

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

JUDY L. LYONS	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	NO. 11-4318
v.	:	
	:	
MICHAEL J. ASTRUE,	:	
Commissioner of the	:	
Social Security Administration,	:	
	:	
Defendant.	:	

REPORT AND RECOMMENDATION

DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

May 31st, 2012

I. INTRODUCTION

Plaintiff Judy L. Lyons¹ (“Lyons” or “Plaintiff”) brings this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of the final decision of the Commissioner of the Social Security Administration (the “Commissioner” or “Defendant”) denying her application for Disability Insurance Benefits (“DIB”), and for Supplemental Security Income (“SSI”), under Titles II and XVI of the Social Security Act, 42 U.S.C. § § 301 *et seq.* (the “Act”). Presently before the Court are Plaintiff’s “Brief and Statement of Issues in Support of Request for Review” (“Pl. Br.”)(Doc. No. 9), Defendant’s “Response to Request for Review of Plaintiff” (“Def. Br.”)(Doc. No. 10), “Plaintiff’s Reply Brief” (“Pl. Reply”) (Doc. No. 12), and the record of the proceedings before the

¹ We note that the vast majority of the medical records list the patient’s name as Judy Handy, which was her married name. (*See, e.g.*, R. 333.) After Plaintiff’s divorce from her husband, she changed her name to Lyons.

Administrative Law Judge (“ALJ”) and the Appeals Council (hereinafter “R.”). Plaintiff identifies two alleged errors of law that she believes require that the ALJ’s decision be vacated and benefits awarded pursuant to Sentence Four of 42 U.S.C. § 405(g). First, she challenges the ALJ’s application of a medical-vocational rule to support the finding that Plaintiff was not disabled without taking testimony from a vocational expert and notwithstanding her significant non-exertional impairments. (Pl. Br. at 5.) She next disputes the ALJ’s alleged rejection of medical opinion evidence in the absence of a legally adequate explanation. (*Id.* at 7.) Ultimately, she asserts that these errors led the ALJ to arrive at findings that are not supported by substantial evidence: first, that her non-exertional limitations have little or no effect on her occupational base, and second, that her syncope is not a medically determinable impairment. (*Id.* at 2-3.) Plaintiff therefore asks the Court to reverse the decision of the Commissioner and award her benefits. (*Id.* at 15.) The Commissioner opposes any such award and seeks the entry of an order affirming the ALJ’s decision. (*See, e.g.*, Def. Br. at 2.) For the reasons set out within, we conclude that the ALJ’s decision is not supported by substantial evidence due to his failure to consider vocational expert testimony or take official notice of the impact of Plaintiff’s nonexertional limitations on her occupational base. Accordingly, we **RECOMMEND** that the final decision of the Commissioner be **VACATED** and that the matter be **REMANDED** for further consideration consistent with this report.

II. FACTUAL AND PROCEDURAL HISTORY:

At the time of her December 10, 2009 hearing before the ALJ, Lyons was 47 years old. (R. 123.) She earned her high school equivalency certificate in 1999 or 2000² when she also completed

² Plaintiff testified that she got her GED, and stated that “I think it was in 1999, 2000 and [I] got a regular high school diploma.” (R. 33.)

training as a Certified Nursing Assistant (“CNA”). (R. 33. *See also* R. 136.) Between 1992 and 2004 she worked as a prep cook, waitress, and dishwasher at a restaurant owned by her family. (R. 34, 129.) Between 1999 and 2002, she also worked as both a nurse’s aide and a machine operator. (*Id.*)

Plaintiff’s food service work is notable both for its duration and because it is the last position she held prior to initiating her disability claim.³ (*See* R. 34, 128.) She has testified that in this role, she did “a little bit of everything,” including waiting tables, clearing tables, receiving deliveries, and washing dishes. (R. 35.) She characterized this work as fast-paced and noted that it required her to be on her feet constantly. (*Id.* *See also* R. 130.) On the “Disability Report” form she completed as a part of her benefits application, Plaintiff also reported using machines or equipment as well as performing writing tasks as part of her work at the restaurant. (R. 129.)

Plaintiff protectively filed for both DIB and SSI on May 4, 2007 (R. 97-105), alleging a disability onset date of February 19, 2005. (R. 97, 123.) This filing, which gives rise to the present appeal, alleges disability due to back pain, arthritis, migraines, and depression. (Pl. Br. at 2, R. 128. *See also* R. 36.) Plaintiff contends that these conditions affect her ability to work in that the back pain and arthritis made it difficult for her to walk, stand, sit, lift, carry, push, pull and bend, and that her depressive disorder created impediments to her ability to “interact appropriately with coworkers in the work environment” and “to understand and complete complex directions.” (Pl. Br. at 12-14. *See also* R. 186, 326-29, 345-48.) She also reported experiencing blackout spells, migraine

³ It is unclear when Plaintiff last worked, as she has furnished several different dates. In an undated Disability Report, Lyons stated that her work at the restaurant concluded on October 31, 2004. (R. 128.) However, she indicated on her work history report that 2002-2003 was the last year in which she was employed. (R. 149.) Eleven days after completing this form, Lyons told Thomas Osika, Ph. D. that she last worked in early 2000, as a machine operator. (R. 346.)

headaches and vacillations in her heart rate and blood pressure, as well as incidences of her hands falling asleep. (R. 33-35).

Lyons' medical history details her treatment for these impairments and their manifestations. The evidence before the ALJ showed that in addition to her primary care physicians, she was treated by a psychiatrist (*see, e.g.*, 511-514) a rheumatologist (*see, e.g.*, R. 302-304) and, at the direction of the New York Division of Disability Determination⁴ (*See, e.g.*, Pl. Br. at 12), was evaluated by an orthopedist (R. 326-329) and a psychologist (R. 345-348). The reports provided by these and other doctors describe her back troubles, for which she underwent a left L5-SI discectomy in May 2005 (R. 400),⁵ and for psychiatric issues. (*See, e.g.*, R. 189-193, 210, 218, 225, 289, and 293-295.) Plaintiff also underwent a tilt table test in 2007 to assess the causes of fainting episodes she experienced intermittently.⁶ (R. 286.) Her primary care physician first diagnosed her with depression in June 2005 and Plaintiff has taken various medications to treat this condition, with the

⁴ The record suggests that Plaintiff was living in upstate New York, and had relocated to Pennsylvania around October 2008, at least on a part time basis, where she alternated staying with her daughter and her daughter's husband, and her "brother and his wife," who also lived with her "mom and Dad[...]and [her] daughter and her husband." (R. 32. *See also* R. 29, 185-278, 513.)

⁵ On May 3, 2005, Plaintiff underwent back surgery by Michael Cho, M.D., to correct disc herniation. (*See* R. 400.)

⁶ On March 27, 2007, Dr. John J. Cai performed a tilt table test on Plaintiff at St. Elizabeth Hospital. (R. 286.) Dr. Cai reported the results as positive with "nitroglycerine challenge." (R. 286.) A tilt table test is utilized in order to "evaluate the cause of unexplained fainting (syncope)[...and may be recommended if a patient has] had repeated, unexplained episodes of fainting. A tilt table test may also be appropriate to investigate the cause of fainting if [an individual has] fainted only once, but another episode would put you at high risk of injury due to your work environment, medical history, age or other factors." *See Tilt Table Test, available at: <http://www.mayoclinic.com/health/tilt-table-test/MY01091>* (last visited Apr. 2, 2012).

most recent being Celexa in May of 2009. (R. 201, 516.) Additionally, the record includes various forms completed by state medical examiners, which were submitted as part of the disability review process as assessments of both her mental and physical conditions. With respect to her mental impairments, State Agency psychiatric consultant, George⁷ Petro, M.D. completed both a Psychiatric Review Technique Form (“PRTF”) and a Mental Residual Functional Capacity Assessment (“MRFCA”) on October 22, 2007. (R. 351-368). To assess Plaintiff’s physical impairments, Carol Anne Wakeley, M.D., a state medical consultant, completed an assessment of Plaintiff’s physical residual functional capacity (“RFC”) on October 25, 2007. (R. 369-370.) A state agency medical consultant, C. Rosney, also completed a Physical Residual Functional Capacity Assessment on October 29, 2007. (R. 371-376.)

After her claim was initially denied on October 30, 2007 (R. 45-50), Lyons was given a hearing before an ALJ at which she appeared *pro se*. At the December 10, 2009 hearing, Lyons was the only witness to offer testimony (R. 25) and the ALJ did not hear from a Vocational Expert (“VE”). (R. 24-42.) Lyons told the ALJ about her lack of tolerance for prescription medication. (R. 35.) She stated that she could not take pain medication or cortisone shots to treat her physical ailments, and that this was a major factor contributing to her inability to work. (*Id.*) She also complained of back pain, leading to “little to no feeling” in her left leg from the knee down, and weakness in her ankle, which caused her to fall frequently. (R. 36-37.) Lyons further testified to suffering from blackout spells, dizziness, and weekly migraines (R. 33, 35-36), as well as possessing a “very short term memory” and becoming “very anxious and nervous” around people. (R. 37-38.)

⁷ The ALJ refers to Dr. Petro as Dr. George Petro, although the forms are signed “Petro, R.” (*See, e.g.*, R. 351, 367.) For the sake of consistency, we refer to Dr. Petro as George Petro, M.D., or Dr. Petro, throughout this Report and Recommendation.

