Estrella v. Commissioner of Social Security

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UNI TED STATES DISTRI CT COURT SOUTHERN DISTRI CT OF FLORI DA CASE NO. 15-22890- CI V- MOORE/ MCAL1LEY NI URKA ESTRELLA,

Pl ai ntiff,

CAROLYN COLVI N, COMMI SSI ONER of SOCI AL SECURI TY,

Def endant .

REPORT AND RECOMMI I NDATION Pendi ng bef ore t he Court i s Pl ai nt i f f s Mot i on f or Summary Judgment (DE 201, and Def endant ' s Mot i on for Summar y Judgment. g DE 211. The Honorabl e K. Mi chael Moore ref err ed t he mot i ons t o me and t hey ar e f ul l y bri ef ed. (DE 3, 231. For t he reasons set f ort h bel ow, 1 recommend t hat t he Court grant Pl ai nt i f fs mot i on and deny Def endant' s mot i on. 1. Overview

Pl ai nt i f f appl i ed i ncome on November 15, 20 1 1, al l egi ng an onset of di s abi l i t y on January 15, 20 10. Tr.

1 H l i cati on was i ni t i al l y deni ed on Januar y 13, 20 1 2, and on reconsi der at i on 209 - 18. er app on Febr uary 2012. Tr. 1 18- 29, 137-48. Pl ai nt i ff request ed a heari ng bef or e an

for di sabi l i t y i ns ur ance benef i ts and suppl ement al secur i t y

1 Ci tati ons to the transcript of proceedi ngs bef ore t he Soci al Securi ty Admi ni st rati on, whi ch was f i l ed at DE 14, ar e t o ' $ Tr. (#j ' ' .

Admi ni st rat i ve Law Judge (ALJ) , whi ch t ook pl ace on November 4, 2013, and at whi ch Pl ai nt i f f and St even Bas t , a vocat i onal exper t , t est i t sed. Tr. 37- 61, 153-5.

On Febr uary 20 14, t he ALJ i ssued a deci si on f i ndi ng t hat Pl ai nt i f f i s not di sabl ed. Tr. 18-31. The Appeal s Counci l deni ed Pl ai nt i ffs reques t f or revi ew of t he ALJ' S deci si on, Tr. 1-1 1, maki ng t hat deci si on t he f i nal deci s i on of t he Commi ssi oner. Pl ai nt i ff nos v asks t hi s benest s, or al t ernat i vel y r emand wi t h i nst ruct i ons

Court t o ei t her r emand t he mat t er to t he ALJ f or an award of

for t he ALJ t o re- eval uat e Pl ai nti f f s di sabi l i t y cl ai m i n l i ght of t he r emand or der. (DE 20, p. 231. ll. Proceedi ngs before t he Commi ssi oner

2 A .

Pl ai nti fps testimony Pl ai nt i f f was bor n i n Cuba and came t o t he Uni t ed St at es i n 1995. Tr. 42. She i s a Uni t ed St at es ci t i zen, havi ng passed t he Uni t ed St at es ci t i zens hi p exam, i n Engl i s h, about f i ve years ago pri or t o t he heari ng. Tr. 43. She test i f i ed t hat s he under st ands wri t t en Engl i s h, but speaks l i t t l e Engl i s h. Havana Uni ver si t y and i s a medi cal doct or. Tr. 49. She l i veswi t h her t w0 t eenage

Tr. 43. Pl ai nt i ff went t o medi cal school i n Cuba at

3 Tr 43 On a t ypi cal day Pl ai nt i f f begi ns t he day by hel pi ng d aught er s and her part ner. . . her daught ers ready f or school . 1d. Her part ner dri ves t hem t o s chool because Pl ai nt i ff has not been dri vi ng. 1d. She goes wi t h hi m and t hen ret ur ns home. Pl ai nt i f f s pends t he day l yi ng down of t he sof a or t he bed. Tr. 44.

2 pl aint if f test if ied wi t h the assi stance of a Spanish i nt emret er. 3 i ti mes duri ng the heari ng, t he i nt erpret er transl ated Plai nt iff as ref erring t o her At var ous art ner as her ç i mate' ' her S s husband' ' or her i t boyfri end. ' ' The record is not cl ear regardi ng thei r P , l egal relati onshi p. For t he sake of consi st ency, the Court uses t he t erm d t partner. ' '

2

The day before t he hear i ng, Pl ai nt i f f went t o Kendal l Hospi t al f or el ect r i c shock t herapy. Tr. 44. l t was her si xt h sessi on of el ect ri c shock t herapy. Tr. 45. She t hen r et ur ned home t o go wi t h her part ner t o pi ck up her daught ers. Tr. 44. Her part ner pr epares di nner, and her daught ers hel p her wi t h t he l aundr y. Tr. 44. Her daught er s and her part ner cl ean t he house. Tr. 52. Al t hough s he showers and dresses hersel f, Pl ai nt i f f has l os t i nt eres t i n doi ng so. Tr. 44.

Pl ai nt i ff t akes Cymbal t a, Abi l i f y, Al pr azol am, Pomoat e, Percocet , Fl exer i l , and Topi ramat e. Tr. 45- 6.At t he t i me of t he hear i ng,

Temazepam, Hydroxyzi ne

Pl ai nt i ff had not wor ked f or 5 year s.Her l as t job was t r ansl ati ng pat i ent chart s fr om Engl i sh t o Spani sh wi t h t he hel p of a di ct i onary, al t hough s he was f i red her because she di d not have suff i ci ent knowl edge of t he Engl i sh l anguage. Tr. 46-7. Af t er l eavi ng t hat posi t i on, Pl ai nt i ff underwent gast ri c bypas s sur ger y. Tr. 47. Because of her depr essi on, she had not sear ched f or wor k i n t he pri or f our year s. 1d.

