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

DAMARIS SANTIAGO-RIVERA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	CIVIL ACTION
	:	
JOANNE B. BARNHART,	:	NO. 05-5698
Commissioner of the	:	
Social Security Administration,	:	
	:	
Respondent.	:	

MEMORANDUM

Baylson, J. **September 26, 2006**

Plaintiff Damaris Santiago-Rivera ("Plaintiff") seeks judicial review of the decision of the Commissioner of the Social Security Administration denying her claim for disability insurance benefits (DIB) under Title II of the Social Security Act, 42 U.S.C. §§ 401-433 ("the Act"). Presently before this Court are the parties' Cross-Motions for Summary Judgment (Doc. Nos. 12 & 13). For the reasons that follow, the Court will grant each motion in part and deny each motion in part.

I. Procedural History

Santiago-Rivera was born on December 25, 1967, and was 36 years old at the time of the ALJ's decision.[1] R. at 91. She has a general equivalency diploma (GED) obtained in Puerto Rico in 2002. R. at 50. However, Santiago-Rivera is unable to communicate in English. R. at

[1] Santiago-Rivera thus qualified as a "younger person" under the regulations. 20 C.F.R. § 404.1563. The Court must "cautiously scrutinize the employment prospects of so young an individual before placing him on the disability rolls." McLamore v. Weinberger, 530 F.2d, 572, 574 (4th Cir. 1976).

30, 95, 102. Santiago-Rivera has a background of past relevant work experience as a wire drawing machine tender (considered an "unskilled" position[2]) and as a home health aide (considered a "semi-skilled" position[3]). R. at 69-70. Both jobs were performed at the medium level of exertion.[4]

Santiago-Rivera filed for Social Security disability insurance benefits on or about June 12, 2003, alleging that she became disabled due to impairments including headaches, sleep apnea, back pain, asthma, depression and anxiety, and morbid obesity. R. at 42-47. After Santiago-Rivera's claim was initially denied by the state agency on October 3, 2003 (see R. at 81-84), Santiago-Rivera requested a hearing before an Administrative Law Judge ("ALJ") on December 4, 2003. R. at 85. The ALJ, Sherman S. Poland, conducted a hearing on April 29, 2004, at which Santiago-Rivera, who was represented by counsel, and a vocational expert, testified. See R. at 39-78. On May 28, 2004, the ALJ issued a decision denying Santiago-Rivera's claim, and concluded that, although Santiago-Rivera could not perform her past relevant work, Santiago-Rivera was not "disabled" under the meaning of the Act because she had, at all pertinent times, "the residual functional capacity to perform work for which jobs exist in significant numbers in the national economy." R. at 24-29. More specifically, the ALJ found Santiago-Rivera could perform the full range of millions of unskilled, sedentary jobs identified

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[2] See Dictionary of Occupational Titles, Appendix C (Westlaw Social Security Library); 20 C.F.R. § 416.968(a).

[3] See Dictionary of Occupational Titles, Appendix C (Westlaw Social Security Library); 20 C.F.R. § 416.968(b).

[4] Medium work involves lifting no more than fifty pounds at a time with frequent lifting or carrying of objects weighing up to twenty-five pounds." 20 C.F.R. § 416.967(c). If someone can do medium work, it is presumed that they can also do sedentary and light work. Id.

by the Vocational Expert ("VE"). Id.

On May 29, 2005, the Appeals Council issued a notice denying Santiago-Rivera's request for review without comment ®. at 8), making the ALJ's decision the final decision of the Commissioner. See 20 C.F.R. §§ 404.955, 404.981 (2005); Matthews v. Apfel, 239 F.3d 589, 592 (3d Cir. 2001). Santiago-Rivera thereafter sought judicial review of the Commissioner's decision in this Court. She filed a Motion for Summary Judgment on March 21, 2006 (Doc. No. 12) and Respondent, the Commissioner of the Social Security Administration ("Commissioner"), filed a Cross-Motion for Summary Judgment on April 17, 2006 (Doc. No. 13).

II. Contentions of the Parties

Santiago-Rivera's five arguments challenge the ALJ's decision in regard to only two impairments: depressive disorder and headaches.[5]

Santiago-Rivera's first three arguments relate solely to the ALJ's evaluation of her depressive disorder. Specifically, Santiago-Rivera argues that (1) the ALJ's mental residual functional capacity ("RFC") assessment is not supported by substantial evidence; (2) the ALJ erred in failing to re-contact Santiago-Rivera's treating psychiatrist, Dr. Shapiro, if he felt that Dr. Shapiro's opinion was contrary to medical records and lacked a legitimate rationale; and (3) the ALJ's hypothetical concerning Santiago-Rivera's RFC was legally and factually deficient, and therefore the VE's response did not satisfy Respondent's burden.

Santiago-Rivera's fourth argument relates solely to the ALJ's evaluation of her headaches. Specifically, Santiago-Rivera argues that the ALJ erred as a matter of law by finding

[5] A party waives any issue not raised in its opening brief. Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999). Indeed, Santiago-Rivera concedes that she does not challenge a significant number of the ALJ's findings. See Pl's Br. at 7.

Santiago-Rivera's headaches to be severe, but failing to consider the impact of the severe headaches on Santiago-Rivera's RFC.

