SECOND CIRCUIT UPDATE
July 2022

Selected Second Circuit Summary Orders

Loucks v. Kijakazi, 2022 WL 2189293 (2d Cir. June 17, 2022) (Gorton) – court remanded for calculation of benefits, applying the 2017 opinion evidence regulations rather than the treating physician rule. It found the ALJ erred in failing to explain adequately how the supportability and consistency factors in regulations were considered in finding the medical opinions of record unpersuasive. The court cited its treating physician rule precedent to fault the ALJ for relying too heavily on mental status exams, selective examples of improvement, and alleged failure to follow treatment without considering lack of compliance was due to part in mental illness.

Lundie v. Kijakazi, 2022 WL 1154122 (Apr. 19, 2022) (*pro se*) – court remanded because the ALJ failed to develop the record adequately. The ALJ's duty was heightened because the plaintiff was *pro se*. The record indicated the plaintiff had been psychiatrically hospitalized, but the ALJ failed to request medical records. Nor did the ALJ contact the plaintiff's parents, who would be likely to have firsthand knowledge of the plaintiff's condition, especially since documentary and testimonial evidence indicated the plaintiff suffers from cognitive impairments.

Manderville v. Kijakazi, 2022 WL 1013969 (Apr. 5, 2022) (Gorton) – Court refused to remand for calculation of benefits; it remanded for a new ALJ to reevaluate evidence of an earlier onset of disability but to consider no new evidence.

Bellehsen v. Commissioner of Soc. Sec., 851 F. App'x 283, (July 6, 2021) (Osborn) – court remanded because the ALJ failed to apply the *Burgess* factors in deciding not to accord controlling weight to the opinion of the plaintiff's long-time treating psychiatrist. The ALJ's mere reference to the length of the treatment relationship was not sufficient consideration. Nor did the ALJ consider any of the other factors. A searching review of the record of the record did not reveal that the ALJ had otherwise considered the substance of "treating physician rule." The intermittent examples of remission and stability of the plaintiff's symptoms were not sufficient, especially given the cyclical nature of mental illness. Furthermore, if the ALJ perceived inconsistencies in the record, the ALJ had an affirmative obligation to seek out more information from the treating physician.

Schafenberg v. Saul, 858 F. App'x 455 (June 22, 2021) (Gorton) – court remanded, finding plaintiff's mental impairments exceeded the "*de minimus*" threshold for the severity step. Both the consultative examiner and the stage agency review physician opined that the plaintiff's impairments markedly or moderately affected her ability to concentrate and perform ordinary work-related tasks. No medical opinions contradicted these opinions. The ALJ erred in suggesting the impairments were less than severe because the plaintiff cared for her mother and sister when in fact the tasks often overwhelmed her and caused panic attacks. The ALJ also erred in highlighting periods of improvement. The court found the treatment notes also documented significant impairments, citing *Estrella* as to the cyclical nature of mental illness.

DeGraff v. Commissioner of Soc. Sec., 850 F. App'x 130 (June 21, 2021) (Goldstein/Hiller) – court remanded where the ALJ erred in refusing to consider treatment notes submitted by the plaintiff based on the five-day rule. The court held that the rule does not require claimants to obtain and submit all evidence five days prior to the hearing, but rather to "inform" the ALJ of the existence of the records by that deadline.

Gentles v. Commissioner of Soc. Sec., 848 F. App'x 56 (May 24, 2021) (Schneider) – court remanded, finding the ALJ erred in substituting his opinion for that of the treating physician. The ALJ did not cite any medical evidence contradicting the treating physician, instead relying only the plaintiff's reports of her daily activities.

Streich v. Saul, 846 F.App'x 80 (May 5, 2021) (Kubitschek) – court remanded for a new hearing before a properly appointed ALJ, pursuant to *Carr v. Saul*, 141 S. Ct. 1352 (2021), which held that a claimant does not forfeit an Appointments Clause challenge by failing to first raise it before the ALJ.

Demars v. Commissioner of Soc. Sec., 841 F. App'x 258 (Jan. 6, 2021) – court remanded for *calculation of benefits*, finding the ALJ erred in assigning little weight to the plaintiff's long-time treating orthopedist. The court faulted the ALJ for relying on the *absence* of consistent notations in the treatment records that plaintiff needed assistive devices to ambulate. The silences were insufficient to outweigh otherwise extensive evidence of plaintiff's inability to ambulate. Substantial evidence demonstrates the plaintiff meets Listings 1.03 or 1.02.