She began t reat ment wi t h a psychi at ri st f or depressi on a number of mont hs aher she was f i red. Tr, 48. Her sympt oms i ncl ude l ack of sexual dr i ve, l oss of i nt erest , l ack of concent rat i on, i mpai red memor y, shaki ng, t remors, anxi et y, pani cat tacks, and f at i gue. Tr. 48. She exper i ences up t o t hree pani c at t acks a week and t hey l ast about 10 mi nut es. 1d. Pl ai nt i ff mai nt ai ns a bl og about Cuban pol i t i cs t hat she updat es dai l y; t he updat es t ake

a f ew mi nut es. Tr. 52- 3.

Physi call y, radi at es downwar d t o t he l egs, causi ng numbnes s, and maki ng i t di f f i cul t f or her t o squat. Tr. 50. Wi t hout pai n medi cat i on, her pai n i s at an 8. 5 on a scal e of 10. , wi t h t he

Pl ai nti ff suf fers f rom back pai n i n t hesacr al l umbar ar ea. The pai n

medi cat i on, i t i s a 6 or 7. Tr. 51. She can wal k f or one bl ock, and st and i n a fi xed posi t i on f or f i ve mi nut es bef ore her 1 eg pai n f or ces her t o move. 1d. She cannot pi ck object s of f t he t loor, or pi ck up anyt hi ng heavi er t hat a paper f i l e. Tr. 52.

The ALJ ques t i oned Pl ai nt i f f about a report prepared by a consul t at i ve physi ci an, who exami ned Pl ai nt i f f and opi ned t hat she was exagger at i ng her physi cal sympt oms. Tr. 49. Pl ai nt i f fs t est i f i ed t hat t he consul t ant di d not conduct any di agnos t i c t es t s or, t o her knowl edge, revi ew any of her medi cal records. Rat her, he perf or med a cursor y physi cal exam t hat l ast ed l ess t han 5ve mi nut es. Tr. 49-50.

B. The Vocati onal Expert' s (VE) t esti mony At t he hear i ng, t he ALJ asked t he VE t o assume a hypot het i cal per son who was

a per son of t he Cl ai mant ' s age, educat i on, and wor k hi s t or y. Fur t her assume t hat t hi s i ndi vi dual has t he r esi dual funct i onal capaci t y t o per for m a part i al range of l i ght wor k. Speci f i cal l y assume t he i ndi vi dual can l i ft , car r y, push or pul l up t o 10 pounds f requent l y and 20 pounds occasi onal l y; t he i ndi vi dual can si t f or up to si x hours t ot al i n an ei ght - hour workday. She can s t and and wal k for up t o si x hours t ot al i n an ei ght- hour wor kday. The i ndi vi dual can occasi onal l y cl i mb r amps and st ai r s, but can never cl i mb l adders, ropes or scaf f ol ds. The i ndi vi dual can occasi onal l y st oop, kneel , crouch or crawl . The i ndi vi dual i s l i mi t ed t o occupat i ons i n whi ch she woul d not be expos ed t o wor kpl ace hazards t hat i ncl ude but ar e not l i mi t ed t o wor ki ng i n pr oxi mi t y t o movi ng mechani cal par t s, wor ki ng i n proxi mi t y t o hi gh exposed pl aces, or wor ki ng around ot her hazar ds t hat ar e not r eadi l y apparent. The i ndi vi dual i s f urt her l i mi t ed t o t he basi c demands of unski l l ed wor k, and by t hat l mean an i ndi vi dual who can under st and, r emember and carr y out short and si mpl e i nst ruct ions. The i ndivi dual can respond appropriatel y to supervi si on. The indi vi dual can interact appropriatel y wi th coworkers, and she can respond to changes in routi ne work set tings. Thi s i ndi vi dual i s f urt her l i mi t ed to occupat i ons i nvol vi ng not more t han occasi onal i nt eract i on wi t h supervi sors,

cowor kers or t he publ i c.

And l ast l y, t he i ndi vi dual i s l i mi t ed t o occupat i ons i n whi ch t he pr i nci pl e measure of perf or mance i s not based on product i on quot as or product i on goal s. Tr. 56-7. The VE t es t i f i ed t hat a hypot het i cal per son wi t h t hese l i mi tat i ons woul d not be abl e t o do Pl ai nt i ff s pri or work; but coul d be empl oyed i n unski l l ed jobs t hat exi st i n Fl or i da and t he nat i onal economy. Tr. 57-8. However, i f t he hypot heti cal per son coul d be expect ed t o mi ss mor e t hanone day of work a mont h, t hi s woul d pl ace her S û i nt o t he al most unempl oyabl e zone . . . . ' ' Tr. 59.

I n res ponse t o ques t i oni ng by Pl ai nt i f f s at t or ney,t he VE t est i sed t hat i f t he hypot het i cal cl ai mant al so had t he non- exer t i onal i mpai r ment sfound i n t he medi cal assessment pr epar ed by Pl ai nt i f f s psychi at ri s t, she woul d not be abl e t o wor k i n any job.

59. The VE al so t es t i f i ed t hat i f t he hypot het i cal cl ai mant had onl y t he physi cal i mpai r ment f ound i n a medi cal assessment prepared by Pl ai nt i f fs t reat i ng physi ci ans she woul d not be abl e t o work. Tr. 60-1.

C. The recor d bef ore t he ALJi ncl udes Pl ai nt i f f s medi cal recor ds evi dence, whi ch

sledical records

t he Court has caref ul l y revi ewed. I addr ess t he medi cal recor d evi dence as i t i s r el evant t o t he i ssues addr essed bel ow.