Finally, Santiago-Rivera makes one additional argument relating only to additional evidence that was not presented to the ALJ. Specifically, Santiago-Rivera argues that additional medical evidence submitted to the Appeals Council should be considered "new and material" and supports the conclusion that Santiago-Rivera is unable to sustain any substantial gainful activity due to the combination of her severe impairments. Santiago-Rivera also asserts that there was "good cause" for Santiago-Rivera to not submit the additional evidence to the ALJ at the time of the hearing.[6]

The Commissioner counters that the ALJ evaluated all the evidence in the record, and had substantial evidence to conclude that Santiago-Rivera was not disabled. The Commissioner argues that (1) the ALJ's assessment of Santiago-Rivera's mental impairment is supported by substantial evidence, (2) the ALJ's assessment of Santiago-Rivera's functional abilities properly included consideration of her headaches, and (3) the additional evidence submitted to the Appeals Council does not warrant remand.

III. History and Treatment of Impairments At Issue[7]

A. Santiago-Rivera's Mental Impairment

When Santiago-Rivera completed her initial disability report in June of 2003, she did not

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[6] See note 9, infra.

[7] Because Santiago-Rivera's arguments on appeal are limited to the ALJ's assessment of only two specific impairments – mental depressive disorder and headaches – the Court will only recite the relevant evidence (i.e., history and treatment) concerning those particular impairments. For a more complete discussion of the relevant evidence concerning the impairments about which Santiago-Rivera's raises no objection to the ALJ's determination, see R. at 23-31.

identify depression as a condition that limited her ability to work. R. at 96. Santiago-Rivera first reported depression when examined by Dr. Preet Batra, at the request of the Pennsylvania Bureau of Disability Determination, in September of 2003. R. at 115-16. At that time, Dr. Batra observed that Santiago-Rivera had no signs of psychopathology. R. at 116. Dr. Batra also noted that Santiago-Rivera followed commands very well and related very well to her sister. R. at 116. Later in September of 2003, Santiago-Rivera's records were reviewed by a state agency psychologist. R. at 118-31. After noting the results of Dr. Batra's examination and the fact that Santiago-Rivera had presented no evidence of a psychiatric treatment history, the reviewing psychologist opined that Santiago-Rivera had no medically determinable mental impairment and no functional mental limitations. R. at 118, 128, 130.

In April of 2004, Santiago-Rivera submitted mental health treatment records from Hispanic Community Counseling Services, covering the period from August 2003 through February 2004. R. at 207. During that period of time, Santiago-Rivera was seen for an initial intake assessment, an initial psychiatric assessment, ten counseling sessions, and three psychiatric checks. R. at 207-228.

On August 21, 2003, Santiago-Rivera underwent an initial intake assessment by Mr. Humberto de la Cruz. R. at 210-212. Santiago-Rivera complained of a depressed mood and low self esteem, and expressed some feelings of hopelessness about her health problems. R. at 208-10. Santiago-Rivera's thoughts progressed at a normal rate, with no flight of ideas. R. at 210. Moreover, Santiago-Rivera was alert and oriented, with normal attention, concentration and judgment, average intelligence and fund of information, relevant associations, and goal-directed speech. Id. Her appearance was good, and she was informative, with the ability to provide

suitable detail, but her self-esteem and energy were low. R. at 210-211. Santiago-Rivera's global assessment of functioning ("GAF") was rated at 50 ®. at 211, 226), which indicates "serious symptoms or any serious impairment in social, occupational or school functioning."[8] Diagnostic and Statistical Manual for Mental Disorders 34 (4th ed., text rev., 2000) ("DSM-IV").

Mr. De la Cruz diagnosed Santiago-Rivera with "dysthymic disorder, rule out major depression." R. at 211. The essential feature of dysthymic disorder is a chronically depressed mood, generally described as "sad" or "down in the dumps." Id. at 376-77. Although the condition is described as occurring for most of the day and lasting for at least two years, it may not be diagnosed if any major depressive episodes occur during that period. Id. Dysthymic disorder is usually characterized by chronic, but less severe, symptoms than major depression. Id. at 379. Santiago-Rivera saw Mr. De la Cruz several more times for therapy. R. at 213-216. During those visits, she complained of a depressed mood. Id.

Santiago-Rivera underwent a psychiatric evaluation by Dr. F. Shapiro in September of 2003. R. at 110, 224-26. At that time, Santiago-Rivera reported her current health as "fair." R. at 224. Santiago-Rivera reported depression, anxiety, poor sleep, and low frustration tolerance. R at 226. However, on mental status examination, her thoughts progressed at a normal rate, with no flight of ideas, hallucinations, delusions, or suicidal or homicidal ideations, although there was some evidence of hypochondria. R. at 225. Her associations were logical and relevant. Id. Her speech was soft, but goal-directed, and her perceptions were normal. Id. Santiago-Rivera

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[8] A GAF score 50 is on the borderline between serious and moderate symptoms. GAF scores between 51 and 60 indicate moderate symptoms (e.g., circumstantial speech and occasional panic attacks or moderate difficulty in social or occupational functioning as evidenced by few friends and conflicts with peers or coworkers). DSM-IV at 32-34.

was alert and oriented, with normal attention, insight, judgment and reliability, and she had no memory impairment. Id. Her intelligence and fund of knowledge were average, and she had a normal ability to evaluate abstractions and symbolization. Id.

Dr. Shapiro's diagnosis was adjustment disorder with depression and anxiety. R. at 226. The essential feature of adjustment disorder is a psychological response to identifiable stressor(s), resulting in clinically identifiable symptoms. DSM-IV at 680. An adjustment disorder with depressed mood and anxiety manifests with depressive symptoms (such as tearfulness or hopelessness) and anxious symptoms (such as nervousness or worry). Id. at 680-81. Dr. Shapiro prescribed Prozac, Buspar, Zyprexa, and individual psychotherapy. R. at 226.