Drake v. Saul, 839 F. App'x 584 (Dec. 11, 2020) (Gorton) – court remanded, finding the ALJ failed to justify the weights afforded various medical experts. A cursory statement assigning no weight because the opinion is not supported by the evidence is inadequate. The ALJ failed to consider the relevant regulatory factors of 20 C.F.R. § 404.1527, even though the opinion in question was not necessarily rendered by a treating source, as his minimal interactions with the plaintiff were not enough to constitute an ongoing treating relationship. Similarly, the ALJ failed to give any explanation for granting great evidentiary weight to the opinion of a consultative examiner. The ALJ's credibility determination regarding the plaintiff's testimony about the frequency and intensity of his headaches was not supported by substantial evidence. She erred in finding all the evidence of headaches subjective given that headaches are subjective symptoms not subject to objective testing. She further erred in assessing the plaintiff's compliance since the record supports that his financial situation prevented him from obtaining his medication. The court also found the ALJ relied too heavily on the fact that the plaintiff did not appear in distress at the hearing.

Blash v. Commissioner of Soc. Sec., 813 F. App'x 642 (2d Cir. May 18, 2020) (*pro se*) – court remanded for consideration of additional evidence both the ALJ and Appeals Council failed to consider evidence that demonstrated the plaintiff's condition had significantly worsened. Although plaintiff raised this argument for the first time on appeal, the court reached the merits to avoid manifest injustice. The court also found the ALJ had failed in his affirmative duty to develop the record, especially where plaintiff's attorney had informed the ALJ that she had significant changes in her condition and was receiving at-home medical care because of her functional limitations.

Ferraro v. Saul, 806 F. App'x 13 (2d Cir. Mar. 12, 2020) (*pro se*) – court remanded, finding the ALJ failed to apply the *Burgess* factors or provide "good reasons" for assigning reduced weight to the opinions of plaintiff's treating physicians. The ALJ's mere acknowledgement of the physicians' lengthy relationships with the plaintiff does not constitute explicitly considering "the frequency, length, nature, and extent of treatment." Nor did the ALJ give "good reasons" for discounting the medical evidence supporting their opinions. It also found the plaintiff's ability to care for his father had little relevance to his ability to function in a work-setting. It also faulted the ALJ for relying instead on the CE opinion.

Riccobono v. Saul, 796 F. App'x 49 (2d Cir. Mar. 4, 2020) (Bohr, Persaud) – court remanded based on ALJ's failure to base her RFC on a medical opinion, as opposed to relying on her own lay interpretation of the diagnostic tests and other non-medical evidence. Citing *Balsamo,* the court found the ALJ over relied on the plaintiff's past ability to exercise and play sports. The court also held the ALJ was obligated to develop the record to fill any gaps created by perceived inconsistencies in the medical opinions.

Gough v. Saul, 799 F. App'x 12 (2d Cir. Jan. 13, 2020) (Schneider) – court remanded where ALJ had cherry-picked the evidence to find plaintiff's limitations did not preclude full-time work where treatment notes and testimony did not contradict treating clinician opinions. The ALJ failed to identify conflicting evidence and failed to seek medical source statement where plaintiff appeared *pro se* before the ALJ. The court also noted a subsequent ALJ had found the plaintiff disabled based on the same record.

Stacey v. Commissioner, 799 F. App'x 7 (2d Cir. Jan. 7, 2020) (Kubitschek) – court remanded for calculation of benefits, finding the ALJ erred in discounting the treating psychiatrist's opinion as based on subjective symptoms. The court noted that mental health cases are less susceptible to objective testing and assessment. It also faulted the ALJ for cherry-picking isolated incidents of improvement and overemphasizing the plaintiff's ability to get along with family members and perform simple, passive activities such as watching TV.

Byrne v. Berryhill, 752 F. App'x. 96 (2d Cir. 2019) (Bowes) – Court of Appeals remanded in light of the ALJ's conclusory reasons for assigning "less" weight to three treating physician opinions. The ALJ failed to explain why the diagnostic tests cited by the physician were insufficient to support his conclusions. Nor did the court find the physician's acknowledgement that physical therapy had been "helpful" inconsistent with his treatment notes.