D. The ALJ' S deci si on As not ed, i n hi s wri t t en deci si on, t he ALJ concl uded t hat Pl ai nt i f f i s not di sabl ed. Tr. 18- 31. The ALJ f i rs t found t hat Pl ai nt i f f has not engaged i n subs t ant i al gai nf ul

act i vi t y si nce Januar y Januar y 1, 20 l2, t o t he dat e of t he deci si on. Tr. 20. Next , t he ALJ f ound t hat Pl ai nt i f f has

1, 20 12, t hus t he deci si on addresses t he per i od commenci ng

t he sever e i mpai r ment s of depr essi ve di sor der, anxi et y di sorder , and degenerat i ve di sc di sease, but she does not have an i mpai rment or combi nati on of i mpai r ment s t hat meet s or medi cal l y equal st he severi t y of one of t he l i st ed i mpai rment s i n 20 CFR Part 404, Subpart P, Appendi x 1. Tr. 20-1.

The ALJ t hen det er mi ned Pl ai nt i f f has t he res i dual f unct i onal capaci t y I RFCI t o perfor m a part i al range of l i ght wor k. Tr. 24. Speci f i cal l y, t he ALJ found Pl ai nt i ff can:

si t f or up t o si x hours i n an ei ght hour workday. She can st and and/ or wal k f or up t o s i x hours i n an ei ght hour wor kday. She can l i ft , car ry, pus h and/ or pul l up t o 10 pounds f requent l y and 20 pounds occasi onal l y. The cl ai mant can occasi onal l y st oop, kncel , crouch and/ or crawl . She can occasi onal l y cl i mb ramps and st ai rs. However, she can never: (1) cl i mb l adders, ropes, or s caff ol ds; (i i) work i n proxi mi t y t o movi ng, mechani cal par t s; (i i i) wor k i n proxi mi t y t o hi gh exposed pl aces; or (i v) be exposed t o ot her wor kpl ace hazards t hat are not r eadi l y apparent. I n addi t i on, t he cl ai mant i s l i mi t ed t o occupat i ons whi ch requi re no mor e t han t he basi c demands of uns ki l l ed work i n t hat she can; (i) under st and, remember, and car ry out short and si mpl e i ns t r uct i ons; (i i) r espond appropri at el y t o super vi si on; (i i i) i nt eract appr opri at el y wi t h co- wor kers; and (i v) r espond appropri at el y t o changes i n r out i ne work set t i ngs. The cl ai mant i s f urt her l i mi t ed t o occupati ons i n whi ch t he pr i nci pal measure of per for mance i s not based on product i on quot as or product i on goal s. Fi nal l y, t he cl ai mant i s l i mi t ed t o occupat i ons i n whi ch she has onl y occasi onal i nt eract i on wi t h super vi sors, co- worker s and t he publ i c. Tr. 24- 5. The ALJ al so found t hat Pl ai nt i f f i s not abl e t o communi cat e i n Engl i s h. Tr. 29. Appl yi ng t hese l i mi t at i ons, t he ALJ found t hat Pl ai nt i f f cannot perfor m her past rel evant work, but i s not di sabl ed because she i s capabl e of perfor mi ngot her jobs exi st i ng i n si gni f i cant numbers i n t he nat i onal economy. Tr. 28-30. 111. Anal ysi s

I n eval uat i ng a cl ai m f or di sabi l i t y benef i t s, t he ALJ mus t f ol l ow t he f i ve s t eps set f ort h i n 20 C. F. R. jj 416. 9204a) and 404. 1520:

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1. l s t he cl ai mant perf or mi ng subst ant i al gai nf ul act i vi t y? l f not , t he ALJ next det ermi nes;

2. Does t he cl ai mant have one or more sever e i mpai r ment ? I f t he cl ai mant does, t he ALJ next consi ders;

3. Does t he cl ai mant have a s evere i mpai rment t hat meets or equal s an i mpai rment speci f i cal l y l i s t ed i n 20 C. F. R. Part 404, Subpart P, Appendi x 1? I f so, cl ai mant i s di sabl ed; i f not , t he ALJ must det er mi ne cl ai mant' s RFC; and t hen det er mi ne;

4. Based on t he RFC, can cl ai mant perf or m her past r el evant work? I f so, s he i s not di sabl ed. If she cannot per f or m her past r el evant work, t he ALJ must t snal l y det er mi ne;

5. Whet her, based on her age, educat i on, and wor k exper i ence, and t he RFC, can cl ai mant perf orm ot her work of t he sort f ound i n t he nat i onal economy. l f s o, cl ai mant i s not di sabl ed. lf not , cl ai mant i s di sabl ed and ent i t l ed t o benef i t s. Phi l l l ps v. Barnhart , 357 F. 3d 1232, 1237 (1 1t h Ci r. 2004).

l n revi ewi ng t he ALJ' S deci si on, t he Court mus t consi der t he r ecor d as whol e and det ermi ne

whet her t he ALJ appl i ed t he cor rect l egal s t andar d, and whet her hi s f i ndi ngs of f act ar e support ed by subs t ant i al evi dence i n t he r ecor d. Powersv. Heckl er, 738 F. 2d 1 15 1, 1 152 (1 1t h Ci r. 1984). i k subs t ant i al evi dence i s mor e t han a sci nt i l l a, but l ess t han a preponder ance. I t i s such r el evant evi dence as a reasonabl e person woul d accept as adequat e t o s upport a concl usi on. ' ' Phi l l i ps, 357 F. 3d at 1240, n. 8 (ci t at i on omi t t ed). The subs t ant i al evi dence s tandard does not per mi t a revi ewi ng court t o consi der onl y t hose part s of t he r ecor d t hat support t he ALJ; t he coul ' t must vi ew t he ent i re recor d and al so consi der evi dence whi ch det ract s f r om t he evi dence rel i ed on by t he ALJ. Macki e v. Ast rue, No. 1: 07- cv-00098- MP-WCS, 2008 WL 7 192 10, at # 1 (N. D. Fl a. Mar. 2008) .

