez, 372 F.3d at 551; Appendix 1 § 12.00(C)(1)-(4). On a standard form called the “Psychiatric Review Technique Form,” a physician assesses the first three functional areas on a five-point scale of none, mild, moderate, marked, and extreme, and the fourth according to a four-point scale of none, one or two, three, and four or more. Ramirez, 372 F.3d at 551; 20 C.F.R. § 416.920a(c)(4). A rating of “none” or “mild” in the first three functional areas and a finding of “none” for the fourth generally amounts to a nonsevere impairment, “unless the evidence otherwise indicates that there is more than a minimal limitation in [claimant’s] ability

to do basic work activities.” 20 C.F.R. § 416.920a(d)(1).

Treating physicians, Dr. Mufson, Dr. Goldstein, and Dr. Erro, diagnosed plaintiff with major depression, while the non-treating and non-examining physicians, Dr. Kowalski and Dr. Friel, concluded that plaintiff’s mental impairments were not severe. Compare Exhibit B-13F at R. 242 (Dr. Mufson’s diagnosis of major depression), Exhibit B-10F at R. 205 (Dr. Goldstein’s diagnosis of adjustment disorder with depression), and Exhibit B-15F at R. 251 (Dr. Erro having diagnosed plaintiff with major depression), with R. 214 (Dr. Kowalski’s finding that plaintiff’s medical disposition is not severe), and R. 67, 69, 72 (Dr. Friel opining that plaintiff’s mental limitations are not severe). Dr. Erro assessed plaintiff’s inability to do work as “marked,” while Dr. Kowalski opined that her limitations were “mild,” and Dr. Goldstein opined that her work abilities were, at best, only “fair” because she should not perform work that involved heights or moving machinery. Furthermore, Dr. Richard Berger, another treating physician, found that plaintiff had refractory irritable bowel syndrome,<sup>16</sup> and that “her status has deteriorated to the point where she can no longer maintain gainable employment.” (R. 281.)

The ALJ adopted the non-examining physician Dr. Kowalski’s conclusion of “mild” limitations. In her decision, the ALJ explained:

Dr. Kowalski, a state agency physician and board-certified psychiatrist, found nonsevere depression. He assessed mild limitations upon daily activities, social functioning, concentration, persistence, and pace as well as no episodes of

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<sup>16</sup>Irritable bowel syndrome is a condition characterized by a combination of abdominal pain and altered bowel function, including diarrhea and/or constipation. See U.S. National Library of Medicine, Medical Encyclopedia, at <http://www.nlm.nih.gov/medlineplus/ency/article/000246.htm> (last updated July 16, 2004). The designation of a condition as “refractory” means that it is “resistant to treatment.” Dorland’s Illustrated Medical Dictionary 1551 (19<sup>th</sup> ed. 2000).

decompensation. I concur. I am aware of Dr. Goldstein's opinion that claimant could not handle complex tasks and had "fair" abilities vis-a-vis attention, concentration, stress working independently, handling detailed tasks, and demonstrating reliability. (Exhibit B-10F). Yet, his assessment is not congruent with the results of his onetime evaluation, and I do not give it much weight. In April 2002, Dr. Erro, a clinic psychiatrist, found "marked" limitations in many areas of functioning (Exhibits B-13F). Dr. Friel commented that his assessment had no objective support, and I agree. In November 2002, Dr. Berger reported a panic disorder with refractory irritable bowel syndrome which precluded employment (Exhibits B-14F and B-16F). There is no indication that Dr. Berger is a mental health specialist nor do his own notes confirm either diagnosis. And there is no support in the record for his conclusion of disability (which is not binding upon me), I will disregard it. In January 2003, Dr. Berger simply reiterated that she could not hold gainful employment, and I will reiterate that the record as a whole does not support disability.

R. 16-17.)

## **2. The ALJ's Rejection of Dr. Erro's Assessment is Not Supported by Substantial Evidence**

During the hearing on February 10, 2003, Dr. Friel testified that Dr. Erro's assessment had no objective support. Dr. Friel reached this conclusion upon reviewing the record that existed at the time. Although the record included Exhibit B-13F, it did not include Exhibits B-17F through B-29F. To determine whether the ALJ's finding of Dr. Erro's assessment lacking support meets the substantial evidence test, the court must consider the evidence of the entire record. See e.g. 20 C.F.R. § 416.920 ("We will consider all evidence in your case record when we make a determination or decision whether you are disabled.") (emphasis added).

