Temple v. Social Security Administration

2017 | Cited 0 times | D. New Mexico | December 12, 2017

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO DIANE MARIE TEMPLE, Plaintiff, v. CIV 16-1007 KBM NANCY A. BERRYHILL, Acting Commissioner of Social Security Administration, Defendant.

MEMORANDUM OPINION AND ORDER THIS MATTER is before the Court on Motion to Reverse and Remand for a Rehearing, with Supporting Memorandum (Doc. 20) filed on April 6, 2017. Pursuant to 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73(b), the parties have consented to me serving as the presiding judge and entering final judgment. See Docs. 4, 7, 11. Having considered the record, submissions of counsel, and relevant law, the Court finds motion is well-taken and will be granted in part. I. Procedural History

On December 31, 2012, Ms. Diane Temple (Plaintiff) protectively filed applications with the Social Security Administration for a period of disability and disability insurance benefits under Title II of the Social Security Act (SSA), and for Supplemental Security Income under Title XVI of the SSA. Administrative Record 1

(AR) at 11, 177-78, 184. Plaintiff alleged a disability onset date of June 1, 2012. AR at 11,

1 Document 15-1 contains the sealed Administrative Record. See Doc. 15-1. The Court cites the page.

177, 184. Disability Determination Services (DDS) determined that Plaintiff was not disabled both initially (AR at 84-85) and on reconsideration (AR at 112-13). Plaintiff requested a hearing with an Administrative Law Judge (ALJ) on the merits of her applications. AR at 136-37. Both Plaintiff and a vocational expert (VE) testified during the de novo hearing. See AR at 26-55. ALJ Eric Weiss issued an unfavorable decision on April 24, 2015. AR at 8-24. Plaintiff submitted a Request for Review of Hearing Decision/Order to the Appeals Council (AR at 6-7), which the council denied on August 10, 2016 (AR at 1-5). See Doyal v. Barnhart, 331 F.3d 758, 759 (10th Cir. 2003). II. Applicable Law and t

A claimant seeking disability benefits must establish that s engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or ca U.S.C. § 423(d)(1)(A); see also 20 C.F.R. § 404.1505(a). The Commissioner must use a

sequential evaluation process to determine eligibility for benefits. 20 C.F.R. §§ 404.1520(a)(4),

416.920(a)(4); see also Wall v. Astrue, 561 F.3d 1048, 1052 (10th Cir. 2009).

The claimant has the burden at the first four steps of the process to show: (1) she she determinable . . . impairment . .

expected to last for at least one year; and (3) her impairment(s) meet or equal one of

the listings in Appendix 1, Subpart P of 20 C.F.R. Pt. 404; or (4) pursuant to the as she is unable to perform her past relevant work. 20 C.F.R §§ 404.1520(a)(4)(i-iv), 416.920(a)(4)(i-iv); see also Grogan v. Barnhart, 399 F.3d 1257, 1261 (10th Cir. 2005) (citations omitted). FC is a multidimensional description of the work-related abilities [a claimant] retain[s] in spite of her Ryan v. Colvin, Civ. 15-0740 KBM, 2016 WL 8230660, at *2 (D.N.M. Sept. 29, 2016) (citing 20 C.F.R. § 404, Subpt. P, App. 1 § 12. a prima facie case of disability[,] . . . the burden of proof shifts to the Commissioner at

the national economy, given [her] Grogan, 399 F.3d at 1261 (citing Williams v. Bowen, 844 F.2d 748, 751 & n.2 (10th Cir. 1988) (internal citation omitted)); see also 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

At Step One of the process, 2

ALJ Weiss found that while Plaintiff worked cleaning houses in 2012 and 2013, and as a delivery driver in 2014, her earnings since 2010 do not rise to the level of gainful activity. AR at 13. Consequently, Plaintiff had not engaged in substantial gainful activity since her alleged onset date of June 1, 2012. AR at 13 (citing 20 C.F.R. §§ 404.1571-1576, 416.971-976). At Step Two, the ALJ depressive disorder, and generalized anxiety disorder 4 (citing 20 C.F.R. §§ 404.1520(c), 416.920(c)).

2 quarters of coverage to remain insured thro

combination of impairments that meets or medically equals the severity of one of the 15 (citing 20 C.F.R. §§ 404.1520(d), 404.1525, 404.1526, 416.920(d), 416.925, 416.926). In making his determination, ALJ Weiss considered listings 12.04 (affective disorders) and 12.06 (anxiety related disorders). AR at 15.