Whi l e t he Cour t appl i es a pr esumpt i on i n f avor of t he ALJ' S f i ndi ng of f act, no such presumpt i on appl i es t o t he ALJ' S l egal concl usi ons. Thus, t he Court must reverse i f t he ALJ i ncor rect l y appl i ed t he l aw, or i f t he deci si on fai l s t o provi de t he court wi t h s uf sci ent reasoni ng to det er mi ne whet her t he l aw was pr operl y appl i ed. Perez v. Comm' r o fsoc. k vec. , No. 6: 06- CV-1648- ORL-19KRS, 2008 WL 191036, * 5 (M. D. Fl a. Jan. 22, 2008). The ALJ' S f ai l ure t o s peci f y t he wei ght gi ven t o evi dence cont rar y t o hi s deci si on, or fai l ure t o gi ve t he r eason f or di scredi t i ng evi dence, i s rever si bl e er r or. Hart v. Ast rue, No. 3: 10- cv-531- J- TEM, 2011 WL 4356149, # 5 (M. D. FI a. Sept. 19, 201 1). The Court i s aut hor i zed t o ent er a judgment aft lr mi ng, modi f yi ng, or r eversi ng t he deci si on of t he ALJ, wi t h or wi t hout r emand. Perez, 2008 WL 191036, * 5; 42 U. S. C. j405(g).

Some of t he ALJ' S f i ndi ngs her e are not i n di s put e. Ther e i s no di s put e t hat Pl ai nt i f f has not engaged Moreover , Pl ai nti ff does not di sput e t hat her i mpai r ment s or combi nat i on of i mpai r ment s do not meet or medi cal l y equal any of t he l i st ed i mpai r ments i n 20 C. F. R. Part 404, Subpart P, Appendi x 1. Rat her, Pl ai nt i f f chal l enges:

i n subst ant i al gai nf ulempl oyment si nce January 1, 2012.

(1) t he ALJ' S f ai l ure t o wei gh t he medi cal opi ni ons of Dr. Pol anco, (2) t he wei ght s gi ven to t he medi cal opi ni ons of t wo t reat i ng physi ci ans, and (3) t he ALJ' S credi bi l i t y assess ment of Pl ai nt i f f. g DE 20, pp. 6- 221. Pl ai nti ff asscr t s t he ALJ' S er ror s r esul t ed i n a RFC t hat i s not suppor t ed by subs tant i al evi dence, and t hat t he appl i cat i on of t hat RFC r esul t ed i n t he i ncor rect det er mi nat i on t hat she i s not di sabl ed.

The RFC i s an assessment by t he ALJ of a cl ai mant ' s abi l i t y t o wor k despi t e her i mpai r ments. Lewi s v.Cal l ahan, 125 F. 3d 1436, 1440 (1 1t h Ci r. 1997). l n det ermi ni ng

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t he RFC, t he ALJ must consi der a1 l t he r el evant evi dence. 1d. The f ocus of t he RFC i s on doct ors' eval uat i ons of t hc cl ai mant' s condi t i on and t he medi cal consequences t hereof. Ti l l man

v. Comm. o fsoc. Sec. , Case No. 6: 12-cv- 969-Or 1 - 22DAB, 2013 WL 4014979, *3 (Aug. 6, 2013 M. D. Fl a). 1 f i nd t hat t he ALJ' S deci si on does not pr ovi de suf f i ci ent r eas oni ng t o support t he RFC and 1 t heref ore recommcnd t hat t he Court remand t hi s mat t er for f urt her consi derat i on.

A. The ALJ erred i n wei ghing the medi cal opinions Pl ai nt i f f chal l enges t he wei ght gi ven by t he ALJ t o t he opi ni ons of some of her t r eat i ng physi ci ans and t he St at e consul t at i ve physi ci ans. E DE 20, pp. 6-151. ç û g - l - l he ALJ must st at e wi t h part i cul ari t y t he wei ght gi ven t o di f ferent medi cal opi ni ons and t he reasons t herefor. ' ' Wi nschel v. Commi ssi oner o f Soci al k vccz / rf / - p, 63 1 F. 3d 1 176, 1 179 (1 1 t h Ci r. 20 1 1).

i . treating physici ans Al t hough t he ALJ general l y summari zed t he t reat ment records of t wo of Pl ai nt i f f s t reat i ng physi ci ans, Dr. Jor ge Vener eo, a neurol ogi st , and Dr. Emi l i ana Arocha, a psychi at ri st , he wei ghed onl y t he opi ni ons set fort h i n t he medi cal sour ce s t at ement each pr ovi ded. val ue, ' ' Tr. 27, and Dr. Ar ocha' s opi ni on was i s overl y di re and of l i t t l e pr obat i ve val ue. ' ' Tr. 28. Addi t i onal l y, t he ALJ di d not assi gn any wei ght t o t he opi ni ons of Dr. Robert o

Tr. 26- 8, The ALJ found t hat Dr. Venereo' s opi ni on was t s of l i t t l e pr obat i ve

Pol anco, Pl ai nt i ff s pai n management t r eat i ng physi ci an.