During the next six months of psychotherapy treatment covered by Santiago-Rivera's mental health records, she continued to report symptoms of depression and worry, primarily related to particular situational factors including housing problems, health problems, the denial of her SSI application, and the difficulties that her children were experiencing in school. R. at 212-22, 227. However, Santiago-Rivera routinely denied hallucinations, paranoid thoughts, and suicidal or homicidal ideations, generally presented with an appropriate appearance, and remained friendly and cooperative. Id. Indeed, on January 19, 2004, Santiago-Rivera reported to Dr. Shapiro “I’m doing fine,” and was calm, friendly and cooperative. R. at 227. Dr. Shapiro periodically adjusted Santiago-Rivera’s medications, and, at the time of her last recorded psychiatric appointment, she agreed to continue treatment. R. at 227-28.

On April 26, 2004, Dr. Shapiro completed a checklist assessment form (a Medical Assessment of Ability to Do Work-Related Activities (Mental)), indicating that Santiago-Rivera

had a “fair” ability to follow work rules, relate to co-workers, deal with the public, interact with supervisors, function independently, maintain concentration and attention, maintain personal appearance, behave in an emotionally stable manner, relate predictably in social situations, and understand, remember and carry out simple instructions. R. at 269-271. Dr. Shapiro also opined that Santiago-Rivera would have a “poor” ability to use judgment, deal with work stress, demonstrate reliability, or understand, remember and carry out detailed or complex job instructions. Id.

B. Santiago-Rivera’s Headaches

Santiago-Rivera did not list headaches as a condition that limited her ability to work at the time that she completed her initial disability report. R. at 96. Indeed, Santiago-Rivera has worked in the past, despite her complaints of headaches. R. at 97.

Santiago-Rivera's first recorded emergency room visit for complaints of headaches was in November of 2000, while she was still working. R. at 97, 135. A CT scan of Santiago-Rivera's brain and an EEG study, taken at about that time, were both normal. R. at 134, 204. Treatment records covering the period between July 2003 and April 2004 mention headaches on only four occasions, and generally indicate that Santiago-Rivera's complaints of pain were treated with prescriptions for Motrin, Naproxen and other non-steroid, anti-inflammatory medications. R. at 235-40.

During her disability consultative examination in September of 2003, Santiago-Rivera mentioned a history of migraines, but did not state that headaches were a current problem. R. at 115. Santiago-Rivera’s physical and mental status examinations were normal except for her weight. R. at 116.

Santiago-Rivera was seen for a neurology consultation in January of 2004. R. at 199-200. At that time, Santiago-Rivera was awake, alert and oriented, with fluid speech, and no visual or facial abnormalities. R. at 200. The diagnosis of Dr. Dalia Fulop was "chronic daily headaches, analgesic rebound." Id. Dr. Fulop referred Santiago-Rivera to the Jefferson Health System for guidance on weaning off of Motrin, because "she does use Motrin on a daily basis and this is leading to her chronic daily headaches." R. at 200.

A second CT scan of Santiago-Rivera's brain, taken in February of 2004, was also normal. R. at 206. When seen for a second neurology consultation in April 2004, Santiago-Rivera remained alert and oriented in all spheres. R. at 263-64. Her CT scan was reviewed, and no abnormalities were noted. R. at 263. The diagnosis of analgesic rebound headaches was again noted. R. at 264. Santiago-Rivera acknowledged that she had not followed-up on the recommendation to seek assistance in weaning off of analgesic medication. R. at 263. Santiago-Rivera was started on Darvocet, which includes a mild narcotic but is recommended only for the treatment of mild to moderate pain. See Physician's Desk Reference 1907 (56th ed. 2002).

At the hearing before the ALJ, Santiago-Rivera testified that she had left-sided headaches which occur daily. R. at 64. She further stated that when she has a headache, she takes a pill and lays down in her room for three to four hours. Id.

C. Additional Evidence Presented to the Appeals Council

During the Santiago-Rivera's hearing before the ALJ, Santiago-Rivera stated that there were records of emergency room visits (which Santiago-Rivera asserted described treatment of both back pain and asthma) that Santiago-Rivera had not been able to obtain in time for the hearing (including a record of a visit that occurred the day before the hearing). See R. at 62–76.

Santiago-Rivera's counsel requested the opportunity to obtain and submit these records. The ALJ instructed counsel that if the records were submitted before the ALJ issued his decision, the ALJ would "certainly consider" them. R. at 76. Santiago-Rivera's counsel apparently sought the records, but requested them from the wrong entity. Counsel therefore did not submit the records to the ALJ prior to the issuance of the ALJ's decision, approximately one month after the hearing. Counsel thereafter submitted the records to the Appeals Council. Santiago-Rivera concedes, in her brief, that the Appeals Council "did consider the records."[9]

The additional evidence presented to the Appeals Council consisted of records of five emergency room visits. R. at 277-329. Specifically, these records indicate that (1) in September of 2003 and April of 2004, Santiago-Rivera was seen for primary complaints of low back pain ®. at 286, 326); (2) in December of 2003, Santiago-Rivera was seen for respiratory complaints ®. at 309); and (3) in March and May of 2004, Santiago-Rivera was seen for primary complaints of headaches ®. at 282, 295). During each visit, Santiago-Rivera was evaluated, treated, and released with prescriptions for medication. R. at 277-329. The only diagnostic studies conducted during these visits were performed in September of 2003. R. at 318-23. At that time, x-rays of Santiago-Rivera's cervical, thoracic spine, lumbar spine and pelvis showed evidence of degenerative changes at L5-S1 ®. at 320-23), and chest x-rays confirmed the presence of pleural effusions ®. at 318).