The ALJ first examined whether . He found that Plaintiff has mild restrictions in her activities of

daily living (AR at 15 noting Plaintiff 20 hours/week, in which she drives locally and to Texas and Colorado) (citing AR at 76,

105, 400); moderate difficulties in the area of social functioning (AR at 15 noting that Plaintiff . . . is sometimes bothered by crowds, . . . limits her contact with others[,] and had a roommate in 2012, 2013, and at the time of the hearing) (citing AR at 232-40); and moderate difficulties in the area of

concentration, persistence or pace (AR at 15-16 noting Plaintiff that her head

ficulty focusing (citing AR at 237).

-day emergency admission to a psychiatric unit on July 28, 2012, toxicity[,] Case 1:16-cv-01007-KBM Document 25 Filed 12/12/17 Page 4 of 30 that Plaintiff has experienced no episodes of decompensation of extended duration, because the episode only lasted two days (AR at 16 noting that Plaintiff . determined that her

criteria. AR at 16. The ALJ also found 16.

At Step Four, the ALJ Weiss concluded that while Plaintiff determinable impairments could reasonably be expected to cause the alleged

he did not find statements concerning the intensity, persistence and limiting effects of these symptoms . . . entirely credible . . . 18. The ALJ considered the evidence of record, including the psychological consultative examination performed by David LaCourt, Ph.D., the opinion of state agency DDS consultant Cheryl Woodson-Johnson, and s roommate. AR at 14-19. Ultimately, the ALJ found that Plaintiff

has the residual functional capacity to perform a full range of work at all exertional levels but with the following nonexertional limitations: she is limited to perform simple, routine and repetitive tasks and is limited to simple work related decisions in a work environment with only occasional changes in the work setting. She may have only occasional interaction with the public, coworkers and supervisors. AR at 17. ALJ Weiss determined that Plaintiff is capable of performing past relevant performance of work- The ALJ

ultimately decided Security Act, from June 1, 2012, through the date of [the 0 (citing 20 C.F.R. §§ 404.1520(f), 416.920(f)). III. Legal Standard factual findings are supported by substantial evidence in the record and whether the

Lax v. Astrue, 489 F.3d 1080, 1084 (10th Cir. 2007) (quoting Hackett v. Barnhart, 395 F.3d 1168, 1172 (10th Cir. 2005) (internal citation omitted)). A deficiency in either area is grounds for remand. Keyes-Zachary v. Astrue, 695 F.3d 1156, 1161, 1166 (citation omitted). relevant evidence as a reasonable mind might accept as adequate to support a

Lax, 489 F.3d at 1084 (quoting Hackett, 395 F.3d at 1172 (internal Id. (quoting Zoltanski v. F.A.A., 372 F.3d 1195, 1200 (10th Cir. 2004) (internal quotation omitted) (alteration in original) specific rules of law that must be followed in weighing particular types of evidence in

disability cases, but [it] will not reweigh the evidence or substitute [its] judgment for the Id. (quoting

Hackett, 395 F.3d at 1172 (internal quotation marks and quotations omitted)).

e Id. (quoting Zoltanski, 372 F.3d at 1200 (internal quotation omitted)). The though the court would justifiably have made a different choice had the matter been Id. (quoting Zoltanski, 372 F.3d at 1200 (internal quotation omitted)). IV. Discussion Plaintiff asserts two broad issues in her Motion. First, Plaintiff argues that the ALJ failed to correctly weigh both the examining -examining Doc. 20 at 6-11. Second, Plaintiff proposes a variety of arguments to support her contention that evidence. Id. at 11.

A. Weiss assessment of opinion is inadequate to

. ion constitutes opinion on evidence; and (2) the ALJ erred by failing to incorporate in the RFC limitations findings by Dr. LaCourt that Plaintiff has a moderate limitation in her ability to carry out instructions due to task impersistence, and marked limitations in working without supervision and in working with supervisors. Doc. 20 at 8-10. DDS referred Plaintiff to a one-time consultation with Dr. LaCourt on June 1, 2013. AR at 400. Dr. LaCourt noted the following background information: Plaintiff lives by herself (with four dogs). AR at 400. She dropped out of school in 9th grade to have her first child; she eventually obtained her GED. AR at 400. Plaintiff has worked over the years for a house-cleaning agency, but she was fired in August 2012. AR at 400.