When t he ALJ makes t he RFC ass essment she must gi ve (û g sl ubs t ant i al wei ght . . . t o t he opi ni on, di agnosi sand medi cal evi dence of a t r eat i ng physi ci an unl ess t here i s

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good cause t o do ot her wi se. ' ' Ti l l man, 20 13 WL 40 14979, #3. C l Good cause exi s t s when t he: (1) t reat i ng physi ci an' s opi ni on was not bol st er ed by t he evi dence' , (2) evi dence support ed a cont rary f i ndi ng; or (3) t reat i ngphysi ci an's opi ni on was concl usor y or i nconsi s t ent wi t h t he doct or' s own medi cal recor ds. ' ' Phi l li ps, 357 F. 3d at 1241 (ci t ati on omi t t ed). The ALJ mus t cl earl y art i cul at e her reasoni ng when gi vi ng a t r eat i ng physi ci an' s opi ni on l ess t han s ubs t ant i al wei ght . f#. C l g Wl here medi cal evi dence does not concl usi vel y count er t he t reat i ng physi ci an' s opi ni on, and no ot her good cause i s pr esent ed, t he Commi ssi oner cannot di s count t he t reat i ng doct or' s opi ni on. ' ' Dobson v. Col vi n, No. 6: 13- CV-01434, 20 14 WL 6432855, * 7 (N. D. Al a. Nov. 14, 2014).

a. Dr. Venereo, an i nt erni st , t r eat ed Pl ai nt i f f i n 20 12 and 20 13, and prepared t wo

Dr. Jorge Venereo and Dr. Emili ana Arocha

medi cal assessment s of Pl ai nt i ff s abi l i t y t o do wor k- r el at ed act i vi t y, dat ed May 2, 2012,

4 I bot h assessment s, Dr. Vener eo f ound t hat and October 23 , 2013. Tr. 512-18, 634- 9. n Pl ai nti ff had si gni f i cant l y mor e sever e physi cal i mpai r ment s t han ar e r et lect ed i n t he RFC. Tr. 5 12- 28, 634-9. Dr. Ar ocha, a psychi at ri st, t reat ed Pl ai nt i ff f rom 2010 t hr ough t he dat e of heari ng i n l at e 2013. Tr. 382- 96, 509-1 1, 532- 40, 566- 83. On Sept ember 24, 2013, about a mont h bef ore t he hear i ng, Dr. Ar ocha pr epar ed a medi cal ass essment of Pl ai nt i ffs abi l i t y to do wor k- rel at ed acti vi ti es, f i ndi ng t hat Pl ai nt i ff had poor abi l i t y t o make any occupat i onal adjus t ment s, and poor t o no abi l i t y t o make per for mance or per sonal or soci al adjus t ment s i n t he work pl ace. Tr. 582- 3.

4 The support i ng treatment records are at Tr. 640-82.

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Regardi ng t hese provi ders, Pl ai nt i f f cl ai ms t he ALJ f ai l ed t o: (1) wei gh t he ent i r ety of t he opi ni ons of Drs. Vener eo and Arocha (DE 20, p. 8- 91, (2) pr operl y art i cul at e a wei ght f or t he opi ni ons (1d. at 9- 1 1q , and (3) accor d cont r ol l i ng wei ght t o t he t reat i ng physi ci an' s opi ni ons. L ld at pp. 1 1 - 41.

Fi rst , as f or Dr s. Venereo and Arocha, t he ALJ wei ghed onl y t hei r medi cal source st at ement s, not t hei r t reat ment not es. Tr. 26- 8. Thi s was er ror. û ç Medi cal opi ni ons' ' i ncl ude a medi cal provi der' s t r eat ment not es. Wi nschel , 63 1 F. 3d at 1 179. On remand, t he ALJ s houl d consi der t he doct or' s t r eat ment not es as wel l as t he medi cal source s t at ement s and wei gh a1 1 of t he opi ni ons.

Second, al t hough t he ALJ cri t i qued t he opi ni ons of Drs. Vener eo and Ar ocha, he di d not unambi guousl y s t at e t he wei ght he gave t hose opi ni ons. Rat her he wrot e t hat Dr. Venereo's opi ni on was û l overl y di r e, ' ' and bot h opi ni ons had i t l i t t l e probat i ve val ue. ' ' Tr. 27-8. Had t he ALJ sai d t hat he gave t hose opi ni ons a part i cul ar wei ght , s uch as k l some wei ght ' ' , i t l i t tl e wei ght ' ' or

not ent i t l ed t o cont rol l i ng wei ght, Dr. Arocha' s opi ni on was

û û no wei ght ' ' t hi s woul d have been cl ear. lns t ead, t he Court must guess whet her û û l i t t l e pr obat i ve val ue' ' , f or exampl e, means he di sr egar ded t hat opi ni on i n i t s ent i ret y, or per haps gave i t l i t tl e wei ght. Because t he ALJ' S deci si on does not pr ovi de t he Cour t wi t h suf f ici ent i nf ormat i on t o eval uat e whet her t he ALJ appl i ed t he cor rect l egal anal ysi s i n wei ghi ng each opi ni on, and whet her s ubst anti al evi dence, t he Court mus t remand. See Perez, 2008 WL 19 1036, # 5.

Thi r d, Pl ai nt i ff argues t hat t he ALJ er r ed i n not gi vi ng t he opi ni ons of t hese

t he ALJ' S det er mi nat i ons are support ed by

t r eati ng physi ci ans cont rol l i ng wei ght. Because t he ALJ

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di d not art i cul at e t he speci f i c

wei ght he gave each opi ni on, l cannot assess whet her t he ALJ pr operl y wei ghed t hese opi ni ons.

For t hese reasons, 1 r ecommend t hat on r emand t he ALJ art i cul at e a s peci f i c

5 d i f t he ALJ chooses t o gi ve wei ght f or t he opi ni ons of each of t he t r eat i ng physi ci ans an

, any of t he opi ni ons l ess t han cont r ol l i ng wei ght , he cl ear l y art i cul at e hi s basi s f or doi ng S 0 .

b. Dr. Roberto Polanco Pl ai nt i f f al so chal l enges t he ALJ' S f ai l ure t o wei gh t heopi ni ons of Dr. Robert o Pol anco, one of Pl ai nt i f f s t reat i ng physi ci ans. (DE 20, pp. 6- 71. An ALJ' S f ai l ur e t o st at e wi t h part i cul ari t y t he wei ght gi ven t o each medi cal opi ni on i s reversi bl e er ror. Cal dwel l v. Barnhart , 26 1 Fed. Appx. 188, 190 (1 lt h Ci r. 2008). The Commi ssi oner ar gues t hat any er ror i s harml ess. g DE 2 1, pp.7-9j. However, f ai l ure t o wei gh medi cal opi ni on ver y rarel y r es ul ts i n har ml ess er r or. Ocasi o v. Comm. o fsoci al Securi t y, Case No: 6: 14-cv-1635-Or 1 - GJK, 20 16 W' L 455459, * 3 (M. D. Fl a. Feb. 5, 2016).