Dr. Friel did review Dr. Erro's assessment in Exhibit B-13F's "Medical Source Statement of Ability to Do Work-Related Activities (Mental)." (R. 236-237.) This form discusses the importance of stating the medical history, laboratory findings, diagnosis, or prescribed

medications that support the assessment, but Dr. Erro failed to list them.<sup>17</sup> However, Dr. Friel did not consider subsequently submitted medical records, Exhibit B-18F, clinical reports by Dr. Erro and the other treating physicians at A.P.M., which repeatedly concluded that plaintiff had major depression after long periods of observing her. For example, it could hardly be said that the progress note dated February 14, 2003, is not significant to a consistent medical diagnosis by A.P.M. (R. 330.) The primary therapist, Josephine Talley, wrote “D: waking with depressive thoughts, easily provoked to anxiety, difficulty staying asleep, treatment plan goals addressed. A: Her mood is pessimistic. Her speech is barely audible. Her behavior is a sad facial expression. P: Encourage sharing feelings of depression, will return to clinic in 2 weeks.”<sup>18</sup> (Id.) This describes an abnormality in behavior, mood, and thought, all of which are listed as examples of psychiatric signs in 20 C.F.R. § 416.928(b) and therefore could constitute objective medical evidence supporting Dr. Erro’s opinion of a major depression.

Dr. Erro is presumed to have considered all of Josephine Talley’s notes. Her notes are A.P.M.’s notes, and those notes preceded the date that Dr. Erro wrote that plaintiff suffered from major depression, a severe impairment. The ALJ never recalled Dr. Friel or any other medical expert to testify about the medical significance of the exhibits that were entered into evidence at the March 14 hearing yet she had an obligation to read and understand all the evidence. To the extent that she assigned significance or insignificance to the medical notes without the benefit of expert testimony, she inappropriately turned herself into a “medical expert.” The only place in

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<sup>17</sup> The supporting factors on part one of the form are barely legible, and he provides no response to the factors supporting part two. (R. 236-237.)

<sup>18</sup> The A.P.M. progress note’s form instructs the physicians to include “D.A.P.”, but the form never defines the acronym. Each day’s note is in this form.

the ALJ's decision where Exhibit B-18F is discussed in relation to plaintiff's mental impairment was in a comparison to Exhibit B-13F. The ALJ stated:

[Plaintiff] has been receiving regular psychotherapy and medication from a mental health clinic since March 1999. Notes by her therapist reflect little variation and seem to indicate no improvement whatsoever in her condition despite four years of treatment . . . . She remains restless, hopeless, and helpless with insomnia, fatigue, irritability, and anergia (Exhibit B-18F). Yet these records<sup>19</sup> conflict with the mental status examinations and medicine checks by her psychiatrists<sup>20</sup>. . . . As of August 2000, she had sporadic attendance and had run out of medications but was doing OK. She was doing OK in February 2001. In April 2001, she had shown a good response to medication but had run out of her prescription. As of June and July 2001, she was doing well on medications (Exhibit B-13F) . . . . In September, October, and December 2001, clinic psychiatrists noted that medication was working in reducing her symptoms. As of January 2002, she was less labile (Exhibit B-13F). The claimant has not submitted any further notes from her psychiatrists.<sup>21</sup> The claimant testified that medication and therapy was helping her.

(R. 16.)

**The ALJ suggested that Exhibit B-18F conflicts with Exhibit B-13F, but she had no medical testimony to support this conclusion.**

**Further, the ALJ's analysis of mental disability is legally flawed because it assumed that**

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<sup>19</sup> "These records" is a reference to Exhibit B-18F.

<sup>20</sup> The ALJ's reference to "mental status examinations and medicine checks by her psychiatrists" refers to Exhibit B-13F. There is no explanation from the ALJ supportive of the conclusion of "conflict," nor is there record cited support for the proposition that plaintiff ever functioned acceptably without medication. This court's review of the record shows the opposite conclusion is clearly warranted.

<sup>21</sup> It is not clear what the ALJ means by this statement. She seems to have been tracing plaintiff's condition as time progressed, thus implying that plaintiff did not submit notes from her psychiatrists for any period after January 2002. This is confusing because the final entries of the Progress Notes in Exhibit B-13F and Exhibit B-18F were March 27, 2002 and February 14, 2003, respectively.

plaintiff would have no disability as long as she took her seizure medication timely and as prescribed. Morales v. Apfel, 225 F.3d at 319, stands for the well-established proposition that the mere fact that a claimant is stable and well controlled with medication in a therapeutic environment does not negate a treating physician's opinion that the claimant would have a limited ability to function in the work setting. (Pl.'s Am. Mot. for Summ. J. at 11.)