Her ex-boyfriend 3

beat Plaintiff in the head with a rock in June 2012, and Dr. LaCourt noted that it was unclear what type of treatment she received after that beating. AR at 400. Plaintiff stated he daytime. AR at 400-01.

Plaintiff also reported that one month after the beating, she checked herself into a psychiatric inpatient because she was having methamphetamine-induced auditory hallucinations and paranoid delusions (she thought someone was after her) AR at 400, 401. Plaintiff discussed her other medical history with Dr. LaCourt, including her broken right index finger and her Hepatitis C diagnosis. AR at 401. Plaintiff wore clean, appropriate clothing, had normal grooming and hygiene, and

functional posture and gait. AR at 401. AR at 401. She showed normal attention el of general concentration AR at 401. While Dr. LaCourt did appointment, Plaintiff reported she was experiencing (both at the appointment and at

other times) ing/persisting anxiety of a free-floating kind, i.e., without identifiable recent/proximal antecedents. AR at 401.

3 -husband, he was actually her ex-boyfriend. Doc. 20 at 17 n.6. The ex-boyfriend was convicted of attempted murder in connection with the beating, AR at 400, and apparently released from prison before the January 2015 hearing before the ALJ. AR at 35.

Dr LaCourt found that varying degrees of low detail/vague retrieval small gaps associated with the

assault. AR at 401. Plaintiff denied regular counseling or psychotherapy. AR at 401. with medications -

at 401. Plaintiff had taken self-defense classes to feel more secure. AR at 401.

- harm ideat AR at 401. Plaintiff displayed average to low-average intellectual -02. Dr. LaCourt listed the medications Plaintiff was

taking, noted that she had occasional alcoholic beverages but not regularly or to the point of intoxication, and indicated that she had not taken illicit substances since July 2012 (methamphetamine). AR at 402. Dr. LaCourt diagnosis of Plaintiff included Generalized Anxiety Disorder, methamphetamine abuse (in sustained full remission), and Depressive Disorder NOS. AR at 402. He opined that Plaintiff had the following limitations:

Understanding and remembering detailed/complex instructions: no

limitation; very short/simple instructions: no limitation Sustained concentration/task persistence, for carrying out instructions:

moderate limitation associated with task impersistence; attending and concentrating: no limitation; working without supervision: marked limitation

Social interaction, with the public: moderate limitation; with coworkers:

marked limitation; with supervisor: marked limitation associated with anxiety Adaptation to changes in the workplace: no limitation; aware of normal

hazards/reacting appropriately: mild limitation Use of public transportation/travel to unfamiliar places: marked

limitation associated with anxiety about being around other people for extended periods of time AR at 402. He opined that Plaintiff could manage her own benefits. AR at 402. The ALJ summarized Dr. LaCo found

that LaCourt opine co-workers or supervisors because she testified that she has no problem working with

Notably, while Plaintiff cites to 20 C.F.R. § 404.1527, she stops short of actually section. See Doc. 20 at 6. Instead, Plaintiff argues that (1) the ALJ erred in rejecting the

marked limitations opined by consultative psychologist Dr. LaCourt; and (2) the RFC fails to account for See Doc. 20 at 7-10.

1. LaCourt opined are supported by substantial evidence.

Dr. LaCourt opined that Plaintiff has marked limitations in four areas: (1) working without supervision; (2) working with coworkers; (3) working with supervisors

(associated with anxiety); and (4) using public transportation (associated with anxiety about being around other people for extended periods of time). AR at 402.

Plaintiff begins with Dr. LaCourt s assessed limitations on working with coworkers and supervisors. In these two areas, the ALJ reasoned the finding of marked limitations is not supported, because Plaintiff te Plaintiff argues this was error, because Plaintiff avoids dealing with

Doc. 20 at 8 (quoting AR at 45) Plaintiff also testified that her coworkers

checking behaviors while in her car in parking lots because of anxiety about who might

Id. (citing AR at 45-47).

However, substantial evidence does support

her ability to use public transportation due to anxiety about being around people. 4

The state agency DDS consultant, on whose opinion the ALJ placed great weight, found that

[and in] getting along with co- Plaintiff is only moderately limited in her ability to accept instructions and respond appropriately to criticism from supervisors. See 4

Plaintiff made no specific arguments about the marked limitation on her ability to use public transportation (due to anxiety about being around people). See Doc. 20. The Court notes, however, that the ability to use public transportation is not a required skill for unskilled work. See, e.g., Soc. Sec. Ruling, SSR 85-15, Titles II & XVI: Capability to do Other Work The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments, at *4 (Jan. 1, 1985). More importantly, the ALJ suf explained in this section.

perform work where . . . supervi AR at 66.