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[9] Therefore, the issue of whether Santiago-Rivera had "good cause" for failure to submit the records to the ALJ is moot and the Court will not discuss it. The Court will limit its discussion to the question of whether the additional records should have compelled the Appeals Council to remand the case to the ALJ for further consideration. See Pl's Br. at 23 n.23.

III. Legal Standard

The standard of review of an ALJ's decision is plenary for all legal issues. Schaudeck v. Comm'r of Soc. Sec. Admin., 181 F.3d 429, 421 (3d Cir. 1999). The scope of the review of determinations of fact, however, is limited to determining whether or not substantial evidence exists in the record to support the Commissioner's decision. Id. As such, "[t]his Court is bound by the ALJ's finding of fact if they are supported by substantial evidence on the record." Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999). Where "an agency's fact finding is supported by substantial evidence, reviewing courts lack power to reverse . . . those findings." Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1191 (3d Cir. 1986). "Substantial evidence does not mean a large or considerable amount of evidence but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999).

IV. Discussion

In order to establish a disability under the Social Security Act, a claimant must demonstrate that there is some "medically determinable basis for an impairment that prevents him from engaging in any "substantial gainful activity" for a statutory twelve month period. 42 U.S.C. § 423(d)(2)(A); Stunkard v. Sec'y of HHS, 841 F.2d 57, 59 (3d Cir. 1988).
To determine whether an individual is disabled, the regulations proscribe a five-step analysis. 20 C.F.R. § 404.1520(a); Ramirez v. Barnhart, 372 F.3d 546, 550-51 (3d Cir. 2004). The fact-finder must determine: (1) if the claimant currently is engaged in substantial gainful employment; (2) if not, whether the claimant suffers from a "severe impairment;" (3) if the claimant has a "severe impairment," whether that impairment meets or equals those listed in 20 C.F.R. Part 404, Subpart

P, Appendix 1, and thus are presumed to be severe enough to preclude gainful work; (4) whether the claimant can still perform work he or she has done in the past ("past relevant work") despite the severe impairment; and (5) if not, whether the claimant is capable of performing other jobs existing in significant numbers in the national economy in view of the claimant's age, education, work experience and residual functional capacity ("RFC"). Id. If there is an affirmative finding at any of steps one, two, four or five, the claimant will be found "not disabled." 20 C.F.R. § 404.1520(b)-(f). See also Brown v. Yuckert, 482, U.S. 137, 140-42 (1987). The claimant carries the initial burden of demonstrating by medical evidence that he or she is unable to return to his or her former occupation. Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). Once the claimant has done so, the burden shifts to the Commissioner to show the existence of substantial gainful employment the claimant could perform. Id.

A. The ALJ's Conclusions

The ALJ concluded that, although Santiago-Rivera had "severe impairments" that included a back disorder, headaches, sleep apnea, and depressive disorder ®. at 30), Santiago-Rivera did not meet or equal the criteria of the Act. The ALJ found that Santiago-Rivera's "statements regarding the severity of her symptoms and their impact on her ability to work are somewhat exaggerated and can not be fully credited." R. at 27. The ALJ found Santiago-Rivera's testimony to be "vague and unpersuasive." Id. The ALJ therefore concluded "the record does not support [Santiago-Rivera's] dire description of her physical and mental limitations. Id.

With specific regard to Santiago-Rivera's depressive disorder, the ALJ found that:

> Although the claimant has received some mental health treatment, her diagnoses have been reported as dysthymic and/or adjustment disorder rather than as major depression, and her symptoms have been intermittent. The medical record does not document any serious problems associated with recurrent panic attacks or hallucinations.

R. at 28. The ALJ also noted that "a State agency psychologist reviewed the medical record and found no conclusive evidence of mental impairment." Id. The ALJ found that Santiago-Rivera's mental impairment resulted in "no more than mild restrictions in her activities of daily living and her ability to maintain social functioning," and "moderate, but not marked, restriction in her ability to maintain concentration." Id. The ALJ acknowledged "that Dr. Shapiro completed a medical source statement rating the claimant's ability to perform work-related mental activities as 'fair' to 'poor to none.'" Id. However, the ALJ concluded that "this assessment is not consistent with the evidence of the claimant's ability to function," and that "Dr. Shapiro did not provide an explanation for this opinion." Id. Finally, the ALJ stated that he found "the objective medical evidence does not support such extreme functional limitations," and therefore the ALJ "assign[ed] little weight to Dr. Shapiro's opinion in this regard." Id.

The ALJ found that Santiago-Rivera had RFC to perform gainful employment at the exertional level of sedentary work in simple, routine jobs. Id. In so finding, the ALJ concluded that Santiago-Rivera "is able to lift no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools). Id. Therefore, the ALJ concluded that Santiago-Rivera was not "disabled" within the meaning of the Act. R. at 29.