She denied any problems with her ability to concentrate (R. 38), estimated that she was able to walk and stand comfortably for roughly ten or fifteen minutes. (R. 38.) She explained that her typical day involved doing “a few” dishes, dusting “a little,” reading “a lot” and attempting to “take little walks.” (R. 40.) Finally, she described assisting her grandchildren in completing their homework and that they kept her “occupied” and “busy all the time.” (*Id.*)

In his February 2, 2010 decision, the ALJ found that Plaintiff was not disabled because she could perform a “wide range of sedentary work” that existed in the national economy. (*See, e.g.*, R. 15.) On June 17, 2011, the Appeals Council denied Plaintiff’s request for review, rendering the ALJ’s decision the final decision of the Commissioner. (R. 1-3.) Plaintiff timely sought relief in this court pursuant to 42 U.S.C. § 405(g). (Doc. No. 3.)

III. STANDARD OF REVIEW

This Court has plenary review of legal issues with respect to a challenge to the ALJ’s conclusions but reviews the ALJ’s factual findings to determine whether they are supported by substantial evidence. *Schaudeck v. CoImm’r of Soc. Sec.*, 181 F.3d 429, 431 (3d Cir. 1999) (citing 42 U.S.C. § 405(g)). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *see also Dobrowolsky v. Califano*, 606 F.2d 403, 406 (3d Cir. 1979). It is more than a mere scintilla but may be less than a preponderance. *See Brown v. Bowen*, 845 F.2d 1211, 1213 (3d Cir. 1988). If the conclusion of the ALJ is supported by substantial evidence, the Court may not set aside the Commissioner’s decision even if it would have decided the factual inquiry differently. *Hartranft v. Apfel*, 181 F.3d 358, 360 (3d Cir. 1999); *see* 42 U.S.C. § 405(g). We also consider whether legal error may have been

committed and if so what effect any such error may have had on the sufficiency of the evidence needed to support the ALJ's conclusions.

IV. THE DECISION UNDER REVIEW

The issue before the ALJ at the time of his February 2, 2010 decision was whether Lyons was disabled under Sections 216(I) and 223(d) of the Social Security Act ("the Act") and, if so, when the disability began and its duration. (R. 11.) Disability is defined by the Act as the inability to engage in any substantial gainful employment due to a medically determinable impairment that has lasted or can be expected to last for a continuous period of not less than one year. 42 U.S.C. § 1382c(a)(3)(A).

In undertaking his assessment, the ALJ embarked upon the familiar five-step sequential evaluation process set forth at 20 C.F.R. § 404.1520. At Step One, the ALJ determined that Plaintiff had not engaged in substantial gainful activity since the alleged onset date. (R. 13, Finding No. 2.) At Step Two, he concluded that Lyons' bipolar disorder and degenerative disc disease qualified as severe, medically determinable impairments. (R. 13, Finding No. 3.)⁸ He found that Plaintiff also

⁸ An impairment is severe if it "significantly limits [plaintiff's] physical or mental ability to do basic work activities." 20 C.F.R. § 404.1520(c); 20 C.F.R. § 404.1521(a) ("An impairment or combination of impairments is not severe if it does not significantly limit your physical or mental ability to do basic work activities.").

Basic work activities refer to the "abilities and aptitudes necessary to do most jobs" and include the following:

- (1) Physical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying, or handling;
- (2) Capacities for seeing, hearing, and speaking;
- (3) Understanding, carrying out, and remembering simple instructions;
- (4) Use of judgment;
- (5) Responding appropriately to supervision, co-workers and usual work situations; and

(continued...)

suffered from migraine headaches, but that they did not constitute a severe impairment, as they did “not impose more than a minimal restriction in the claimant’s ability to perform basic work activities.” (*Id.*) The ALJ similarly recognized Plaintiff’s back pain, intermittent syncope,⁹ persistent mild dyspnea,¹⁰ bilateral knee pain, and right elbow pain as impairments, but determined that they too were not severe. (R. 20, Finding No. 5.) He also dismissed “numerous additional complaints made by the claimant” as not “medically determinable.” (R. 13.) At Step Three, the ALJ found that Lyons’ impairments did not meet or medically equal any of those listed in 20 C.F.R. Part 404, Subpt. P, App. 1. (R. 13, Finding No. 4.)

Before moving on to Step Four, the ALJ concluded that, despite her severe impairments, Plaintiff retained the residual functional capacity (“RFC”) to perform a wide range of sedentary work. (R. 15, Finding No. 5, R. 22.) Specifically, he determined that Plaintiff was “capable of meeting the exertional demands of sedentary work and can understand, carry out and remember simple instructions, maintain attention and concentration, deal with changes in a routine work setting and perform work that does not require more than occasional interaction with the public and co-

⁸(...continued)

(6) Dealing with changes in a routine work setting.

20 C.F.R. § 404.1521(b)(1)-(6).

⁹ As we discuss in greater detail below, syncope is defined as “a loss of consciousness or a faint.” *O’Connor v. Comm’r Soc. Sec.*, 2012 U.S. App. LEXIS 5112, at *11 (3d Cir. 2012) quoting 20 C.F.R. Part 404, Subpart P, § 4.00(F)(3)(b). A diagnosis of syncope “requires more than merely a feeling of light-headedness, momentary weakness, or dizziness.” *Id.* (internal quotations omitted).

¹⁰ Dyspnea is the medical term that describes “shortness of breath.” See *Shortness of Breath*, available at: <http://www.mayoclinic.com/health/shortness-of-breath/MY00119> (last visited May 21, 2012).

workers.” (R. 21.) In so concluding, he rejected some evidence as premised on Lyons’ subjective complaints, noting that some of her “statements concerning the intensity, persistence and limiting effects of [her] symptoms [were] not credible.” (R. 16.) Earlier in his decision, he explained that:

Although the claimant has a long list of subjective physical complaints, there is very little in the way of clinical evidence to suggest that her impairments cause a disabling degree of limitation in her ability to perform regular work on a consistent basis. Her medical care has been very thorough, yet clinical findings are very scarce, and it has been suggested by her own treating doctor that her physical complaints may be originating from a mental or emotional process rather than in a physiological process.

(R. 18.) At Step Four, and without the assistance of a vocational expert (“VE”) (R. 24.) , the ALJ determined that Plaintiff was unable to perform her past relevant work as a waitress, prep cook, dishwasher, home health aide, and nurse’s aide, in light of the standing, walking, and occasional lifting required. (R. 21, Finding No. 6.) In determining whether jobs existed in significant numbers in the national economy that Plaintiff could perform, he noted that her age put her in the “younger individual age 45-49” category at the alleged onset date, and that she had “at least a high school education” and ability to communicate in English. (R. 21, Finding Nos. 7, 8.) At the fifth and final Step, the ALJ found that, under the Medical-Vocational Guidelines, Plaintiff was not disabled, whether or not she possessed transferable job skills. (R. 21, Finding No. 9.) Accordingly, he concluded that Plaintiff had the ability to successfully adjust to other work existing in the national economy, and had not been suffering from a disqualifying disability since the alleged onset date of February 19, 2005. (R. 22, Finding No. 11.)

IV. DISCUSSION

Plaintiff asserts that the ALJ’s decision should be vacated in that his findings that “Plaintiff’s non-exertional limitations have little or no effect on her occupational base” (Pl. Br. at 2), and that

her “syncope is not a medically determinable impairment” (Pl. Br. at 3), are not “supported by substantial evidence.” (*Id.* at 2-3.) Specifically, she alleges that (1) “[t]he ALJ erred by finding Plaintiff not disabled based on a medical-vocational rule despite finding Plaintiff to have significant non-exertional impairments” (Pl. Br. at 5) and that (2) “[t]he ALJ rejected medical opinion evidence without adequate explanation.” (Pl. Br. at 7).

As discussed above, at Step Two, the ALJ determined that Plaintiff had two “severe” impairments: bipolar disorder and degenerative disc disease. He ultimately concluded, however, that

If the claimant had the residual functional capacity to perform a full range of sedentary work, considering the claimant’s age, education, and work experience, a finding of “not disabled” would be directed by the Medical-Vocational Rule 201.21. However, the additional limitations have little or no effect on the occupational base of unskilled sedentary work. A finding of “not disabled” is therefore appropriate under the framework of this rule. The claimant is able to understand, remember, and carryout simple instructions, respond appropriately to supervision, co-workers and usual work situations and is capable of dealing with changes in a routine work setting.

(R. 22.) Plaintiff challenges this determination, generally asserting that the ALJ erred by failing to incorporate the opinion of a vocational expert, in his application of “the Medical-Vocational rule,” and by improperly rejecting medical opinion evidence. We first address the standards governing a proper RFC determination, and then examine Plaintiff’s claims, in turn.