The fact that Plaintiff has been working as a courier negates the fact that she has marked limitations working with supervisors, as she is obviously supervised, at least remotely. And Plaintiff is clearly

able to manage her anxiety working around people as a courier, even if that means she makes her deliveries quickly and avoids excessive interaction with others.

s that [her] past reports of her mental limitations, including her fear of leaving her home, or even to occupy parts of her home, are improved. Her testimony describes a current ability to not only leave her home, but to also maintain part-time employment. hearing:

Q [Dr. LaCourt] said that anxiety-related events caused limitation [sic] in social interaction with coworkers and supervisors. A ave a supervisor back then. . . . I AR at 38-39 (emphasis added). She explained that back then, at the time of her one- time evaluation with Dr. LaCourt in June 2013, she did not have a supervisor and kept the June 2012 incident with her ex-boyfriend. AR at 35. Her interview with Dr. LaCourt

came within that year time period. After that period of bad anxiety, she began working again as a courier. AR at 35-36.

Importantly, the ALJ recognized Plaintiff s anxiety about being around others and incorporated a limitation on her ability to work around the public and with coworkers and , the ALJ did not completely reject

these marked limitations, 5

and the VE considered these limitations when identifying jobs Plaintiff can perform. See, e.g., Chapo v. Astrue, 682 F.3d 1285, 1290-91 (10th Cir. 2012) (noting that where ALJ effectively rejected certain moderate and marked limitations opined by a treating psychologist, the VE did not have the opportunity to consider those limitations).

state agency DDS consultant, who found that Plaintiff was not significantly limited in her

ALJ noted that this opinion was consistent with the longitudinal record. AR at 18.

Included in the longitudinal record, and noted by the ALJ earlier in the decision, is the fact that Plaintiff occasionally works as a housekeeper, apparently on her own and without supervision. AR at 15, 43. And while the ALJ did not note the following exchange that took place at the hearing, it is also relevant to this topic: Q You were seen by a psychologist named David LaCourt back in June 2013. . . . And he in his report talked about problem want [sic] you were having with respect to working without supervision? Do you consider that a problem?

5 Chapo v. Astrue, 682 F.3d 1285, 1289 n.2 (10th Cir. 2012) (quotation omitted).

A No. AR at 38. work without

te decision, and the Court will not displace that decision simply because there are two conflicting views. See Lax, 489 F.3d at 1084 (quotation omitted). There is no reversible error on this issue.

2. The ALJ on remand must address and explain any moderate

limitation in Plaintiff s ability to carry out instructions. Plaintiff also contends that her RFC fails to account for finding Doc. 20 at 9. While the Court on this matter, the ALJ failed to sufficiently explain his finding. Because the Court is

remanding for other reasons (see Section IV(B)), it also directs the ALJ to explain either why this moderate limitation is rejected, or why the RFC incorporates the limitation.

a. The definition of unskilled work includes the ability to

carry out simple instructions. abilities (on a sustained basis) to understand, carry out, and remember simple

instructions; to respond appropriately to supervision, coworkers, and usual work Adkins v. Colvin, No. 14- CV-01043-LTB, 2015 WL 4324564, at *10 (D. Colo. July 16, 2015), aff'd Case 1:16-cv-01007-KBM Document 25 Filed 12/12/17 Page 14 of 30 807 (10th Cir. 2016) (emphasis added) (quoting Jaramillo v. Colvin, 875 (10th Cir. 2014) (quoting SSR 85 15, 1985 WL 56857, at *4 (Jan. 1, 1985))).

The oft-cited case in this area is Jaramillo v. Colvin 870 (10th Cir. 2014). In Jaramillo perform sedentary work but was limited to simple, routine, repetitive and unskilled tasks and had to avoid all exposure to direct sunlight. Jaramillo

abili Id. te agency doctor who had had completed a Mental Residual Function Capacity Assessment (MRFCA), noting in the Section III narrative portion that the plaintiff in that case t simple Id. at 873.