B. The ALJ's Finding that Santiago-Rivera was Not Disabled

1. The ALJ's Assessment of Santiago-Rivera's Mental RFC

Santiago-Rivera contends that the ALJ improperly rejected the opinion of Dr. Shapiro, and that had he properly credited this opinion, the ALJ would have concluded that Santiago-Rivera was unable to perform any job existing in significant numbers in the national economy on a regular and continuing basis. Santiago-Rivera also argues that the ALJ's failure to discuss Santiago-Rivera's GAF score of 50 was improper and requires remand. Respondent asserts that the ALJ properly rejected the opinion of Dr. Shapiro because it was "highly inconsistent with the weight of the evidence, including the results of the mental status examinations conducted by both Dr. Shapiro himself and the counselors at his clinic. Def's Br. at 12.

a. The ALJ's Rejection of Dr. Shapiro's Opinion

The Third Circuit has repeatedly noted that "a cardinal principle guiding disability eligibility determinations is that the ALJ accord treating physicians' reports great weight, especially when their opinions reflect expert judgment based on a continuing observation of the patient's condition over a prolonged period of time." Morales v. Apfel, 225 F.3d 310, 317 (3d Cir. 2000). See also Plummer v. Apfel, 186 F.3d 422, 429 (3d Cir. 1999) (citing Rocco v. Heckler, 826 F.2d 1348, 1350 (3d Cir. 1987)); 20 C.F.R. § 404.1527(d)(2) (providing for controlling weight where treating physician opinion is well-supported by medical evidence and not inconsistent with other substantial evidence in the record). In fact, treating physician's opinions are afforded controlling weight if well-supported by diagnostic evidence and not inconsistent with other medical evidence in the record, and it is an error of law to reject the treating physician's opinion without adequate explanation. 20 C.F.R. §404.1527; Fargnoli v.

Massanari, 247 F.3d 34, 43 (3d Cir. 2001). However, an ALJ may reject a treating physician's opinion outright on the basis of contradictory medical evidence. Newhouse v. Heckler, 753 F.2d 283, 286 (3d Cir. 1984).

Here, the ALJ discounted the conclusion of Dr. Shapiro because the ALJ found it to be inconsistent with record objective medical evidence of Santiago-Rivera's ability to function and not well-supported by diagnostic evidence. Under controlling caselaw, if the ALJ is correct, such is a proper basis for not affording controlling weight to the treating psychiatrist's opinion. Indeed, the Court finds that the ALJ is correct; as adequately explained by the ALJ, the opinion of Dr. Shapiro is poorly supported by objective medical evidence in the record. The record clearly reflects the following evidence that is inconsistent with Dr. Shapiro's ultimate opinion.

During her initial counseling evaluation, Santiago-Rivera was observed to be alert and oriented, with normal attention, concentration and judgment, average intelligence and fund of information, relevant associations, goal-directed speech, and a normal rate of thought. R. at 210. Her appearance and education were good, and she was informative, with the ability to provide suitable detail. R. at 210-11.

When first evaluated by Dr. Shapiro, Santiago-Rivera was alert and oriented, with normal attention, insight, judgment and reliability, no memory impairment, and a normal rate of thought. R. at 225. She evidenced no flight of ideas, hallucinations, delusions, or suicidal or homicidal ideations. Id. Her associations were logical and relevant, her speech was goal-directed, her perceptions were normal, her intelligence and fund of knowledge were average, and she had a normal ability to evaluate abstractions and symbolization. Id.

When evaluated by the consulting disability physician, Santiago-Rivera was alert and

oriented in all spheres, with a neat and appropriate appearance, and no signs of psychopathology. R. at 116. She was able to follow commands very well, and related very well to her sister. Id. Santiago-Rivera's neurologists also noted her to be awake, alert and oriented in all spheres with fluent speech. R. at 200, 263.

Even during her emergency room visits, Santiago-Rivera was observed by medical staff to be awake, alert and oriented. R. at 283, 289, 295, 310, 328. Neither Santiago-Rivera's neurologist, nor the emergency room physicians, identified any mental abnormalities, despite the fact that Santiago-Rivera's neurologist, at least, was aware that Santiago-Rivera took medication for depression. R. at 263.

Santiago-Rivera was routinely diagnosed with conditions such as dysthymia and adjustment disorder, which, as discussed supra, do not rise to the level of a full blown major depressive disorder. Although Santiago-Rivera continued to report symptoms of depression and anxiety, her primary concerns during counseling focused on situational factors, including housing problems, the denial of her SSI application, and the difficulties that her children were experiencing in school. R. at 212-22, 227. She routinely denied hallucinations, paranoid thoughts, and suicidal or homicidal ideations, generally presented with an appropriate appearance, and remained friendly and cooperative. R. at 212-22, 227.

The Court agrees with Respondent that this is simply not the objective medical profile of an individual with a disabling mental impairment.[10] Despite Santiago-Rivera's relatively benign mental health findings, when asked by Santiago-Rivera's attorney to complete a checklist assessment of Santiago-Rivera's mental abilities, Dr. Shapiro indicated that Santiago-Rivera had

[10] Even Dr. Shapiro noted the presence of some level of hypochondria. R. at 225.

no more than a fair ability to perform any mental activity, and further concluded that Santiago-Rivera would have poor to no ability to use judgment, deal with work stress, demonstrate reliability, or understand, remember and carry out detailed or complex job instructions. R. at 269-71.

Given, the lack of evidence to support Dr. Shapiro's conclusions, the ALJ found that Dr. Shapiro's opinion was not entitled to significant weight. R. at 28. The Court agrees with the ALJ that Dr. Shapiro's opinion, as expressed in the checklist assessment, is not well-supported by the record objective medical evidence; to the contrary, it is contradicted.[11] The ALJ was therefore within his discretion to not afford Dr. Shapiro's opinion controlling weight. See Mason v. Shalala, 994 F.2d 1058, 1065 (3d Cir. 1993) (holding that "form reports in which a physician's obligation is only to check a box or fill in a blank are weak evidence at best"); Jones v. Sullivan, 954 F.2d 125, 129 (3d Cir. 1991) (holding that the opinions of a claimant's treating physicians are not controlling when they are conclusory, unsupported by the medical evidence, and in conflict with the opinions of the state agency evaluators).