Dr. Pol anco t r eat ed Pl ai nt i f f f or pai n f rom Oct ober 2012 t hrough August 2013. Tr. 606-633. Dr. Pol anco' s t reat ment not es i ndi cat e t hat Pl ai nt i f f was neurol ogi cal l y i nt act and coul d wal k wi t hout assi st ance, and s he had si gni f i cant pai n i n her back and l ower ext r emi t i es. 1d. The ALJ ment i ons, wi t hout wei ghi ng, t heport i ons of Dr. Pol anco' s opi ni on t hat support hi s RFC. (Tr. 2 1, 25, 27). However, hi s deci si on does not di scuss Dr. Polanco's assessment of Plaintiff s pai n. Tr. 21-2.

5 I n wei ghi ng Dr. Venereo' s opi nions, t he ALJ shoul d specif icall y consi der t he fact t hat port ions of Dr. Pol anco's opini ons are consi stent wi t h Dr. Venereo' s eval uat ion of Pl aint if f s physi cal li mi tati ons.

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Thi s i s not harml ess err or because some of t hose Dr. Pol anco' s opi ni ons cont radi ct t he RFC. Dr. Pol anco' s opi ni ons t hat Pl ai nt i f f suff ers f r om si gni f i cant pai n are consi st ent wi t h Dr. Vener eo' s opi ni on of t he ext ent of Pl ai nt i f fs physi cal l i mi t at i ons, and t hese opi ni ons ar e

i nconsi s t ent wi t h t he physi cal l i mi t ati ons i n t he RFC. As al ready not ed, wher e an ALJ does not s peci f y t he wei ght gi ven t o evi dence cont r ary t o hi s deci s i on, t hi s i s reversi bl e er r or. Hart , 2001 WL 4356149, #5 The Court must know what wei ght t he ALJ gi ves t o Dr. Pol anco' s opi ni ons, so t hat i t can det er mi ne whet her s ubs t ant i al evi dence s upport s t he RFC. anot her r eason why t hi s mat ter shoul d be r emanded t o t he Commi ssi on.

The Court cannot make t hat assessment here; and t hi s i s

II . State agency revi ewers Two st at e agency r evi ewer s, Nancy Hi nkel dey, PI Z. D. , and W endy Si l ver, Ps y. D. , prepared ment al resi dual f uncti onal capaci t y assessment s of Pl ai nt i ff on December 19, 201 1, and January 30, 2012, res pect i vel y. Tr. 70- 1, 97- 99. These revi ewers found t hat Pl ai nt i ff had onl y mi l d non- exert i onal l i mi t at i ons. 1d. Nei t her cons ul t ant exami ned Pl ai nt i f f, r at her t hese assessment s wer e based on a revi ew of t he recor ds provi ded by Pl ai nt i f f at t he t i me. Tr. 63- 5, 90- 3. I n wei ghi ng opi ni ons by medi cal consul t ant s, t he ALJ i s requi r ed t o appl y a st ri ct er st andard t han t hat appl i ed i n wei ghi ng t he opi ni ons of t r eat i ng physi ci ans. SSR 96- 6p. The more at t enuat ed t he i nt eract i on bet ween t he consul t ant and t he cl ai mant, t he st ri ct st andard t he ALJ shoul d appl y. 1d. The opi ni on of a St at e agency consul t ant may be gi ven more wei ght t han t hat of a t r eat i ng sour ce i f t he consul t ant' s opi ni on i û i s based on a revi ew of t he compl et e case r ecord t hat i ncl udes a medi cal r eport f r om a s peci al i st i n t he i ndi vi dual ' s part i cul ar i mpai r ment whi ch pr ovi des

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mor e det ai l ed and comprehensi ve i nf or mat i on t hat what was avai l abl e t o t he i ndi vi dual ' s t r eat i ng source. ' ' f#.

The ALJ det ermi ned t hat t he opi ni ons of t he St at e agency revi ewers wer e i t l argel y cons i st ent wi t h t he object i ve evi dence' ' ; however, he di d not assi gn a speci f i c wei ght t o t hese opi ni ons, Tr. 28. From t he non- exert i onal l i mi t at i ons i n t he RFC i t appears t hat t he ALJ credi t ed t he revi ewers' opi ni ons mor e t han t hose of t hat of Dr. Ar ocha. The ALJ does not i dent i f y any det ai l ed and comprehensi ve i nf or mat i on avai l abl e t o t he revi ewers t hat was not avai l abl e t o Dr. Arocha, t hat woul d just i f y gi vi ng t he r evi ewers opi ni ons great er wei ght, as requi red by SSR 96- 6p.

Thi s i s not surpri si ng gi ven t hat bot h r evi ewer s revi ewed an i ncompl et e ps ychi at r i c t reat ment hi s t ory. l n fact , t he recor d contai ns numerous addi t i onal t reat ment not es by Dr. Arocha and a psychosoci al eval uat i c m of Pl ai nt i ff , a1 1 of whi ch t ook pl ace af t er t he revi ewers had i ssued t hei r opi ni ons. Tr. 532- 540, 553-581. Thus, t he ALJ mus t al s o rewei gh t he Stat e agency revi ewer s' opi ni ons appl yi ng t he st andard set fort h i n SSR 96-6p, and ar t i cul ate a s peci ûc wei ght f or each opi ni on.