The Tenth Circuit discussed SSR 85-15 and noted that demands of competitive, remunerative, unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple Id. at 875 (emphasis added) (discussing Soc. Sec. Ruling, SSR 85-15, Titles II & XVI: Capability to do Other Work The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments, at *4 (Jan. 1, 1985)). These abilities are examples of work-related mental functions. Id. (citing SSR 96 8p, 1996 WL 374184, at *6). Therefore, a limitation to unskilled work or, as the ALJ phrased it here, could be used as shorthand for the specific mental abilities described in SSR 85 15 Id. The RFC tracked the opinion of the DDS doctor (who opined in Section III

that the plaintiff could carry out simple instructions), but it did not comport with the moderate limitation the consultative psychiatr out instructions. Id. The Tenth Circuit emphasized that the ALJ

had placed great weight

this particular limit into the RFC. Id.

b. limitation as one on carrying out simple instructions.

ability to carry out instructions, courts discussing Jaramillo distinguish between limitations on carrying out simple versus detailed instructions. For example, in Shawbaker v. Colvin, 189 F. Supp. 3d 1168 (D. Kan. 2016), the ALJ limited the plaintiff simple, routine and repetitive tasks consistent with unskilled work low-stress work environment with only occasional interaction with co-workers and the public. Shawbaker, 189 F. Supp. 3d at 1171. In making this RFC determination, the ALJ had upon 6

the opinion of a consultative psychologist, who found that the plaintiff there was not significantly limited in her ability to carry out very short and simple instructions, but was moderately limited in her ability to carry out detailed instructions. Id. at 1173.

The Shawbaker plaintiff argued that Jaramillo supported her theory that the RFC did not reflect her mental impairments. Id. The court distinguished Jaramillo because the consultant upon whom the ALJ relied found that plaintiff was less impaired than the claimant in Jaramillo. [Ms. Shawbaker] was considered moderately limited in her ability

6 The Shawbaker court does not disclose what weight the ALJ gave the consultative psychologist. Shawbaker, 189 F. Supp. 3d at 1172-73.

to carry out detailed instructions, not all instructions. Id. (emphasis added). The court concluded that the RFC comported with SSR 85- decision in Jaramillo. Id.

s RFC i.e., that plaintiff would be limited to simple, routine and repetitive tasks consistent with unskilled work and that she would be precluded from production-rate job tasks but could tolerate a low-stress work environment and only occasional interaction with co-workers and the public sufficiently expresses s moderate limitations in carrying out detailed instructions, maintaining attention and concentration for extended periods, and interacting with the general public. Id. (citing Adkins v. Colvin, 2015 WL 4324564 *10 (D. Colo. July 26, 2015) (unskilled work limitation adequately expresses similar mental restrictions); Vigil v. Colvin, 805 F.3d 1199, 1203-04 (20th Cir. 2015) (unskilled work limitation adequately accounts for moderate limitations in concentration, persistence and pace where there was a specific finding that the claimant had enough memory and concentration to perform simple tasks)).

In Whelan v. Colvin, No. CIV-15-129-R, 2016 WL 562871 (W.D. Okla. Jan. 22, 2016), R. & R. adopted, No. CIV-15-129-R, 2016 WL 593835 (W.D. Okla. Feb. 12, 2016), the court found Jaramillo inapplicable

because the consultant in Whelan had Jaramillo whether the plaintiff was moderately impaired in her ability to perform work with detailed

Whelan, 2016 WL 562871, at *8; see also Knight v. Colvin, CIV 15-0882 KBM, 2016 WL 9489144, at *7

(D.N.M. Dec. 5, 2016) (noting that the psychologist in that case had not made a

Dr. LaCourt opined that Plaintiff has a moderate limitation in her ability to carry ; he did not specify whether this means she is limited in carrying out simple and/or detailed instructions. In fact, he did not offer any ordinarily appears in social security regulations or relevant caselaw.

out instructions does not reference either simple or detailed instructions. The ALJ did

offer some discussion of his findings on P his finding that Plaintiff has moderate difficulties with respect to concentration,

persistence and pace, 7

Nonetheless, the ALJ

expressly found more limited in the area of concentration, persistence and pace than Dr. L 8

AR at 18 (emphasis added). ALJ Weiss also noted that while the DDS consultant found detailed instructions, and remember very short and simple instructions. See AR at 18, 64. Further, in the

narrative explanation of the MRFC assessment, the DDS consultant explained that

7 The ability to carry out simple and/or detailed instructions is listed under the section entitled See, i.e., AR at 64. 8 is in contrast to Jaramillo great weight, then instructions was not incorporated into the RFC. See Jaramillo

related a AR at 66; see also SSR 85-15.