A. RFC Determinations

i. In General

Where the ALJ is satisfied, based on the evidence, that a claimant has a medically-determinable impairment that could reasonably be expected to produce the symptoms alleged (but would not meet or exceed a listing), he must decide the extent to which the claimant’s symptoms actually limit her capacity to work. *See* 20 C.F.R. §§ 404.1529(c)(1), 416.929(c)(1). The regulations

set forth the process by which an ALJ is to consider a claimant's descriptions of those symptoms and assess the extent to which they could reasonably be accepted as consistent with the objective medical and other evidence of record. *See* 20 C.F.R. §§ 404.1529(a), 416.929(a). When evaluating the intensity and persistence of the symptoms, the ALJ is to consider objective medical evidence,¹¹ including findings from medical sources; a claimant's treatment history; statements regarding the location, duration, frequency and intensity of the claimant's symptoms; any precipitating and aggravating factors; any measures used to reduce the symptoms; the type, dosage, effectiveness and side effects of medication taken to alleviate those symptoms. 20 C.F.R. §§ 404.1529(c)(1)-(3), 416.929(c)(1)-(3). The ALJ likewise must consider any other relevant information, including factors concerning the claimant's functional limitations and restrictions due to those symptoms, the claimant's work history, and her daily activities.

ii. Treatment of Medical Opinions

Pertinent to a proper RFC determination are medical opinions, or, "statements from physicians and psychologists or other acceptable medical sources that reflect judgments about the nature and severity of [the claimant's] impairment . . ." 20 C.F.R. § 404.1527(a)(2). A case should not, however, "be decided in reliance on a medical opinion without some reasonable support for the opinion." SSR 96-2, 61 Fed. Reg. 34490. In determining what weight to give a medical opinion, an ALJ must consider certain factors, including: the examining relationship, the treating relationship, supportability, and consistency with the record as a whole. 20 C.F.R. §§ 404.1527(d), 416.927(d).

¹¹ Objective medical evidence, relevant to an RFC determination, is defined under the pertinent regulations as "evidence obtained from the application of medically acceptable clinical and laboratory diagnostic techniques," and is deemed to be a "useful indicator" of "the intensity and persistence of [the claimant's] symptoms and the effect those symptoms, such as pain, may have on [the claimant's] ability to work." 20 C.F.R. § 404.1529(c)(2).

With respect to treating physicians, an ALJ should normally “accord treating physicians’ reports great weight, especially when their opinions reflect expert judgment based on a continuing observation of the patients condition over a prolonged period of time.” *Brownawell v. Comm’r of Soc. Sec.*, 554 F.3d 352, 355 (3d Cir. 2008) (quoting *Morales v. Apfel*, 225 F.3d 310, 317 (3d Cir. 2000)). Notwithstanding that directive, an ALJ is required to “consider the medical findings that support a treating physician’s opinion that the claimant is disabled” and, in the event that a treating physician’s opinion “conflicts with that of a non-treating, non-examining physician, the ALJ may choose whom to credit.” *Morales*, 225 F.3d at 317. The ALJ cannot, of course, simply “reject evidence for no reason or for the wrong reason” and, when specifically deciding “to reject the treating physician’s assessment, [] 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.” *Id.* (quoting *Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999)). *See also Cotter v. Harris*, 642 F.2d 700, 706-07 (3d Cir. 1981).

B. Alleged Error in the ALJ’s RFC Determination

Lyons first contends that the ALJ’s application of the medical-vocational guidelines to find that she could perform sedentary work was improper. At Steps Four and Five, respectively, an ALJ is required to determine whether a claimant, given her limitations supported by the record, and given her age, education, and work experience, can return to work in her previous occupation, or whether, alternatively, there exist other jobs within the national economy that she could perform. *See* 20 C.F.R. § 404.1520(a)(4)(v). The Commissioner bears the burden of establishing the existence of other work within the national economy. *See* 20 C.F.R. § 404.1560(c)(2). An ALJ often will seek

input from a vocational expert to assist with this analysis.

The ALJ here found Plaintiff’s bipolar disorder and degenerative disc disease to be severe impairments. (R. 13, Finding No. 3.) He also recognized Plaintiff’s back pain, intermittent syncope, persistent mild dyspnea, bilateral knee pain, and right elbow pain as impairments, but determined that they were not severe. (R. 20, Finding No. 5.) Despite his recognition of at least one severe nonexertional impairment—bipolar disorder, which is an affective disorder—the ALJ nonetheless concluded, without reference to VE testimony and without following the steps for taking official notice,¹² that Lyons’ “additional limitations have little or no effect on the occupational base of unskilled sedentary work.” (R. 22, Finding No. 10.) Specifically, he determined that she could “understand, carry out and remember simple instructions, maintain attention and concentration, deal with changes in a routine work setting and perform work that does not require more than occasional interaction with the public and co-workers.” (R. 15, Finding No. 5.) He concluded that under these circumstances, the Medical-Vocational Guidelines (20 C.F.R. Part 404, Subpt. P, App. 2, or “the grids”) directed “a finding of ‘not disabled.’” (R. 22.)

Plaintiff urges that the fact that “[t]he ALJ cited no evidence in support of [t]his finding”

¹² Our Circuit has explained that:

Official notice is the proper method for agency decisionmakers to apply knowledge not included in the record. It is the administrative law counterpart of judicial notice. Both doctrines allow adjudicators to take notice of commonly acknowledged facts, but official notice is broader than judicial notice insofar as it also allows an administrative agency to take notice of technical or scientific facts that are within the agency’s area of expertise.

Sykes v. Apfel, 118 F.3d 259, 272 (citing *McLeod v. Immigration & Naturalization Serv.*, 802 F.3d 89, 93 n. 4 (3d Cir. 1986) (citing *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 73 S.Ct. 287, 97 L.Ed. 377 (1953))).

renders it unsupported by substantial evidence. (Pl. Br. at 2-3.) In particular, she highlights that the ALJ “did not take oral testimony from a vocational expert[,...] did not obtain written evidence from such an expert by interrogatories or otherwise[,...]did not cite any regulation or ruling in support of his assessment of the impact of the additional limitations on the occupational base,” and “did not take official notice” of the nonexertional limitation’s impact on her job possibilities. (Pl. Br. at 6.) Accordingly, in Plaintiff’s view, “[t]he ALJ clearly erred by applying the Medical-Vocational rule.” (Pl. Br. at 6.)

In response, Defendant argues that the ALJ adequately substantiated his determination that Plaintiff’s affective disorder did not have “more than a minimal impact on her ability to do that basic work activities recognized under § 201.21 of the Grids.”¹³ (Def. Br. at 23.) Pointing to his citation to various Social Security Regulations (“SSR”s), and to the record, Defendant contends that the ALJ’s determination that Plaintiff could engage in unskilled sedentary employment was “supported by the medical and non-medical evidence” and thus did not require, as Plaintiff has insisted, “additional vocational evidence.” (Def. Br. at 25-26.) In Defendant’s view, “[t]he ALJ properly decided that Plaintiff’s mental limitations had little or no effect on the occupational base of the ‘unskilled’ work recognized under § 201.00(a).” (Def. Br. at 24 (citing R. 22).)

Our circuit has held that generally, the Commissioner can establish a plaintiff’s occupational base without input from a vocational expert. *See Allen v. Barnhart*, 417 F.3d 396, 402-403 (3d Cir. 2005) (reiterating that “the Commissioner can satisfy its burden of proof regarding availability of

¹³ As Defendant notes, “Section 201.21 of the Grids recognizes the existence of approximately 200 separate ‘unskilled’ sedentary occupations, with each occupation representing numerous jobs in the national economy given Plaintiff’s vocational profile.” (Def. Br. at 24 (quoting 20 C.F.R. pt. 404, subpt. P, app. 1, § 201.00 (a).)

jobs in the national economy via rulemaking rather than requiring actual evidence on a case-by-base basis” and accordingly, “[a]gency rulemaking, as long as it is not arbitrary or capricious, is permissible as a substitute for individualized case-by-case determinations” without “evidence to support the determination at Step 5.”¹⁴ In the absence of VE testimony, an ALJ may rely on the medical vocational guidelines (the “grids”) to prove the existence of jobs in the national economy. *See* 20 C.F.R. Part 404, Subpt. P, App. 2, § 200.00(b). The Third Circuit has also held, however, that

The grids establish, for exertional impairments only, that jobs exist in the national economy that people with those impairments can perform. When a claimant has an additional nonexertional impairment, the question whether that impairment diminishes his residual functional capacity is functionally the same as the question whether there are jobs in the national economy that he can perform given his combination of impairments. The grids do not purport to answer this question, and thus ... the practice of the ALJ determining without taking additional evidence [of] the effect of the nonexertional impairment on residual capacity cannot stand.

Maddaloni v. Comm’r Soc. Sec., 340 Fed. Appx. 800, 803 (3d Cir. 2009) (quoting *Sykes v. Apfel*, 228 F.3d 259, 270 (3d Cir. 2000)).¹⁵

¹⁴ In *Allen*, the Third Circuit reiterated support for the general proposition that “the Commissioner can satisfy his burden” with “reliance on the grids, as well as on Social Security Rulings,” but ultimately concluded that, in the particular case at bar, it “disagree[d] with the way in which the ALJ applied the Social Security Ruling at issue.” 417 F.3d at 398.

¹⁵ These decisions built on the previous determination by the Third Circuit that

In the absence of a rulemaking establishing the fact of an undiminished occupational base, the Commissioner cannot determine that a claimant’s nonexertional impairments do not significantly erode his occupational base under the medical-vocational guidelines without either taking additional vocational evidence establishing as much or providing notice to the claimant of his intention to take

(continued...)