B. The ALJ must reeval uate hi s credi bi l i ty determi nati on l n cr af li ng t he RFC, t he ALJ mus t cons i der a cl ai mant' s subject i ve t est i mony of pai n and ot her s ympt oms when t her e i s evi dence of an underl yi ng medi cal condi t i on and (l) û û object i ve medi cal evi dence t o conf i r m t he s everi t y of t he al l eged pai n ari si ng f r om t hat condi t i on' ' , or (2) t he l k object i vel y det ermi ned medi cal condi ti on i s of a severi t y t hat can reasonabl y be expect ed t o gi ve r i se t o t he al l eged pai n. ' ' Foot e v. Chat er, 67 F. 3d l 553, 1560 (1 1t h Ci r. 1995). As set fort h above, at t he hear i ng Pl ai nt i f f t est i sed

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r egar di ng t he severi t y of her pai n and depressi on. When,as her e, a cl ai mant provi des t est i mony as t o her subject i ve cl ai m of di sabl i ng pai n or ot her sympt oms, t he û WLJ must cl earl y art i cul at e expl i ci t and adequat e r easons f or di scredi t i ng t he cl ai mant ' s al l egat i ons.

Dyer v. Barnhart , 395 F. 3d 1206, 12 10 (1 1t h Ci r. 2005) (ci t at i on and quot at i on mar ks omi t t ed).

l n consi deri ng Pl ai nt i ffs t est i mony regar di ng her subject i ve sympt oms, t he ALJ f ound t hat d t cl ai mant' s s t at ement s concer ni ng t he i nt ens i t y, persi s t ence, and l i mi t i ng ef f ects of (herl s ympt oms ar e not cr edi bl ej ' ' and art i cul at ed f our reasons t o support of t hi s

6 concl usi on. Tr. 26.

Fi r st , t he ALJ di s count ed Pl ai nt i f f s cl ai m t hat s he i s unabl e t o focus or concent r at e. Tr. 26. The ALJ not ed t hat Pl ai nt i ff mai nt ai ns a bl og on Cuban pol i t i cs, whi ch she t est i f i ed s he spends a few mi nut es a day updat i ng; however, she st at ed t o Dr. Arocha t hat she updat es t he bl og cons t ant l y. The ALJ found t hese s tat ement s t s ent i r el y i nconsi st ent. ' ' part i cul arl y si nce Pl ai nt i f f was s peaki ng t hrough an i nt er pret er; Pl ai nt i ffs st at ement t hat

necessar i l y i nconsi st ent , 26 . These s t at ement s, however, ar e not

s he updat es her bl og d s cons t ant l y, ' ' coul d be consi s t ent wi t h her t est i mony t hat she updat es i t i i dai l y' ' and t hat t he updat es t ake a f ew mi nut es.

Second, t he ALJ f ound t hat Pl ai nt i f f s cl ai m t hat s he does not speak Engl i sh t luent l y was not cr edi bl e because she passed t he U. S. ci t i zenshi p t es t i n Engl i s h, and s he

6 N tabl y i n i denti fyi ng al l eged i nconsi st enci es in Pl aint if f s stat ements, 1 he ALJ did not 0

, address t he fact t hat her t est imony at t he heari ng was t hrough an i nterpreter. Nor di d he acknowl edge that , given Pl ai ntif f s l imi ted Engl ish ski ll ss her statements to her medi cal

providers were most l i kel y made i n Spanish and transl ated t o Engli sh when the treatment notes were prepared.

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pr evi ousl y wor ked t r ansl at i ng medi cal document s f r om Engl i sh t o Spani sh. Tr. 26. However , t he r ecord s hows t hat Pl ai nt i ff used a di ct i onar y t o do herjob and she was f i red because her Engl i sh was not good enough. Tr. 46-7. Pl ai nt i f f al so conceded at t he heari ng t hat she has a s t ronger command of wr i t t en Engl i sh t han s poken Engl i sh. Tr. 43. Moreover, i n cont radi ct i on t o hi s di scredi t i ng t he Pl ai nt i f f, t he ALJ ul t i mat el y f ound t hat Pl ai nt i f f l k i s not abl e t o communi cat e i n Engl i s h. ' ' (Tr. 291.

Thi rd, t he ALJ f ound Pl ai nt i f fs t es t i mony t hat s he di d not at t end t o t he rout i ne act i vi t i es of dai l y l i vi ng t o be ç s compl et el y cont rary' ' t o a r epr es entat i on s he made t o a psychi at ri st i n May 20 13 t hat she can compl et e basi c l i vi ngs ski l l s on her own. Tr. 26, 558. Agai n, t he st at ement s ar e not t ot al l y i nconsi st ent . At t he heari ng, Pl ai nt i f f t est i f i ed t hat she can get hersel f s hower ed, dressed, and s haved, whi ch is consi st ent wi t h t he st at ement she made i n May 20 13. Tr. 44. She al so st at ed at t he hear i ng, however, t hat she di d not have t he desi r e t o car e for her sel f .

Mor eover,i n t he same sessi on wher e Pl ai nt i f f sel f - report ed s he coul d undert ake basi c l i vi ng ski l l s, t he doct or not ed t hat Pl ai nt i ff had C t poor copi ng s ki l l s. ' ' Tr. 559. Li kewi se, Dr. Ar ocha' s t reat ment not es f rom Apri l 20 13 i ndi cat e t hat, at t hat t i me, Pl ai nt i f f was exhi bi ti ng i s psychot i c orborderl i ne ps ychoti c process' ' and vi sual and audi tory f i ndi ngs cal l i nt o doubt Pl ai nt i f f s abi l i t y t o accur at el y assess her copi ng ski l l s i n May

hal l uci nat i ons t hat t t i nt er f er e wi t h day t o day f unct i oni ng. ' ' Tr. 568- 9. These

2013.