It is telling that the DDS consultants and the ALJ in discu opinions ies to carry out short and simple versus complex instructions. F the ALJ regarding task impersistence to call for a limitation to carrying out simple instructions only. This is only an inference, however, If t s holding, it would have to read such an expl s decision. See Doom v. Colvin, No. CIV-15-409-R, 2016 WL 3248590, at *3 (W.D. Okla. June 13, 2016); see also See Haga v. Astrue, 482 F.3d 1205, 1207-08 (10th Cir. 2007). The Court will remand for further analysis of this issue and asks the ALJ to explicitly discuss this moderate limitation detailed instructions.

B. The ALJ did not adequately account opinions on s moderate limitation regarding interruptions

from psychological symptoms. Plaintiff next argues the ALJ did not account for two moderate limitations that the DDS consultants found in the areas of completing a workday without interruptions from psychological symptoms, and performing at a consistent pace without an unreasonable number and length of rest periods. Doc. 20 at 11 (citing AR at 65). Plaintiff proffers that mpersistence. See id. The Court agrees that the limitation in performing at a

, and the Court will ask the ALJ to address this limitation for the reasoning described above in Section IV(A)(2).

The Court also agrees that ALJ Weiss failed to account for the remaining moderate limitation regarding interruptions from psychological symptoms. Here, the DDS consultants both indicated a moderate limitation in this area and specified in the MRFC narrative portion occasional interruptions in her See Smith v. Colvin, 821 F.3d 1264, 1269 n.2 (10th Cir. 2016) (instructing courts to examine the MRFC narrative, not

workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest

25020.010, http://policy.ssa.gov/poms.nsf/lnx/0425020010 (emphasis added) (quoted in Ellis v. Berryhill, 2:15-CV-00917-LF, 2017 WL 3084467, at *5 (D.N.M. July 19, 2017)). Id. The Court finds the facts here are analogous to those in Ellis v. Berryhill, where the non-examining state agency psychological consultant Ellis, 2017 WL 3084467, at *4. The court

found that because the ability to complete a normal workday and workweek without psychologically ba Id. at *5 (citing

Bowers v. Astrue 731, 733-34 (10th Cir. 2008)). While the Court observes that Plaintiff mental limitations have their opinions, the ALJ did not specifically discuss this limitation in his decision. Because

this court may not create or adopt post-hoc rati s decision tha s Motion on this issue and remand for clarification. See Haga, 482 F.3d at 1207-08 (citations omitted).

C. past work and credibility findings were adequate, but the

ALJ should the level-

Plaintiff evidence because he: (1) incorrectly omitted several limitations from her RFC finding, (2) made an improper credibility finding, and (3) failed to make appropriate findings regarding the

demands of her past work and whether she may now meet those demands. Doc. 20 at 11-12.

1. The Plaintiff has waived any argument about determination regarding her headaches and manipulative

impairment. Plaintiff contends that ALJ Weiss failed to consider the limiting effects of her headaches and manipulative impairment. Id. at 12-15. Plaintiff summarizes the record evidence and makes the brief and conclusory argument that the ALJ failed to weigh the medical opinions properly, . . . because she [sic] failed to recognize and analyze the Doc. 20 at 13; see also id.

at 13-15. Yet Plaintiff fails to present any kind of analysis or authority to support her argument.

The Court notes that the ALJ discussed both of these impairments in his

hearing testimony. AR at 14 (citing AR at 263-64, 285, 303, 305, 309, 371, 376, 380-81, 392); see also AR at 31-36; 227. Without developing her arguments on this issue, the Court is left to assume that she is simply offering another possible view of the evidence. The Court declines to second- on this issue.

2. redibility finding stands. reports

Doc. 20 at 15 (quoting AR at 19). failure to request certain medical records. Id. at 16.

Plaintiff contends it was error for ALJ Weiss to question her credibility when he Doc. 20 at 16. Plaintiff severity of a mental impairment. Doc. 20 at 15 (quoting Grotendorst v. Astrue, 370 F.

(alteration in original)).