Following upon the Third Circuit’s proclamations about nonexertional impairments in *Sykes*, the Social Security Administration (“the Agency”) issued an “Acquiescence Ruling” (“Ruling”) to codify how it would handle issues of this nature. *See Allen*, 417 F.3d at 404. *See also* AR 01-1(3), 2001 WL 65745 at *4-5. The Agency advised that, in the case of a Plaintiff with nonexertional limitations, it would not rely exclusively on the grids, but would instead require an ALJ to consider vocational evidence or to “[p]rovide notice that [he or she] intend[s] to take or [is] taking administrative notice of the fact that the particular nonexertional limitation(s) does not significantly erode the occupational base, and allow the claimant the opportunity to respond before” denying the claim. *Allen*, 417 F.3d at 404 (citing AR 01-1(3), 2001 WL 65745 at *4-5.)) The Ruling clarified, however, that it “does not apply to claims where we [(the Agency)] rely on an SSR that includes a statement explaining how the particular nonexertional limitation(s) under consideration in the claim being adjudicated affects the claimant’s occupational job base.” *Id.*

Here, the ALJ noted that “additional limitations” impacted the determination of Plaintiff’s RFC, above and beyond what the guidelines would have directed. (*See* R. 22.) Although he did not provide much explication, he did observe that “the additional limitations have little or no effect on the occupational base of unskilled sedentary work.”¹⁶ (*Id.*) This language, however, is identical to

¹⁵(...continued)

official notice of this fact (and providing the claimant with an opportunity to counter the conclusion).

Sykes v. Apfel, 228 F.3d 259, 261 (3d Cir. 2000).

¹⁶ As we address below in the context of the ALJ’s rejection of certain medical opinion evidence, Plaintiff’s own treating physician did note that Plaintiff did not appear to have any limitations with respect to seeing, hearing, speaking, understanding and remembering instructions, carrying out instructions, maintaining attention/concentration, making simple

(continued...)

the reasoning rejected by the Third Circuit in *Maddaloni* (where the ALJ held that “the additional limitations have little or no effect on the occupational base of unskilled sedentary work. A finding of ‘not disabled’ is therefore appropriate under the framework of this rule”). Our review of the record leads us to conclude that Plaintiff’s nonexertional limitation was not “the subject of administrative rulemaking that establishes that [this limitation] do[es] not significantly erode the occupational base of sedentary work.” *See Maddaloni*, 340 Fed. Appx. at 803 n.2.¹⁷ Accordingly,

¹⁶(...continued)

decisions, interacting appropriately with others, maintaining socially appropriate behavior without exhibiting behavior extremes, and maintaining basic standards of personal hygiene and grooming. (R. 186.) These are all behaviors that would go to her ability to engage in unskilled work. Despite including them in other parts of his decision, the ALJ did not specifically list off these findings when he stated his conclusion regarding Plaintiff’s RFC, or the lack of vocational expert testimony.

¹⁷ In his decision, the ALJ did cite to the following administrative regulations: SSR 83-11, *Titles II and XVI: Capability to Do Other Work - The Exertionally Based Medical-Vocational Rules Met*, 1983 WL 31262 (S.S.A.); SSR 83-12, *Titles II and XVI : Capability to Do Other Work - The Medical-Vocational Rules as a Framework for Evaluating Exertional Limitations Within a Range of Work or Between Ranges of Work*, 1983 WL 31253 (S.S.A.); SSR 83-14, *Titles II and XVI: Capability to Do Other Work - The Medical-Vocational Rules as a Framework for Evaluating a Combination of Exertional and Nonexertional Impairments*, 1983 WL 31254 (S.S.A.); and SSR 85-15, *Titles II and XVI: Capability to Do Other Work - The Medical Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments*, 1985 WL 56857 (S.S.A.). (R. 22.) He did not, however, apply them to the specifics of Plaintiff’s situation, or explain how her particular set of “additional limitations” had “little or no effect on the occupational base of unskilled sedentary work.” (*See id.*)

The ALJ did describe that, in his view, Plaintiff “provided conflicting accounts to various medical sources regarding the severity of her symptoms, work activity, past work, and daily activities” and also that she appeared to be noncompliant with many of her medication and other treatment regimens. (R. 21.) He adequately substantiated his ultimate conclusion that he viewed her testimony as less credible, and also as to the reasons why he accorded full weight to some, but not all, of the medical evidence in the record. (*Id.*) He did not, however, provide a particularly satisfying link between all of these assessments and his conclusion regarding her RFC. As we described above, the ALJ concluded that Plaintiff was “capable of performing a wide range of sedentary work.” (*Id.*) The closest to a description of why specifically he arrived at that conclusion was an explanation provided earlier in his decision that,

(continued...)

we agree with Plaintiff that the ALJ's finding that she had nonexertional limitations precluded his application of the Grids at Step Five without taking VE testimony or official notice. *See generally Maddaloni*, 340 Fed. Appx. at 803. *See also Poulos v. Comm'r Soc. Sec.*, 474 F.3d 88, 94 (3d Cir. 2007), *Allen*, 417 F.3d at 403-405. In these circumstances an ALJ is required to take VE testimony or official notice of his conclusion. His failure to do so here constitutes reversible error and requires remand.

C. The ALJ's Rejection of Medical Opinion Evidence

Plaintiff next identifies three sources of medical opinion evidence that she contends the ALJ rejected without providing a legally sufficient explanation: the opinion of Luke Handy, M.D., her treating physician (Pl. Br. at 7-11), the opinion of Amelita Balagtas, M.D., a consultative orthopedist (Pl. Br. at 12), and the opinion of consultative examiner, psychologist Thomas Osika, Ph.D. (Pl. Br. at 12-15.) In response, Defendant emphasizes that “[t]he ALJ was not required to automatically adopt any medical opinion,” and that a medical opinion, even from a treating physician, need be accorded “‘controlling’ weight only when it is ‘well-supported’ by ‘medically acceptable clinical and

¹⁷(...continued)

Although the claimant has a long list of subjective physical complaints, there is very little in the way of clinical evidence to suggest that her impairments cause a disabling degree of limitation in her ability to perform regular work on a consistent basis. Her medical care has been very thorough, yet clinical findings are very scarce, and it has been suggested by her own treating doctor that her physical complaints may be originating from a mental or emotional process rather than in a physiological process.

(R. 18.) This description helps explain why the ALJ accorded less weight to aspects of the record, including Plaintiff's own subjective complaints, but does not directly substantiate his conclusions regarding Plaintiff's RFC and ability to engage in sedentary work.

laboratory diagnostic findings’ and is ‘not inconsistent’ with the other ‘substantial’ evidence in the record.” (Def. Br. at 7, citing 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).) In Defendant’s view, the ALJ thus did not err in rejecting these medical opinions, as they failed to meet the applicable standard. Our independent review of the record leads us to conclude that the ALJ did not commit reversible error when he rejected this medical opinion evidence.

i. Rejection of Dr. Handy’s Medical Opinion Evidence: Plaintiff’s RFC and Syncope

a. Plaintiff’s RFC

Plaintiff alleges that the ALJ’s finding that Lyons was capable of performing the full range of sedentary work is inconsistent with Dr. Handy’s assessment of her limitations. (Pl. Br. at 8. *See also* R. 15, Finding 5.¹⁸) In formulating his assessment, the ALJ attributed “little weight” to Dr. Handy’s opinion regarding Plaintiff’s physical limitations. (R. 19-20.) Relying principally on an Employability Assessment form (“Employability Assessment” or “form”) completed by Dr. Handy in on October 3, 2006¹⁹ for the purpose of determining her eligibility for the New York State Office

¹⁸ In arriving at Plaintiff’s RFC, the ALJ primarily credited the medical opinions of Dr. Carol Wakeley, who assessed Plaintiff’s physical impairments on behalf of the New York Disability Office, and the opinions of Dr. Osika and Dr. Petro regarding Plaintiff’s mental impairments. (R. 20-21.) The ALJ also discussed the findings of rheumatologist Dr. Griger, Dr. Balagtas, Dr. Sucharitha Shanmugam, who evaluated Plaintiff when she first moved to Pennsylvania, and Dr. Gerald Sager, a psychiatrist. (R. 17-21.)

¹⁹ Plaintiff signed the form on September 19, 2006. (R. 186.) However, Dr. Handy indicated on the form that he last examined Lyons on October 3, 2006, thus prompting the inference that Dr. Handy completed this form on or after October 3, 2006. (R. 187.) Plaintiff had been treating with Dr. Handy for approximately a year and a half when this form was completed. For the sake of consistency, we refer to the October 3, 2006 date.

of Temporary and Disability,²⁰ Plaintiff argues that Dr. Handy observed many physical limitations, which he described as permanent. (Pl. Br. at 8 (citing R. 186-187).)