Fi nal l y, t he ALJ rel i es on an opi ni on by Dr.Peter Mi l l hei ser, a consul t i ng ort hopedi st, who br i et ly exami ned Pl ai nt i f f, t o f i nd t hat Pl ai nt i f f i s l ess t han credi bl e. Tr.

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26, 550-1. Dr. Mi l l hei ser opi ned t hatPl ai nt i f f was ç k over exaggerat ed' ' her physi cal symptoms based on t he f ound t hat Pl ai nt i ff û ç i s and l et har gi c. ' ' Tr. 55 1 . The ALJ accords Dr. Mi l l hei ser' s opi ni on si gni f i cant wei ght. Tr.

res ul t s of mul ti pl e Waddel l t est s.Tr. 551. Dr. Mi l l hei ser al s o al so ext remel y depr ess ed l ooki ng, and her movement s ar e sl ow

At t he heari ng, t he ALJi nt emret ed Dr. Mi l l hei s er' s det er mi nat i on t hat Pl ai nt i f f was exaggerat i ng her physi cal sympt oms based on t he W addel l t est s as an opi ni on t hat Pl ai nt i f f was l yi ng. Tr. 49. Waddel l s i gns are a group of physi cal si gns t hat may i ndi cat e a ps ychol ogi cal component t o chroni c l ow back pai n, and t hat are posi t i vel y corr el at ed wi t h hi gh scor es for depressi on. l A t t p. . / / en. N , v ' i l ki l l edi a. t l r g/ l s , z i l ki / Wc t dt l el l t /e z7s si gns. Gi ven Pl ai nt i ff s acknowl edged depr essi ve di sor der, posi t i ve W addel l si gns may wel l be a r et lect i on of her depressi on rat her t han del i ber at e unt r ut hf ul ness,

Mor eover , al t hough t he ALJ gi ves si gni f i cant wei ght t o Dr. Mi l l hei ser' s det er mi nat i ons regar di ng Pl ai nti f f s physi cal sympt oms, he compl et el y i gnores Dr. Mi l l hei ser' s cor roborat i on of Pl ai nt i f f s sever e depressi on. Gay v. Ast rue, No. 3: 09- cv- 679- . 1 1 G , 2010 WL 3220299, * 7 n.8 (M. D. Fl a. Aug. 13, 20 10) (s i Al t hough an ALJ i s not requi red t o di scuss ever y pi ece of evi dence i n a r ecord, an ALJ cannot pi ck and choose whi ch evi dence support s a deci si on whi l e di sregar di ng evi dence t o t he

ont rar y- ' '). C

On remand, t he ALJ shal l r econsi der Pl ai nt i fps cr edi bi l i t y i n l i ght of t he above

7 di scussi on , aft er properl y wei ghi ng and consi deri ng al l of t he medi cal opi ni ons. C. Summary On remand, t he ALJ shoul d wei gh t he opi ni ons of Dr. Jorge Vener eo, Dr. Emi l i ana Arocha and Dr. Robert o Pol anco, as wel l as t he s t at e agency r evi ewers, and st at e wi t h part i cul ari t y t he wei ght t o be gi ven t o each of t hei r opi ni ons and t he reasons t her ef or, as addr essed i n t hi s report and r ecommendat i on. The ALJ shoul d t hen consi der t he f ul l medi cal recor d, as properl y wei ght ed, as wel l as t he ot her evi dence i n t he record t o eval uat e Pl ai nt i fps cr edi bi l i t y and det ermi ne t he RFC, and expl i ci t l y st at e t he basi s f or t hat det er mi nat i on. Appl yi ng t he r evi sed RFC, t he ALJ shoul d proceed t o st ep f i ve of t he requi r ed anal ysi s, t o make a f i nal det er mi nat i on of Pl ai nt i f f s el i gi bi l i t y f or di sabi l i t y benet st s. lV. Recommendations

Based on t he f oregoi ng, 1 respect f ul l y recommend t hat ; Pl ai nt i ff ' s Mot i on f or Summar y Judgment g DE 20j, be GRANTED, and Def endant ' s Moti on f or Summary Judgment (DE 2 1) , be DENIED, and t he mat t er r emanded f or proceedi ngs consi st ent wi t h t hi s r eport and recommendat i on.

1 B l recommend t hat thi s matt er be remanded for furt her consi derat ion as set fort h ecause above, and remand may resul t i n a revi sed RFC, 1 do not reach Pl ai nti fps cl ai m t hat the RFC is not suppor t ed by subs t ant i al evi dence. g DE 20, pp. 15- 81.

V. Object i ons

The part i es may t 5l e any wr i t t en object i ons t o t hi s Report and Recommendat i on wi t h t he Honor abl e K. Mi chael Moor e no l at er t han fourt een days f rom t he dat e of t hi s report and recommendat i on. Fai l ure t o t i mel y f i l e object i ons shal l bar t he part i es f r om at t acki ng on appeal any f act ual f i ndi ngs cont ai ned herei n. RTC v. Hal l mark Bui l der s, Inc. , 996 F. 2d l 144, 1 l 49 (1 lt h Ci r. 1993); Locat e v. Dagger, 847 F. 2d 745, 749- 50

(1 1t h Ci r. 1988).

RESPECTFULLY SUBMI TTED i n chambers i n Mi ami , Fl ori da, t hi s 27t h day of

July, 2016.

< CHRI S MCALI LEY UNI TED STATES MAGISTRATE JUDGE Copi es t o: The Honorabl e K. Mi chael Moor e Counsel of record

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