When a claimant establishes a medically determinable physical or mental impairment that could reasonably be expected to produce the symptoms complained of, the ALJ must evaluate the intensity, persistence, and functionally limiting effects of the

symptoms to determine the extent to which t s capacity for work. Holcomb v. Astrue x 757, 760 (10th Cir. 2010) (citing 20 C.F.R. §§ 404.1529(c), 404.929(c)). To do this, the ALJ must make a finding about the s statements regarding the symptoms and their functional effects. Id. (citing Soc. Sec. Ruling, SSR 96-7p, Titles II & XVI: Evaluation of Symptoms 1996 WL 374186, at *1 (July 2, 1996)) the finder of fact, and we will not upset such determinations when supported by

Id. (quoting Kepler v. Chater, 68 F.3d 387, 391 (10th Cir. 1995) (internal quotation omitted) be closely and affirmatively linked to substantial evidence and not just a conclusion in Id. (quoting Hardman v. Barnhart, 362 F.3d 676, 678-79 (10th Cir. 2004) (internal quotation omitted)).

The Court agrees that it would be improper for the ALJ to have determined credibility solely on the lack of medical records. The Court finds, however, that ALJ Weiss was not simply basing his credibility determination on a lack of treatment records; rather, he was commenting on the fact that her claims of the severity of her impairments are inconsistent with the record evidence. See AR at 19. The ALJ also is able to maintain a part time job. AR at 19. fi this issue.

Plaintiff also contends the ALJ erred by failing to request specific medical records. Doc. 20 at 16. In his decision, the ALJ noted that Plaintiff reported to Dr. to the examination because she thought someone was after her, although no such report iting AR at 401). Plaintiff argues that her 2012 hospitalization is evidence that she has a disorder not considered by the ALJ stress disorder. 9

Doc. 20 at 16-19. he burden to prove disability in a social security case is on the claimant, and to meet this burden, the claimant must furnish medical and other evidence of the existence of the disability. Branum v. Barnhart, 385 F.3d 1268, 1271 (10th Cir. 2004) (citing Bowen v. Yuckert A social security disability hearing is nonadversarial, however, and the ALJ bears responsibility for ensuring that an adequate record is developed during the disability hearing consistent with the issues raised. Id. (quoting , 13 F.3d 359, 360- 61 (10th Cir. 1993) (internal citation omitted)). [a]n ALJ has the duty to develop the record by obtaining pertinent, available medical records which come to his attention during the course of the hearing. Id. (quoting Carter v. Chater, 73 F.3d 1019, 1022 (10th Cir. 1996) (internal citations omitted)). Nonetheless, in cases such as this one where the claimant was represented by counsel at the hearing before the ALJ, the ALJ should ordinarily be entitled to rely on the claimant s counsel to structure and s s claims are adequately explored,

9 16.

and the ALJ may ordinarily require counsel to identify the issue or issues requiring further development. Id. (quoting Hawkins v. Chater, 113 F.3d 1162, 1167 (10th Cir. 1997) (internal citation omitted)).

review the record, and if he had other exhibits to offer. AR at 29-30. Mr. Harris

answered in the negative. AR at 30. that [Mr. Harris was] going to be requesting additional medical records from a Dr. Rios

Notably, Mr. Harris never raised the mention the missing hospitalization record.

counsel .

The Court does not agree that the ALJ erred in failing to request this record. Because the Court is remanding the case, however, the Court will direct the ALJ to consider however, to locate and submit the record.

3. The adequately accounted for how Plaintiff

performed her past relevant work. Plaintiff argues that the ALJ committed error in failing to ask Plaintiff how she performed her past relevant work. Doc. 20 at 19-21 (citing Wells v. Colvin, 727 F.3d 1061, 1075 (10th Cir. 2013) (relevant work] . . . must be obtained as appropriate (internal quotation omitted)). To

the extent Plaintiff references her earlier arguments regarding the alleged marked limitations in task impersistence, working without supervision, and working with

supervisors (see Doc. 20 at 19), the Court has already found that substantial evidence . no specific argument concerning sufficiency of s finding that she can meet the demands of her past relevant wor s alleged failure to

See Doyal, 331 F.3d at 760. See also Doc. 20 at 19-20.

The Court disagrees and finds that the question of how Plaintiff performed her s attorney and the ALJ. For example, Mr. Harris asked her if she leaves work when she gets a headache. AR at 33. Plaintiff responded that rather than leaving, she sits down and relaxes. AR at 33. Mr. Harris followed up,

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AR at 33. He asked Plaintiff about the number of hours she works and how long she has been working, her job duties as a courier, and what was difficult for her as a housekeeper. AR at 34-35. Mr. Harris then asked Plaintiff again about how she handles headaches while driving as a courier. AR at 36. Later, Mr. Harris crowds, and he asked her how she deals with panic attacks, particularly during deliveries. AR at 38-40.