In the October 2006 Employability Assessment, Dr. Handy reported—via placing a check in the corresponding box—that Plaintiff was “moderately limited” with respect to walking, standing, sitting, lifting, carrying, stairs or other climbing, and functioning in a work setting at a consistent pace. (R. 186.) He further opined that she would be “very limited” with respect to pushing, pulling, and bending. (*Id.*) Dr. Handy observed that there was no evidence indicating that Plaintiff had any limitations with respect to seeing, hearing, speaking, understanding and remembering instructions, carrying out instructions, maintaining attention/concentration, making simple decisions, interacting appropriately with others, maintaining socially appropriate behavior without exhibiting behavior extremes, and maintaining basic standards of personal hygiene and grooming. (*Id.*) Finally, he indicated that she was “minimally limited” with respect to using her hands. (*Id.*) In light of the reported limitations, Dr. Handy opined that the following activities were “contraindicated:” lifting greater than 30 pounds, walking, sitting, and standing for more than 30 minutes per hour, and pushing, pulling, or bending. (R. 187.) He further reported that along with “other limitations,” Lyons’ difficulties with pushing, pulling, and bending were permanent. (R. 187.)

The ALJ concluded that “Dr. Handy’s own reports fail to reveal the type of significant clinical and laboratory abnormalities one would expect if the claimant were in fact disabled.” (R. 20.) Plaintiff contests what she terms the ALJ’s “rejection” of Dr. Handy’s opinion. She alleges that

²⁰ This form sets forth a series of physical and mental functioning indicators, and requests that a check be placed to indicate whether medical findings show plaintiff would be moderately limited, very limited, or have no limitation with respect to the listed indicators. (R. 186.) The form provides a space labeled “other” where any additional mental or physical functional limitations may be asserted. (R. 186.)

the ALJ erred in assigning “little weight” to Dr. Handy’s opinion about her back impairment, and in reaching the ultimate conclusion that, accordingly, Lyons could perform the full range of sedentary work.²⁰ (*See* Pl. Br. at 9-10. *See also* R. 19.) Plaintiff specifically takes issue with the ALJ’s conclusion in light of Dr. Handy’s opinions about her ability to sit, bend, and stoop. (Pl. Br. at 8-9.) She claims that the two reasons offered by the ALJ for rejecting Dr. Handy’s assessment were improper,²¹ and that the ALJ erred by rejecting Dr. Handy’s opinion without pointing to other medical evidence. (Pl. Br. at 10-11.) In Plaintiff’s view, the ALJ’s conclusion that ““Dr. Handy’s own reports fail to reveal the type of significant clinical and laboratory abnormalities one would expect if the claimant were in fact disabled”” was inappropriate in that “the ALJ substituted his lay judgment on a medical matter for that of a qualified expert.” (Pl. Br. at 11.) In response, Defendant asserts that “Dr. Handy never opined that Plaintiff was totally disabled or otherwise unable to

²⁰ The regulations describe the physical exertion requirements of sedentary work as follows:

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 404.1567(a). Walking and standing is characterized as occasional if it does not exceed more than 2 hours of an 8-hour work day. 1983 SSR LEXIS 30, at *13 (1983). Performing sedentary work will generally require sitting for approximately 6 hours of an 8-hour workday. *See id.*

²¹ Plaintiff characterizes the two reasons offered by the ALJ “in justification of rejection Dr. Handy’s opinions [as]: there was a psychogenic element to the complaints, and Dr. Handy’s reports did not reveal the type of significant clinical and laboratory abnormalities one would expect if the claimant were in fact disabled.” (*See, e.g.*, Pl. Reply at 4-5.) Specifically, she describes the psychogenic component as “a crude beginner’s blunder,” in that the ALJ considered “the possibility of psychogenic etiology[...] in a totally inappropriate way.” (*Id.* at 5.)

perform unskilled sedentary work that existed in significant numbers in the national economy.”²²

(Def. Br. at 7.) We agree.

Defendant appropriately notes that in the above-referenced report, Dr. Handy described Plaintiff as only “temporarily” disabled, and also observed that before he could definitively determine her degree of disability, Plaintiff needed to undergo a functional capacity evaluation (“FCE”). (R. 20, 241.)²³ We also point out that forms like the one principally relied on by Plaintiff,

²² We point out that in light of our conclusion that the first error alleged by Plaintiff does require remand, Plaintiff’s concerns regarding any improprieties in the ALJ’s treatment of Dr. Handy’s opinions are less critical to our consideration of the case as a whole, particularly in the context of how it might relate to or be impacted by VE testimony. We address this and all other issues raised in Plaintiff’s briefs for the sake of thoroughness, and as guidance for the ALJ upon remand.

²³ As Defendant points out, “[i]t does not appear that Dr. Handy examined Plaintiff [immediately] before he completed the questionnaire because he reported that he examined her for her ‘disability papers’ on October 3, 2006.” (Def. Br. at 10 (citing R. 221-222).) The record reveals, however, that he had examined Plaintiff several times before that date. (See R. 193, a “Progress Note” from March 21, 2005, which describes Plaintiff as a “[n]ew patient.” See also R. 196 (Progress Note from April 11, 2005), R. 198 (Progress Note from April 28, 2005), R. 201 (Progress Note from June 23, 2005), R. 202 (Progress Note from July 21, 2005), and R. 207 (Progress Note from September 29, 2005). “Progress Note” appears to be the label or title used for the short summary or report written by Dr. Handy after each patient visit.)

Overall, the record reveals that Plaintiff treated with Dr. Handy more than twenty-five times between March 2005 and October 2008. (See R. 187-310, 408-09.) In addition to the 2006 Employability Assessment, Dr. Handy issued two other opinions on Plaintiff’s disability. (R. 229, 240.) In a March 12, 2007 progress note, Dr. Handy noted that he had completed a New York temporary disability assistance form, in which he stated that Lyons was under temporary partial disability due to her intermittent syncope, persistent mild dyspnea, bilateral knee pain, and right elbow pain. (R. 229.) In a May 7, 2007 progress note, he observed that Plaintiff had “once again applied for Social Security Disability,” and then expressed uncertainty as to whether she was permanently totally disabled, explaining that she was “a complicated patient” whose complaints were “difficult to etiologically explain.” (R. 240-41.)

The relevant portion of his assessment is as follows:

[Lyons] has once again applied for Social Security Disability. I have given her my opinion that I think that she is permanently partially disabled. I am unsure whether she is permanently totally disabled.

(continued...)

requiring merely checking boxes or filling in a blank, are viewed with skepticism by this Circuit. *See, e.g., Mason v. Shalala*, 994 F.2d 1058, 1065 (3d Cir. 1993) (characterizing such forms as “weak evidence at best”); *see also Schmidt v. Comm’r Soc. Sec.*, 2012 U.S. App. LEXIS 3706, at *8-*9 (3d Cir. 2012) (assessing credibility of physician’s opinion consisting largely of checked boxes on DPW form as “open to question.”); *Phillips v. Barnhart*, 91 Fed. Appx. 775, 781 n.9 (3d Cir. 2004) (characterizing similar form as a “conclusory report” that does not merit significant weight under the regulations) *citing* 20 CFR § § 404.1527(d)(2)(ii), 416.927(d)(2)(ii). Our review of the ALJ’s opinion in light of the record he had before him reveals that rather than outrightly rejecting it, the ALJ assigned “little weight” to Dr. Handy’s reports. (R. 19-20.) Consistent with the regulations, the ALJ did properly consider and weigh Dr. Handy’s opinions against the conflicting evidence on the record.²⁴ (*See, e.g., R. 20.*)

Additionally, Dr. Handy, who treated Plaintiff over a long period of time, provided some opinion evidence that is not helpful to Plaintiff’s case for benefits. Importantly, Dr. Handy’s own

²³(...continued)

Given the information I currently have, it is my opinion [she] should have a functional capacity evaluation before I can be more definitive regarding her degree of disability . . . She is somewhat of a complicated patient and it is difficult to etiologically explain her current motor complaints. Her exam suggests a psychogenic element, though at least regarding her lower extremity symptoms, she does have at least some plausible reason for weakness based on her discogenic lumbar disease. I suspect that there is a complex interplay between her medical conditions and psychiatric conditions.”

(R. 240-41.)

²⁴ For example, the ALJ credited the opinion offered by Dr. Wakeley, which specifically discredited Dr. Handy’s assessment of Plaintiff’s ability to walk, sit, and stand as “not well supported” in that Plaintiff later ambulated without difficulty and was able to climb onto the exam table without assistance on May 7, 2002. (*See R. 375.*)

treatment notes are inconsistent with his determinations on the Employability Assessment. The record reveals that he examined Plaintiff at least nine times prior to rendering his opinion as to her ability to walk, stand, sit, lift, carry, push, pull, bend, and climb on October 3, 2006.²⁵ Dr. Handy conducted at least six of these examinations after her May 3, 2005 back surgery was performed (*see* R. at 201, 202, 207, 210, 216, 218), and yet his notes do not mention her back or any examination of it.²⁶ (*See id.*) Plaintiff expressed subjective complaints of back pain to Dr. Handy only once during this time period, on July 21, 2005, and denied experiencing any such pain at least five times thereafter.²⁷ (*See* R. 203, 204, 206, 208, 212, 214.) Despite this lengthy medical record to the contrary, Dr. Handy characterized Plaintiff's back pain as a severe impairment on the Employability Assessment form. (R. 187.) Accordingly, the ALJ did not commit reversible error in according Dr.