In short, with the principles clearly articulated by the Third Circuit in mind, the Court concludes the ALJ had a sufficient record basis to discount the deference that would normally be afforded to Dr. Shapiro under treating physician rule. Accordingly, the Court finds that ALJ's decision in this regard was supported by substantial evidence.

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[11] Santiago-Rivera's arguments to the contrary are unpersuasive. For example, Santiago-Rivera contends that certain record evidence supports Dr. Shapiro's opinion. However, the evidence to which Santiago-Rivera cites is hardly indicative of a disabling mental impairment. See Pl's Br. at 14-15 (citing record evidence that, inter alia, Santiago-Rivera only "cooks sometimes," does not do grocery shopping or laundry, does not regularly read newspapers, only reads the Bible "sometimes," and falls asleep while watching television.

b. Failure to Address Santiago-Rivera's GAF Score of 50

When Santiago-Rivera underwent her initial psychiatric evaluation on September 15, 2003, the counselor gave Santiago-Rivera a GAF assessment score of 50. R. at 211, 226. The ALJ did not address this GAF score in his determination.

Pursuant to the final rules of the Social Security Administration, a claimant's GAF score is not considered to have a "direct correlation to the severity requirements." 66 Fed. Reg. 50746, 50764–65 (2000). However, the rules still note that the GAF remains the scale used by mental health professionals to "assess current treatment needs and provide a prognosis." Id. As such, it constitutes medical evidence accepted and relied upon by a medical source and must be addressed by an ALJ in making a determination regarding a claimant's disability. Although the ALJ "may properly accept some parts of the medical evidence and reject other parts . . . he must consider all the evidence and give some reason for discounting the evidence he rejects." Adorno v. Shalala, 40 F.3d 43, 48 (3d Cir. 1994).

In Span ex rel. R.C. v. Barnhart, 2004 WL 1535768 (E.D. Pa. May 21, 2004), this Court held that an ALJ's determination of a claimant's level of function was not supported by substantial evidence because of the ALJ's failure to explain how he weighed and discounted the significance of the claimant's GAF scores. Id. at *9. In Span, the ALJ relied upon the findings of a particular doctor in concluding that claimant's condition did not meet the requirements to be considered disabled under the law. Id. at *7. Ultimately, the Span court held that the "ALJ's written opinion does not evidence that he seriously considered and weighed the importance of these scores," and the case was remanded in order that the ALJ could clarify the basis for his holding. Id.

In Escardille v. Barnhart, 2003 WL 21499999 (E.D. Pa. June 24, 2003), this Court also addressed the significance of an ALJ's consideration of GAF scores in reaching a decision on a claimant's disability status. In Escardille, the ALJ failed to mention the claimant's GAF score of 50, and we concluded that the test score "constituted a specific medical finding" that the claimant was unable to perform competitive work. Id. at *7. The court thus remanded the case for further consideration, since there was no indication that significant probative evidence was either simply ignored or not credited. Id. at **6–7 (citing Cotter v. Harris, 642 F.2d 700, 705 (3d Cir. 1981)).

This case is directly akin to Escardille. As in Escardille, here the ALJ's written opinion contains no reference to the GAF score and thus the Court must conclude that the ALJ did not consider or weigh Santiago-Rivera's GAF score. It is clear that Santiago-Rivera received a GAF score indicating serious symptoms, however the ALJ in this case simply failed to discuss that score.

Because a GAF constitutes medical evidence accepted and relied upon by a medical source, it should be addressed by an ALJ in making a determination regarding a claimant's disability. After examining the record and the GAF score contained therein, the Court finds that while the ALJ provided an explanation regarding the evidence he relied upon, he failed to disclose any reasons for not considering the GAF score.[12] See Span, 2004 WL 1535768, at *8 (citing Adorno, 40 F.3d at 48). Upon remand, the ALJ must address Santiago-Rivera's GAF score.

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[12] This is not to say that the Court finds that the GAF score in question necessarily indicates that Santiago-Rivera is disabled under the Act. The Court simply finds that the score should be addressed by the ALJ in the first instance.

2. The ALJ's Decision To Not Re-Contact Santiago-Rivera's Treating Psychiatrist

Santiago-Rivera contends that "if the ALJ had reservations concerning Dr. Shapiro's opinion, he could and should have contacted Dr. Shapiro for clarification...." Pl's Br. at 17. Respondent asserts that the ALJ was not required to re-contact Dr. Shapiro. Respondent is correct.

Recontact of medical sources is required only if the evidence received is "inadequate for [the ALJ] to determine whether [the claimant] is disabled." 20 C.F.R. § 416.912. In this case, the ALJ did not have "reservations" about Dr. Shapiro's opinion because the evidence received was somehow "inadequate." To the contrary, the evidence was more than adequate for the ALJ to conclude that it did not support Dr. Shapiro's ultimate opinion. In short, the ALJ specifically found (and this Court agrees) that the evidence in the existing record was sufficient to make a determination in regard to Santiago-Rivera's allegations of disability. Accordingly, the ALJ was not required to recontact Dr. Shapiro.[13]

3. The ALJ's Hypothetical to the VE

The ALJ asked the VE whether jobs exist in the national economy for an individual of Santiago-Rivera's age, education, past relevant work experience, and RFC. The ALJ stated the following as to Santiago-Rivera's mental RFC: "She would have moderate limitation in ability to concentrate and maintain attention. She could do simple, routine tasks." R. at 70. Relying on

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[13] The resolution of evidentiary conflicts falls within the purview of the ALJ. See Richardson v. Perales, 402 U.S. at 399. In this case, after fully reviewing all of the documentary evidence, listening to Santiago-Rivera's testimony, and observing her during the course of the hearing, the ALJ reasonably concluded that, although Santiago-Rivera had some level of mental impairment, she was not mentally disabled. R. at 23-31.