Finally, a glaring material omission in the fact-finding process and the decision itself is the profound memory problems of the plaintiff. Her critical memory deficit with respect to her medication was demonstrable, even at the hearing before the ALJ. Plaintiff had been requested by her attorney to keep a diary of her medications as to the times taken. (R. 60.) She was unable to do this without assistance. When she was not supervised in this endeavor by a friend, she forgot to make an entry in the journal and was unsure whether she had taken the medication as prescribed. (R. 41-44.) There is no finding by the ALJ that the "memory problem" is contrived. On the other hand, the record shows that plaintiff's failure to take her medication due to forgetfulness has resulted in seizure episodes. There is no finding that plaintiff can be relied upon to take her required medications consistently without oversight by her mother, friends, or social workers.

Employability in any job presumes that she can remember to take her medication. The record on this score is to the contrary. When she has seizures, plaintiff falls unconscious, urinates upon herself, bites her tongue and is completely at the mercy of the environment, attendants or passersby. Moreover, it is undisputed that when she takes her seizure medication as prescribed she becomes very tired and falls asleep and remains asleep until she wakes. These conditions do not appear to be consistent with an ability to work in gainful employment and were

not included in the ALJ's hypothetical question addressed to her vocational report.

There may also be an issue as to whether, due to her memory problems, plaintiff herself is a sufficiently reliable historian on matters related to work ability, and there may be a language problem. Dr. Goldstein, for example, recorded in his report that plaintiff cooks, cleans the house, does laundry, keep appointments, goes shopping, visits her mother by train in New Jersey, gets her kids ready for school and visits her aunt by walking there. (R. 204.) Dr. Goldstein may have assumed that plaintiff cooks independently. The evidence, however, is that plaintiff does no more than microwave frozen meals (R. 51); put clothes in the washer (R.52); go shopping only for food at the corner store, in the company of another, usually her oldest, age 19 or 20, and travels to New Jersey or places outside of the home only in the company of a responsible person. Her mother travels from New Jersey to stay with her three or four days a week, five or six hours a day, helps her cook, takes care of the baby, cleans the house and even assists her in showering and dressing. (R. 84-85.) This level of assistance has been going on for four years because of the frequency of seizures grand and small, and the need to help make sure plaintiff takes the prescribed medications timely. (R. 85-87.)<sup>22</sup> The unpredictability of plaintiff seizures even while taking medication is evidenced by the fact that she has collapsed while waiting for emergency room treatment (R. 48), while awaiting a barium study (R. 179), and at A.P.M. while waiting for a therapy session to begin (R. 335).

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<sup>22</sup> The court notes that the testimony of the social worker, mother, and Dr. Berger may have medical implications which have not been explored in the testimony of any medical expert. One example, the social worker testified, “[S]omebody needs to make sure that she [plaintiff] takes the medicine, because she, she forgets or maybe she forgot that she took it already.” (R. 44.) Plaintiff’s mother’s suggesting that she helps plaintiff bathe, cook, care for the grandchildren, and clean the house is another illustration of testimony which may have medical implications. (R. 84-90.)

At the ALJ hearing, plaintiff testified that since there had been a change in her medication within the month and that she had not had a seizure. (R.53.) However, she also testified that she was still having seizures. (Id.) Perhaps, there is no contradiction plaintiff testified that she has different types of seizures, those that cause her to lose consciousness and those that result in “daydreaming.” (R. 61-62.) Both types of seizures would seem to be relevant to employability.

### **Conclusion**

For the foregoing reasons, this matter is remanded to the ALJ for reconsideration of the entire record.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DAISY RIVERA, :  
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 Plaintiff, :  
 :  
 :  
 v. : CIVIL ACTION  
 : NO. 04-2102  
 :  
 JO ANNE B. BARNHART, :  
 :  
 COMMISSIONER OF SOCIAL :  
 :  
 SOCIAL SECURITY, :  
 :  
 :  
 Defendant. :

**ORDER**

AND NOW, this 24th day of March, 2005, in consideration of Plaintiff's Motion for Summary Judgment, Defendant's Motion for to Summary Judgment, and the record, it is hereby ORDERED that:

1. Both Motions for Summary Judgment are DENIED;

2. This case is REMANDED in accordance with the fourth sentence of 42 U.S.C. § 405(g) to the Commissioner of the Social Security Administration.

BY THE COURT:

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JAMES T. GILES

C.J.

copies by FAX on

to