²⁵ Dr. Handy's treatment notes are memorialized in typed form and are often accompanied by handwritten notes on what appears to be a standard form used by Little Falls Hospital Primary Care Center to record nursing notes ("Nursing Notes") detailing a patient's subjective complaints. Between the time of Plaintiff's back surgery and Dr. Handy's opinion as to Plaintiff's abilities on the Employability Assessment form, the record contains three Nursing Notes that do not have an accompanying typed treatment note signed by the doctor. (R. 204, 212, 219.) Thus, although Plaintiff apparently visited the Primary Care Center on those dates, it is not clear whether Dr. Handy actually examined Plaintiff. On two of the visits, Plaintiff reported experiencing no pain. (R. 204, 212.) On one of the three visits, she reported experiencing joint pain but did not rate its severity. (R. 219.)

²⁶ The treatment notes following Plaintiff's back surgery and predating the Employability Assessment primarily relate to Plaintiff's mental status and other ailments. (R. at 201, 202, 210, 218.) We note, however, that Plaintiff appeared to be treating with Dr. Cho during much of this period, so it is possible that Dr. Handy did not examine her back or analyze her pain in that area out of recognition that a specialist was handling that component of her treatment. (*See* R. 333-339.)

Additionally, we also note that subsequent medical records from Dr. Handy (created long after he completed the October 2006 Employability Assessment) do detail Plaintiff's "complain[t]s of recurrent lower back pain." (R. 232.)

²⁷ Plaintiff complained of "chronic pain all over" only when she visited Dr. Handy's office for the purpose of completing disability paperwork. (R. 222.)

Handy's opinion about Plaintiff's back pain minimal weight, nor did he "improperly substitute[] his lay judgment for Dr. Handy's expert medical opinion" (*see, e.g.*, Pl. Reply at 6) when he concluded that there was "no evidence to suggest that [Plaintiff's] back pain is so severe as to interfere with her ability to perform the physical demands of sedentary work." (R. 20.)

In a related argument, Plaintiff alleges that the ALJ committed reversible error by failing to acknowledge the possibility that her pain was caused by a medically determinable nonexertional or mental impairment. (*See* Pl. Br. at 10-11.) Plaintiff argues that the ALJ "erred by relying on [a psychogenic] etiology as a reason to discount [Plaintiff's complaints of] pain." (Pl. Reply at 6. *See also* Pl. Br. at 10, in which Plaintiff contends that the ALJ erred by rejecting Dr. Handy's assessment based on the fact that a "'psychogenic element' may have been present.") Plaintiff contends that "Defendant, playing doctor, argues that Plaintiff has 'only a medically determinable affective disorder' not one 'that could account for her complained of pain'" and that "[t]his assertion is incorrect, as a medically determinable affective disorder can account for pain." (Pl. Reply at 5.)

In Plaintiff's view, this constitutes reversible error because "[t]he agency does not permit its adjudicators to ignore physical limitations if their etiology is psychogenic," and instead must "'consider whether there is an underlying medically determinable physical *or mental* impairment(s)'" (*Id.*, quoting Social Security Ruling 96-7p.) It is regarding Plaintiff's alleged mental impairments that she appears to argue that the ALJ "substituted his lay judgment on a medical matter for that of a qualified expert." (*Id.* at 11.)

Our reading of the ALJ's decision does not lead us to the same conclusion regarding his reliance upon this reasoning for rejecting Dr. Handy's opinion. Plaintiff focuses on the following sentence in the ALJ's decision, regarding Dr. Handy's assessments: "[h]e did note, however, that the

claimant was a complicated patient and difficult to etiologically explain and that the exams did suggest that a psychogenic element was present .” (Pl. Br. at 9-10 (citing R. 19-20).) We do not interpret the ALJ’s decision in the same way as Plaintiff appears to, as the portion of the ALJ’s decision that Plaintiff quotes does not, in our view, stand for the proposition that Plaintiff now attacks. Rather than provide a reason that the ALJ rejected Dr. Handy’s assessment, we view this statement as merely summarizing parts of Dr. Handy’s report. We therefore do not find this portion of the ALJ’s decision to constitute reversible error.

b. Plaintiff’s Syncope

Plaintiff next argues that the ALJ did not take into account the severity of her syncope in assessing her functioning. (Pl. Br. at 4-5.) To this end, she maintains that her syncope is a severe, medically determinable impairment, and the ALJ’s “implicit” rejection of it as such was not supported by substantial evidence. (Pl. Br. at 3. *See also* Pl. Reply at 2-3.) Plaintiff challenges the ALJ’s conclusion that “clinical findings failed to establish” that her intermittent syncope was severe. (R. 20.) Specifically, Lyons points to Dr. Handy’s March 12, 2007 report that she was under a temporary partial disability due in part to intermittent syncope, as well as the accounts she provided to an examining orthopedist and the ALJ that she did not drive due to syncope-related passing out or black out spells.²⁸ (Pl. Br. at 4.) As an initial matter, we note that Plaintiff did not list syncope among the impairments she alleged in her disability report.²⁹ (R. 128), or in the listing she provides

²⁸ In the June 2, 2007 form that Plaintiff filled out for the New York State Office of Temporary and Disability Assessment, she reported that she refused to drive or go out alone because of a fear of random fainting and blackout spells and the pain it causes her legs, back and arms. (R. at 141.) She reiterated this concern in her testimony before the ALJ. (R. 33.)

²⁹ This report does reveal the date it was completed, so it is possible that it predated the onset of her syncope.

in her brief before this Court. (*See* Pl. Br. at 2.) This fact, along with our independent review of the record, leads us to conclude that the ALJ did not err in rejecting elements of Dr. Handy’s medical opinion evidence related to syncope.

A physical or mental impairment is medically determinable, and thus relevant for purposes of determining disability if it “results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.” *Green v. Comm’r of Soc. Sec.*, 226 Fed. Appx. 125, 127 (3d Cir. 2008) (internal quotations omitted) *quoting* 42 U.S.C. § 423(d)(3). An impairment is severe if it “significantly limits [Plaintiff]’s physical or mental ability to do basic work activities.” 20 C.F.R. § 404.1520(c); *see also Taylor v. Astrue*, 2011 U.S. Dist. LEXIS 149173, at *5 (E.D. Pa. 2011) (describing a medically determinable impairment as “one that causes functional limitations and has more than a *de minimis* effect on the claimant’s ability to perform basic work activities.”). As noted above, syncope is defined as “a loss of consciousness or a faint.” *O’Connor v. Comm’r Soc. Sec.*, 2012 U.S. App. LEXIS 5112, at *11 (3d Cir. 2012) *quoting* 20 C.F.R. Part 404, Subpart P, § 4.00(F)(3)(b). A diagnosis of syncope “requires more than merely a feeling of light-headedness, momentary weakness, or dizziness.” *Id.* (internal quotations omitted).

Dr. Handy’s own treatment notes suggest that Plaintiff’s intermittent syncope did not significantly limit her ability to perform basic work activities. When Dr. Handy first opined that Lyons was suffering from syncope, Lyons had reported that she was participating in a work program two times per week that involved answering telephones, taking messages, and updating files. (R. 225.)³⁰ Dr. Handy’s opinion that Plaintiff was temporarily disabled due in part to her intermittent

³⁰ Additionally, we observe that in a January 11, 2007 “Physician Progress Note”
(continued...)

syncope was apparently based solely on Plaintiff's subjective complaints of such episodes.³¹ (*See* R. 229, 281.)

Lyons first reported subjective complaints of "spells" involving headache and shortness of breath to Dr. Handy on January 29, 2007. (R. 225, 465, 578.) These spells resulted in her falling to the ground and one allegedly resulted in loss of consciousness. (R. 225.) It was during this visit that Dr. Handy first referred to syncope in his assessment of Plaintiff's condition. (R. 225.) According to Dr. Handy's progress notes, a Holter monitor study was conducted on January 30, 2007.³² (R. 223.) It revealed "short runs of supraventricular tachycardia with 2:1 block."³³ (R. 223, 464, 582.) Dr. Handy referred Plaintiff to Dr. Andrew T. Ho, who examined her on March 6, 2007. (R. 283.) Plaintiff presented with subjective complaints of syncopal episodes, exertional dyspnea,

³⁰(...continued)

completed by Valerie Ramsey, a "Nurse Practitioner Psych." ("NPP") with the Comprehensive Mental health and Alcoholism Center at St. Mary's Hospital in Amsterdam, New York, NPP Ramsey noted that Petitioner "will begin a work program at FMCC" and that she was "excited about this." (R. 297.)

³¹ Dr. Handy's March 12, 2007 report predated the positive tilt table test conducted March 27, 2007. (*See* R. 286.) It was, however, conducted after the Holter monitor study, which was Plaintiff underwent on January 30, 2007. *See, infra* n. 31 and accompanying text.

³² A Holter monitor is a small device worn by patients to record their heart rhythm and detect any irregularities. It "has electrodes that are attached to [the] chest with adhesive and then are connected to a recording device." *See Holter Monitor, available at: <http://www.mayoclinic.com/health/holter-monitor/MY00577>* (last visited Apr. 2, 2012).