Ramirez v. Barnhart, 373 F.3d 546 (3d Cir. 2004), Santiago-Rivera contends that the ALJ's hypothetical concerning Santiago-Rivera's mental RFC was deficient, and, therefore, the VE's response did not satisfy Respondent's burden at Step Five in the sequential evaluation of disability process. Respondent does not offer any argument on this issue.

When it comes to the hypothetical questions posed to VEs, the Third Circuit has held that "while the ALJ may proffer a variety of assumptions to the expert, the vocational expert's testimony concerning a claimant's ability to perform alternative employment may only be considered for purposes of determining disability if the question accurately portrays the claimant's individual physical and mental impairments." Burns v. Barnhart, 312 F.3d 113, 123 (3d Cir. 2002) (quoting Podedworny v. Harris, 745 F.2d 210, 218 (3d Cir. 1984)). Testimony of a VE constitutes substantial evidence for purposes of judicial review only where the hypothetical question posed by the ALJ fairly encompasses all of an individual's significant limitations that are supported by the record. Ramirez, 372 F.3d at 552; Chrupcala, 829 F.2d at 1276. When an ALJ incorporates a claimant's limitations into a hypothetical, "great specificity" is required. Ramirez, 372 F.3d at 554–55 (citing Burns, 312 F.3d at 122).

It is true that, in Ramirez, the Third Circuit held that greater specificity than a limitation to one to two step simple tasks may be necessary in presenting functional limitations caused by a mental impairment in a hypothetical to a VE. Ramirez, 373 .3d at 554. However, the Ramirez Court specifically suggested that the case in which more may be required is one in which the Santiago-Rivera had clearly established in the record additional, specific deficiencies in concentration, persistence and/or pace that could not be adequately conveyed by a hypothetical limited to simple tasks. See id. at 554 (holding that the hypothetical was inadequate because it

did not take into account record evidence (and the ALJ's own observation) that Ramirez often suffered from additional deficiencies in concentration, persistence, or pace) (emphasis added). On the other hand, the Ramirez Court also noted that "there may be a valid reason for the omission" of more specific references in the hypothetical – namely, for example, that the ALJ may have concluded from the record that the deficiencies were minimal, infrequent, and/or "would not limit her ability to perform simple tasks." Id. at 555. The Third Circuit only reversed in Ramirez because "the record would suggest otherwise." Stated differently, unlike here, in Ramirez the record clearly suggested the need for more specificity. Id.

The case sub judice, however, is not analogous to Ramirez. This is not a case where the objective medical evidence of record bespeaks the need for the ALJ to query the VE as to additional, more specific deficiencies. As discussed, supra, the record evidence in this case does not support the conclusion that Santiago-Rivera suffered from numerous specific mental deficiencies that would interfere with her ability to perform simple tasks. See Section IV(B)(1)(a), supra (concluding the ALJ had a proper basis to disregard Dr. Shapiro's opinion that Santiago-Rivera could not perform simple sedentary tasks satisfactorily). To the contrary, the record suggests that Santiago-Rivera's mental deficiencies would not limit her ability to perform simple tasks. Here, Santiago-Rivera had not clearly established in the record additional specific deficiencies so as to require inclusion of those elements in the ALJ's hypothetical. Accordingly, there was a valid reason for the ALJ's omission of more specific references in the hypothetical, and the Court is satisfied that the ALJ's hypothetical was legally sufficient.

4. Santiago-Rivera's Headaches and the ALJ's Determination of Santiago-Rivera's RFC

There is no question that the ALJ found Santiago-Rivera's headaches constituted a

"severe" impairment. R. at 24. However, aside from mentioning isolated treatment notes for headaches, the ALJ made no further mention of Santiago-Rivera's headaches, conducted no relevant analysis, and offered no explanation for why Santiago-Rivera's "severe" headaches would or would not affect her ability to work.[14]

Social Security Ruling 96-8p requires that the ALJ's RFC assessment "include a narrative discussion describing how the evidence supports each conclusion, citing specific medical facts (e.g., laboratory findings) and non-medical evidence (e.g., daily activities, observations)." SSR 96-8p further provides:

> In assessing RFC, the adjudicator must discuss the individual's ability to perform sustained work activities in an ordinary work setting on a regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or an equivalent work schedule), and describe the maximum amount of each work-related activity the individual can perform based on the evidence available in the case record. The adjudicator must also explain how any material inconsistencies or ambiguities in the evidence in the case record were considered and resolved.

1996 WL 374184 at *7.

The ALJ is also required to include in the RFC assessment, "a discussion of why reported symptom-related functional limitations and restrictions can or cannot reasonably be accepted as consistent with the medical and other evidence." Id. Significantly, the "RFC assessment must always consider and address medical source opinions," and in cases where the assessment conflicts with an opinion from a medical source, the ALJ "must explain why the opinion was not adopted." Id.

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[14] In contrast, the ALJ offered specific discussion and analysis regarding other of Santiago-Rivera's "severe" impairments.