ALJ Weiss then asked questions about her past relevant work: he elicited testimony on what she delivers, the weight of her deliveries, how long she drives, and what she does during a delivery (AR at 40-41), her work as a pastry chef and a 10 Plaintiff points out one particular alleged deficiency, in that she testified that if her employer asks her to work when she has a headache, she will decline. Doc. 20 at 20 (citing AR at 34). But as the testimony above shows, Plaintiff also testified that she will work through a headache if she gets one when she is already at work.

cashier/stocker at a gas station (AR at 41-42), and her work as a house cleaner, including when she last did a house cleaning job, and what her duties were (AR at 42- 43). The ALJ also asked her, with respect to her courier job, to what extent she comes into contact) and , and asked if ve a then followed up with more questions about her ability to work full-time (AR at 45-46), additional questions about long-term deliveries (AR at 46-47), and her feelings about being around strangers

(AR at 47). The line of questioning at the hearing was sufficient to establish how Plaintiff performed her past work.

as they are generally Doc. 20 at 19 (quoting AR at 19). reviewed the information in the file regarding how [Pl

Doc. 20 at 20. read answered in the affirmative. AR at 48 (emphasis added). That the VE testified he had

perform her past work; the VE said she could be a housekeeper or a courier. AR at 49. affirmed it was. AR at 51. The ALJ further inquired if Plaintiff was -task 15 percent of

the eight-hour workday including normal breaks, could [she] perfo AR at 51. The VE responded that Plaintiff could still perform the courier job, but not the

housekeeper job. AR at 51. Finally, the ALJ asked if classif[ied] it, was that performed and as found i -52. The VE

In his decision, the ALJ noted the VE past relevant work . . . as [she] performed the jobs and as they are generally

The

issue.

4. The ALJ should address the inconsistency between the VE

testimony and the DOT. in the , in that the reasoning level of deliverer/courier is not Plaintiff is limited to simple work. Doc. 20 at 21. must investigate and elicit a reasonable explanation for any conflict between the [DOT]

Haddock v. Apfel, 196 F.3d 1084, 1091 (10th Cir. 1999); see also Soc. Sec. Ruling, SSR 00-4p, Policy Interpretation Ruling: Titles II & XVI: Use of Vocational Expert & Vocational Specialist Evidence, & Other Reliable Occupational Information in Disability Decisions, 2000 WL 1898704, at

. . . if the evidence he or she has provided conflicts with the . . . evidence appears to conflict with the DOT, the adjudicator w SSR 00-4p, 2000 WL 1898704, at *4.

The Tenth Circuit extended these principles to General Educational Development (GED) reasoning levels in Hackett ts of education (formal and informal) which are required of the worker for satisfactory job DevelopmenId. At issue

here is the Reasoning Development division, which has six defined levels, with one representing the lowest level and six representing the highest. Id.

Plaintiff argues that the deliverer/courier job, with a reasoning level of two, is

Doc. 20 at 21. A Apply commonsense understanding to carry out detailed but uninvolved written or oral instructions. Deal with problems involving a few concrete variables in or from standardized situations. WL 688702. As Plaintiff points out, the fact that reasoning level two requires an

understanding of , see id., seems to conflict with See AR at 17. Because the Court is remanding this

case for other reasons, the ALJ should also address any inconsistency between instructions in the level-two reasoning deliverer/courier job identified as appropriate for her. See Hackett, 395 F.3d at 1176.

V. Conclusion The Court finds that this case should be remanded for the ALJ to address the following: (1) finding of a to carry out instructions due to task impersistence; (2) address the D

symptoms; and (3) the level-

two reasoning deliverer/courier job identified as appropriate for her. If Plaintiff produces the missing 2012 hospitalization record referred to in Section IV(C)(2), the ALJ should consider it as part of the record.

Wherefore, IT IS ORDERED that to Reverse and Remand for a Rehearing, with Supporting Memorandum (Doc. 20) is granted. A final order pursuant to Rule 58 of the Federal Rules of Civil Procedure will enter concurrently herewith.

_____ UNITED STATES CHIEF MAGISTRATE JUDGE

Presiding by Consent