³³ Tachycardia is "a faster than normal heart rate." *See Tachycardia, available at: <http://www.mayoclinic.com/health/tachycardia/DS00929>* (last visited Apr. 2, 2012). Symptoms of tachycardia include the following: dizziness, shortness of breath, lightheadedness, heart palpitations, chest pain, and fainting (syncope). *See id.* Supraventricular tachycardia ("SVT") refers to "rapid rhythm of the heart that begins in the upper chambers." *See* Dr. Paul J. Wang and Dr. N.A. Mark Estes III, *Supraventricular Tachycardia*, *Circulation: Journal of the American Heart Association*, 2002, *available at <http://circ.ahajournals.org/content/106/25/e206>* (last visited Apr. 2, 2012). Loss of consciousness or syncope is a "rare occurrence" during SVT. *See id.*

occasional palpitations and occasional chest pain. (R. 283.) She alleged that she had three syncopal episodes within the past year, occurring roughly twelve (March 2006), six (September 2006), and three (December 2006) months prior to appearing in Dr. Ho's office. (R. 283.) One of the alleged episodes occurred while she was driving and reportedly resulted in her driving through a fence into a field. (R. 283.) The details of this episode do not appear elsewhere in the record, and do not appear to have been reported to her treating physician, Dr. Handy.

Dr. Ho reported that despite her many subjective complaints, his general examination of Plaintiff was unremarkable. (R. 282.) However, he did schedule a tilt table test in order to evaluate for neurocardiogenic (vasovagal) syncope.³⁴ (R. 282.) On March 12, 2007, prior to the administration of this test, Dr. Handy opined that Plaintiff was under temporary partial disability on the basis of her intermittent syncope. (R. 229.)

Notably, Dr. Handy made no reference to syncope when he listed Plaintiff's medical conditions for a disability screening for the state of New York in late 2006. (R. 186.)³⁵ When this same form requested that he list all of Lyons' severe impairments that lasted or were expected to last at least 12 months, Dr. Handy did not list syncope. (R. 187.) Plaintiff herself failed to list syncope as a condition limiting her ability to work in an undated Disability Report (Form SSA-3368) (R.

³⁴ A tilt table test is utilized in order to "evaluate the cause of unexplained fainting (syncope) . . . Your doctor may recommend a tilt table test if you've had repeated, unexplained episodes of fainting. A tilt table test may also be appropriate to investigate the cause of fainting if you've fainted only once, but another episode would put you at high risk of injury due to your work environment, medical history, age or other factors." *See Tilt table test, available at: <http://www.mayoclinic.com/health/tilt-table-test/MY01091>* (last visited Apr. 2, 2012).

³⁵ We do note, however, that in the January 29, 2007 "Progress Note," Dr. Handy observed that he was "concerned about [Plaintiff's] episode of syncope in particular." (R. 226.) He described the tests and records he planned to obtain, and that he was "going to see her back [the] next week for reevaluation." (*Id.*)

128.) Additionally, Plaintiff denied any loss of consciousness or dizziness during her consultative examination with Dr. Lore L. Garten in December of 2006. (R. 306.) When he saw her on June 12, 2008, Dr. Handy noted that Plaintiff “complain[ed] of ‘dizzy spells again’” and that she reported “[r]ecurrent lightheadedness in the setting of history of supraventricular tachycardia.” (R. 413.) He noted, however, that he was “suspicious that these episodes of dizziness [were] due to brief runs of supraventricular tachycardia,” and did not prescribe her any medication for syncope at that time. (*Id.*) Accordingly, the ALJ’s determination that elements of the record cast doubt on the extent to which Dr. Handy’s assessment reflected a substantiated medical opinion was thus not the product of legal error.

As we described above, notwithstanding his status as a treating physician, Dr. Handy’s opinion is entitled to controlling weight only if it is “well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record.” 20 C.F.R. § 404.1527(d)(2); *see also Salles v. Comm’r of Soc. Sec.*, 229 Fed. Appx. 140, 146 (3d Cir. 2007) (holding that “[e]ven limitations that are medically supported but are also contradicted by other evidence in the record may or may not be found credible – the ALJ can choose to credit portions of the existing evidence” (quoting *Rutherford v. Barnhart*, 399 F.3d 546, 554 (3d Cir. 2005) (internal quotations omitted))). Here, both other medical source opinions and Plaintiff herself at times contradict Dr. Handy’s finding that her intermittent syncope had a significant impact on her functioning.

Lyons own accounts of her condition suggest that her intermittent syncope did not impact her functioning in such a way as to significantly impact her ability to perform basic work activities. Since the inception of her complaints of syncope, Lyons herself stated that she was engaged in a

work program two days per week and reported seeking additional work on at least three occasions. (R. 34, 225, 522.) In March of 2007, Lyons indicated that she babysat for her four-year-old granddaughter on a daily basis and performed work around the home, including painting and general “tidying up.” (R. 289.) In a June 2007 report for the New York State Office of Temporary and Disability Assistance, Lyons stated that she was capable of dressing herself (but required assistance with her socks and shoes), preparing meals including sandwiches and TV dinners, reading, walking around the yard with a cane, performing light cleaning such as washing dishes, dusting, and folding clothes, paying bills, and counting change. (R. 138, 140-42.) She did report having several physical limitations.³⁶ On June 13, 2007, Lyons told Dr. Osika that she worked in her garden. (R. 347.)

Additionally, Dr. Handy’s opinion that, as of March 2007, Plaintiff had “a temporary partial disability” due in part to her intermittent syncope (*see* R. 229) was inconsistent with the clinical findings of three consultative examiners—Thomas Osika, Ph.D., an examining physician, George Petro, M.D., a State Agency psychiatric consultant who assessed Plaintiff’s mental RFC, and Carol Anne Wakeley, M.D., a state medical consultant who assessed Plaintiff’s physical RFC. While it is possible that syncope would not have been relevant for the types of examinations several of these doctors was tasked with conducting, and thus we are cautious not to overstate the importance of any omission, we describe each doctor’s findings as part of the evidence the ALJ had before him.

Dr. Osika issued a report in June of 2007 that found Plaintiff would have difficulty understanding and completing complex directions and engaging in appropriate interaction with co-workers. (R. 347-48.) After performing a mental status examination, however, Dr. Osika attributed

³⁶ Lyons reported having issues lifting, bending, pushing, standing, kneeling, squatting, reaching, and walking. (R. 140-43.) She stated that she was unable to sit, stand, or walk for more than thirty minutes. (R. 142-44.) Lyons did not report any issues with hearing or speaking. (R. 143.)

these difficulties to Plaintiff's depressive and anxiety-related symptoms. (R. 347-48.) Notably, he did not mention syncope or related symptoms in his report. (R. 345-48.) Similarly, in his October 2007, mental RFC Assessment, Dr. Petro made no mention of syncope or related symptoms. (*See* R. 367.) Instead, Dr. Petro opined that despite having some cognitive or psychiatric limitations, Lyons was "able to dress, bathe and groom, cook, [and] do light household tasks." (R. 367.) He further stated that she possessed the ability to "understand and remember simple instructions, sustain attention and concentration for simple tasks, relate adequately with others, and adapt to simple changes." (R. 367.) Finally, in her physical RFC Assessment, Dr. Wakeley similarly failed to mention syncope as impacting Plaintiff's functioning. (R. 371-75.) While acknowledging that Plaintiff reported having episodes of syncope since 2007, Dr. Wakeley opined that Lyons had the ability to sit for 6 hours of an 8 hour workday, stand and/or walk for 2 hours of an 8 hour workday, lift a maximum of 20 pounds, and bend occasionally. (R. 369.) Susan Gifford, a certified psychiatric nurse who Lyons visited two days after the tilt table test was performed, opined that Plaintiff appeared "pretty active with a variety of hobbies" and noted that she had tried to discourage her from applying for disability benefits, instead "encourag[ing] some type of part time work." (R. 300.) Again, we appreciate that these examiners may not have had a reason to mention syncope, but simply point out that they did not do so.

Furthermore, aside from undergoing a tilt-table test in March of 2007, Plaintiff does not appear to have engaged in any substantial treatment for her syncopal episodes, despite being prescribed medication on one occasion by Dr. Cai. (*See, e.g.*, R. 281, a March 27, 2007 "Discharge Summary" in which Dr. Cai describes that he "started the patient on Florinef and also [recommended that she] continue the rest of [her previously prescribed] medications which included Celexa, Claritin

as needed, Klonopin.” *See also* R. 286, a March 27, 2007 “Procedure Note” in which Dr. Cai recommended “[t]reat[ing Plaintiff] with Florinef” and suggested that she “follow [up] with Dr. Andy Ho in 2 months and follow [up] with Dr. Cai in 6 months.”) The record does not include any subsequent medical reports from either doctor, nor do the medications prescribed to control Plaintiff’s intermittent syncope appear in any subsequent records. (*See, e.g.*, R. 283, 286.)³⁷ The Third Circuit has held that a lack of treatment or control of an impairment by medication support a finding that the impairment is not severe. *See Salles v. Comm’r of Soc. Sec.*, 229 Fed. Appx. 140, 145 (3d Cir. 2007).

The record as a whole indicates that Plaintiff’s ability to perform basic work activities was not significantly limited since she first complained of syncopal episodes on January 29, 2007. Beyond Plaintiff’s subjective complaints and Dr. Handy’s temporary partial disability opinion apparently rendered solely on the basis of those complaints, there is no evidence suggesting that Lyons’ syncope resulted in functional limitations that affected her ability to work. The ALJ did not improperly discredit Dr. Handy’s assessment that Plaintiff’s syncope impacted her abilities given the evidence in the record contradicting such a finding.

ii. “Rejection” of Dr. Balagtas’s Medical Opinion Evidence

Plaintiff next argues that the ALJ’s findings are inconsistent with the limitations reported by Amelita Balagtas, M.D. (*See, e.g.*, Pl. Br. at 12.) Dr. Balagtas performed an orthopedic examination of Plaintiff on June 4, 2007, at the request of the New York Division of Disability Determination.