In this case, the ALJ found that Santiago-Rivera's headaches were a "severe" impairment, and, indeed, record medical evidence supports, to some extent, Santiago-Rivera's claims. However, Santiago-Rivera correctly notes that the ALJ's decision here is devoid of <u>any</u> discussion of this impairment and its specific impact on Santiago-Rivera's RFC. Even if the ALJ had a legitimate basis for finding Santiago-Rivera's reported headache-related functional limitations inconsistent with medical and other evidence, the ALJ utterly failed to include the required discussion explaining that basis and the relevant analysis.[15] In short, the ALJ simply failed to properly address the assessment and impact of Santiago-Rivera's "severe" headaches upon Santiago-Rivera's RFC. The ALJ must do so upon remand.

5. <u>Santiago-Rivera's Additional Evidence</u>

Santiago-Rivera contends that additional medical evidence submitted to the Appeals Council should have compelled the Council to remand Santiago-Rivera's case to the ALJ for reconsideration. Respondent asserts that the records are neither new nor material, and, as such, do not compel remand. Respondent is correct.

Under Sentence Six of 42 U.S.C. § 405(g), later-submitted evidence may be relied upon for remand only if it is found to be new and material, and if good cause is shown for its late

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[15] Respondent's entire argument on this issues focuses on the reasons why the ALJ could properly determine that Santiago-Rivera's headaches were not disabling. However, Respondent misses the point. The ALJ's error at issue is not the ALJ's apparent determination that Santiago-Rivera's headaches were not disabling, but, rather, the ALJ's decision not to explain the reasoning that led to that apparent conclusion (or, indeed, to discuss the impact of Santiago-Rivera's headaches at all).

The Court takes no position on whether the ALJ had a legitimate basis to discount Santiago-Rivera's subjective assertions of the disabling effect of her "severe" headaches. The ALJ is required to set forth its discussion and conclusions in the first instance.

submission.[16] Id. Evidence that is merely cumulative may not be classified as "new." To be "material," evidence must be relevant, probative, related to the period at issue, and sufficient to create a reasonable possibility that the Commissioner's decision would have been changed by its presence. Finally, a claimant must demonstrate "good cause" for not having incorporated the additional evidence into the original record.[17] Id.; Szubak v. Sec'y of Health and Human Services, 745 F.2d 831, 833 (3d Cir. 1984).

As discussed, supra, the later-submitted evidence at issue in this case consists of the records of five emergency room visits made by Santiago-Rivera between August 2003 and May 2004. Two of these visits were for complaints of low back pain; one was for complaints of respiratory problems; and two were for complaints of headaches. On each occasion, Santiago-Rivera was evaluated, treated, and released with medication.

The Court agrees with Respondent that these limited records are neither new nor material. They are nothing more than cumulative reports related to the same complaints that had already been set forth in the remainder of the record. They are not material because there is no reasonable possibility that they would have changed the ALJ's decision. The Court finds that the records do not suggest either a frequency of visits or a severity of impairments that would be expected to limit Santiago-Rivera's ability to perform sustained work activity. In short, the reports set forth nothing more than a repetition of the same complaints that are already fully

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[16] The Court may not consider later-submitted evidence in a substantial evidence review of the ALJ's decision under Sentence Four of 42 U.S.C. § 405(g). Later-submitted evidence may only be reviewed for the limited purpose of determining whether or not remand is warranted under Sentence Six of 42 U.S.C. § 405(g). See Matthews v. Apfel, 239 F.3d 589, 594 (3d Cir. 2001).

[17] As mentioned, supra, "good cause" is not at issue in this case.

covered in Santiago-Rivera's treatment records. Santiago-Rivera was not admitted to the hospital as a result of these emergency room visits, and the reports of these visits do not identify any previously unknown findings.[18]

The Appeal's Council properly considered the emergency room records submitted by Santiago-Rivera, but reasonably determined that they established no basis for review of the ALJ's decision. R. at 8-12. Thereafter, the ALJ's decision became the final decision of the Commissioner, subject to judicial review. See Sims v. Apfel, 530 U.S. at 107. This Court may only order remand based on the evidence presented to the Appeals Council if it finds it to be new and material to the period at issue. Matthews v. Apfel, 239 F.3d at 594. In this case, because the evidence is cumulative and could not reasonably be expected to change the ALJ's decision, it is neither new nor material. Id. Accordingly, it provides no basis for remand. Id.

V. Conclusion

For the foregoing reasons, this Court concludes that while most of the ALJ's decision is supported by substantial evidence, there are several elements that require remand for further consideration. Specifically, the ALJ shall, upon remand, address Santiago-Rivera's GAF score of 50 and the impact of Santiago-Rivera's headaches upon the assessment of her RFC.

Accordingly, Santiago-Rivera's and the Commissioner's Motions for Summary Judgment will each be granted in part and denied in part.

An appropriate Order follows.

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[18] If anything, these records offer further support for the ALJ's decision because of the routine nature of the treatment provided.

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

DAMARIS SANTIAGO-RIVERA	:	CIVIL ACTION
	:	
v.	:	
	:	
JOANNE B. BARNHART, Commissioner of the Social Security Administration	:	NO. 05-5698
	:	

ORDER

AND NOW, this 26th day of September, 2006, after careful and independent consideration of the parties' Cross-Motions for Summary Judgment, and review of the record, it is hereby ORDERED as follows:

1. Santiago-Rivera's Motion for Summary Judgment (Doc. No. 6) is GRANTED IN PART and DENIED IN PART.

2. The Commissioner's Motion for Summary Judgment (Doc. No. 7) is GRANTED IN PART and DENIED IN PART.

3. The case is remanded to the Commissioner in accordance with the foregoing Memorandum. This remand is ORDERED pursuant to the fourth sentence of 42 U.S.C. § 405(g).

4. The Clerk shall mark this case CLOSED for statistical purposes.

BY THE COURT:

s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.