³⁷ We do note, however, that Dr. Handy included syncope among the ailments listed under Plaintiff’s “Past Medical/Surgical History” on an April 9, 2007 Progress Note. (R. 233.) He listed, among ten other medical issues, that she had a “[h]istory of syncope and palpitations. (*Id.*) He did not, however, provide any other description of her syncope, including in his analysis of her “Chief Complaint” at the time, nor did he provide her any treatment or prescribe her any medications for it. (*Id.* at 232.)

(R. 326-29.) Her assessment addressed Plaintiff’s physical abilities and she opined that Plaintiff would have “moderate limitations” with respect to “bending, lifting, prolonged sitting, standing, and activities that require kneeling and squatting.” (R. 328.) Dr. Balagtas offered no explanation of the word “moderate,”³⁸ nor any opinion as to how long Plaintiff could sit or bend. (*Id.*) She did note, however, that Plaintiff reported experiencing pain in her lower back and right knee, as well as numbness in her left lower extremity, which was aggravated by prolonged sitting or standing. (R. 326.) She also observed that Plaintiff’s lumbar spine x-rays revealed only mild narrowing at L4-L5 and L5-S1 with no spondylolisthesis or spondylolysis. (R. 329.)

Plaintiff argues that the ALJ’s opinion that Plaintiff could do the full range of sedentary work was inconsistent with Dr. Balagtas’s report, despite the fact that the ALJ did not specifically make an adverse finding about it. (Pl. Br. at 12.) Defendant responds that Dr. Balagtas did not define “moderate limitations” and therefore the ALJ did not err when he “indicated that Dr. Balagtas’ opinion was not inconsistent with Plaintiff’s RFC for sedentary work given that she believed that Plaintiff had moderate limitations.” (Def. Br. at 10, citing R. 17.) In Defendant’s view, “[i]t was fair for the ALJ to presume that if Dr. Balagtas believed that, for example, Plaintiff’s ability to sit was essentially compromised, then she would have rated Plaintiff as having a marked an extreme limitation in this area of functioning.” (*Id.* at 16.) Plaintiff argues that this interpretation “is patently unreasonable” as a moderate limitation, necessarily “more severe than a mild” one, must limit an individual’s ability to sit, and therefore impact his or her ability to perform sedentary work. (Pl. Reply at 7.)

³⁸ Unlike some of the forms referenced above, this was not a “check box” type form, with a spectrum of degrees of severity.

We do not find the ALJ's ultimate conclusion about Plaintiff's RFC to have been in error, in light of Dr. Balagtas's opinions. Dr. Balagtas's view likely does encompass some diminution in Plaintiff's ability to sit, however we review the ALJ's decision only to see whether it is supported by substantial evidence, or the product of legal error. Here, the ALJ's decision makes clear that, given his acceptance of Dr. Balagtas's report as "not inconsistent with Plaintiff's RFC for sedentary work," the ALJ interpreted the term "moderate" to mean a relatively small impact on Plaintiff's ability to sit. We note as well that medical evidence in the record confirmed that Plaintiff could sit for the majority of a workday. (*See* R. 369, in which Dr. Wakeley opined that Lyons had the ability to sit for 6 hours of an 8 hour workday.³⁹) The ALJ thus did not commit reversible error in his handling of Dr. Balagtas's medical opinion. In that we are remanding on another ground, however, it would be appropriate for the ALJ, on remand, to specifically address how Plaintiff's RFC might have been impacted (or not) by "moderate" limitations in her ability to sit.

iii. Rejection of Dr. Osika's Medical Opinion Evidence

Plaintiff similarly takes issue with the ALJ's RFC determination in light of the limitations reported by Dr. Osika. Thomas Osika, Ph.D. conducted a mental status examination of Plaintiff in June 2007, as a state agency psychologist. (R. 345-348.) Based on Plaintiff's reports to him that she was unable to work due to problems interacting with people (acknowledging that she would "get nasty and violent" at times (R. 346)), he opined that Plaintiff's depression and anxiety-related symptoms would "likely make it difficult for her to consistently interact appropriately with

³⁹ Dr. Wakeley concluded that Lyons was capable of sitting for 6 of 8 hours per day, lifting a maximum of 20 pounds, and bending occasionally. (R. 369.) She discredited Dr. Handy's assessment of Plaintiff's lifting, walking, sitting, and standing capabilities in late 2006 as "not well supported" because Plaintiff was later reported to be ambulating without difficulty and climbing onto the exam table independently on May 7, 2007. (R. 375.)

coworkers in the work environment.” (R. 347-348.) He also noted that these reported symptoms would likely impair “her ability to understand and complete complex directions.” (*Id.* at 348.) Finally, he observed that “she would have mildly impaired performance when trying to complete simple tasks.” (R. at 348.) In his decision, the ALJ described Dr. Osika’s findings in detail and then assigned “some weight” to some of them. (R. 20.) The ALJ specifically stated that he found Dr. Osika’s opinion about Plaintiff’s difficulty interacting with coworkers “to be valid and consistent with other opinions contained in the record.” (R. 20.)

Plaintiff alleges that the ALJ erred in his ultimate determinations about Plaintiff’s ability to work in light of his explicit adoption of “the limitations Dr. Osika reported.” (Pl. Br. at 13.) Focusing on the specific finding regarding ability to interact appropriately with coworkers, Plaintiff takes issue with the ALJ’s determination that “Plaintiff could only ‘perform work that does not require more than occasional interaction with the public and co-workers.’” (*Id.* at 14.) In Plaintiff’s view, the ALJ’s RFC assessment represented an implicit rejection of Dr. Osika’s opinions (despite describing them as “valid and consistent”), which he was obligated to explain. (*Id.* at 14-15.) In Plaintiff’s view, the ALJ’s failure to provide an explanation therefore constituted reversible error.

In response, Defendant asserts that “[w]hile Plaintiff argues that the ALJ erred because he rejected Dr. Osika’s opinion without adequate explanation, she fails to cogently explain why Dr. Osika’s opinion was inherently inconsistent with her RFC.” (Def. Br. at 18.) We agree with Defendant that “Dr. Osika never suggested that Plaintiff’s condition restricted her to [never] interact with coworkers[...n]or did the clinical findings that Dr. Osika reported indicate that Plaintiff was completely restricted from interacting with coworkers.” (*Id.* at 19.) In her reply, Plaintiff urges that an inability to meet the demands of a job (including by way of an inability to interact with

coworkers) only some of the time is sufficient to constitute an inability to sustain employment in today's "competitive workplace." (Pl. Reply at 12.)

Again, we are charged with determining only whether the ALJ's factual findings are supported by substantial evidence. *See Schaudeck v. Comm'r of Soc. Sec.*, 181 F.3d 429, 431 (3d Cir. 1999) (citing 42 U.S.C. § 405(g)). The ALJ's review of Dr. Osika's various findings, as well as those made in the other medical reports provided for his review, reveals that he considered the full record in making a determination about Plaintiff's ability to interact with others in various settings. (R. 20-21, citing the reports of Dr. Handy, Dr. Petro and Dr. Osika.) The ALJ specifically noted that "Dr. Handy found no evidence of limitations in[...] interacting appropriately with others or maintaining socially appropriate behavior." (R. 20.) He described that Dr. Petro, too, concluded that Plaintiff "is viewed as able to[...]relate adequately with others and adapt to simple changes." (R. 20-21.) We appreciate that, in light of his adoption of these findings, the ALJ's ultimate conclusion that he found Dr. Osika's "opinion that [Plaintiff] would have difficulty consistently interacting appropriately with coworkers to be valid and consistent with other opinions contained in the record" (R. 20) means that he concluded that the degree of "difficulty" Plaintiff would experience in interacting with others was minimal. On remand, we would encourage the ALJ to provide a more robust explanation of his conclusions regarding Plaintiff's abilities to interact with coworkers. We believe that input from a vocational expert would be helpful to this end. On the whole, however, we do not find that the ALJ's RFC determination was unsupported by substantial evidence, or the product of legal error, with regard to Dr. Osika's medical opinion in particular.

V. CONCLUSION

Upon careful and independent consideration of the record before us, we conclude that the ALJ's decision is not supported by substantial evidence due to his failure to consider vocational testimony or to take official notice of the impact of Plaintiff's nonexertional limitations on the occupational base for unskilled sedentary work. We therefore recommend that the decision of the Commissioner be vacated and that the matter be remanded for further consideration consistent with this report.

Our recommendation follows.

RECOMMENDATION

AND NOW, this 31st day of May, 2012, upon consideration of the brief in support of review filed by Plaintiff, Defendant's response thereto, and Plaintiff's reply (Docs. 9, 10, and 12), as well as the administrative record, it is respectfully **RECOMMENDED** that the decision of the Commissioner that the decision of the Commissioner be **VACATED** and that the matter be **REMANDED** for further consideration consistent with this report.

BY THE COURT:

/s/ David R. Strawbridge
DAVID R. STRAWBRIDGE
UNITED STATES MAGISTRATE JUDGE