Messina v. Comm'r of Soc. Sec. Admin., 747 F. App'x. 11 (2d Cir. 2018) (*pro se*) – court found ALJ did not provide good reasons for rejecting the opinion of the treating physician opinion that claimant could not sit more than one to three hours in an eight-hour work day. Additionally, the court found the ALJ had an affirmative duty to re-contact the doctor if the report was unclear. Citing *Byam v. Barnhart*, 336 F.3d 172, 183 (2d Cir. 2003), the court held that treating source's retrospective opinion could be accorded controlling weight even though the doctor was not treating claimant at the time he sustained his injuries. Finally, it criticized the ALJ for relying on the opinion of a state agency consultant who had misread some of the evidence.

Adelman v. Berryhill, 742 F. App'x. 566 (2d Cir. 2018) (Kubitschek) – remanded for the Commissioner to determine if claimant was entitled to ongoing benefits, as SSA had never issued a valid decision or reason why his benefits had been terminated. SSA had wrongfully terminated the claimant's benefits and assessed an overpayment based on SGA without taking into account the provisions of 20 C.F.R. § 404.1573(c), which provides that work performed under "special conditions that take into account [the claimant's] impairment may not constitute SGA. The district court had ruled that Adelman did not owe back payments from Feb. 2002-March 2003. On appeal, the claimant sought retroactive reinstatement and on-going benefits. The court ruled that on remand, it would be SSA's burden to demonstrate the claimant's entitlement ended. The court also ordered interim benefits.

Flynn v. Comm'r of Soc. Sec. Admin., 729 F. App'x. 119 (2d Cir. 2018) (Torrisi) – court remanded for *calculation of benefits*. Relying on some of its leading treating physician cases, the court, quoting *Shaw*, found the ALJ substituted his opinion when he concluded the claimant had nothing more than mild anxiety. The ALJ erred in overemphasizing and mischaracterizing a brief period during which the claimant's condition was more positive. Nor was the physician's statement that the claimant could work no more than four days per week inconsistent with his other statements, including that the claimant would be expected to miss two or more days a month due to his condition. The court also faulted the ALJ for relying too heavily on experts who did not examine the claimant, citing *Selian.*

Caldwell v. Comm'r of Soc. Sec., --- F. App'x ---, 2022 WL 728661 (Mar. 11, 2022) – court affirmed, rejecting 57-year-old *pro se* claimant's argument that the ALJ erred in failing to find he was not disabled prior to his 22nd birthday and thus not eligible for disabled adult children's benefits (DAC or CDB). Although some records indicated a history of childhood abuse and psychiatric hospitalizations when younger, the court found agreed there was no evidence the claimant had a medically determinable impairment prior to age 22.

Cuda v. Comm'r of Soc. Sec., --- F. App'x ---, 2021 WL 4887993 (Oct. 20, 2021) – court affirmed, rejecting *pro se* claimant's argument that the ALJ erred in failing to find her acid reflux a severe impairment. The ALJ supported his decision with evidence drawn from the medical records. Nor did the Appeals Council err; evidence of plaintiff's Sjogren's Syndrome would not have altered the ALJ's decision.

Marchand v. Comm'r of Soc. Sec., --- F. App'x ---, 2021 WL 4805215 (Oct. 15, 2021) – court affirmed, rejecting *pro se* plaintiff's claim that he was eligible for disabled adult child's benefits. The court found the ALJ appropriately gave the greatest weight to the record evidence closest in time to the relevant period (before plaintiff turned 22 in 1985) and less weight to the evidence farthest in time from the relevant period. Substantial evidence supported the ALJ's conclusion that plaintiff developed depression long after the relevant period ended, and that plaintiff had the residual functional capacity to perform jobs in the national economy.

Wright v. Comm'r of Soc. Sec., --- F. App'x ---, 2021 WL 4452158 (Sept. 29, 2021) – court affirmed, rejecting *pro se* plaintiff's claim that the ALJ failed to develop the record following a previous court remand. The ALJ was not required to seek supplement opinions from consulting physicians. The court also rejected the plaintiff's argument that the ALJ should have considered

a VA finding of disability, concluding that the VA decision was not rendered until more than a year after the ALJ's decision. Finally, it found that any evidence of insomnia in the medical records did not support a claim that the plaintiff met a listing, but merely that he complained of poor sleep.

Hairston-Scott v. Comm'r of Soc. Sec., --- F. App'x ---, 2021 WL 3777581 (August 26, 2021) (*pro se*) – court affirmed, finding plaintiff had waived several arguments for failing to raise in district court where she had been represented by counsel. It also found meritless her claim that a subsequent favorable disability determination should be considered new and material evidence. The court cited prior decisions finding such determinations not material if not relevant to the time period in question.

Moody v. Comm'r of Soc. Sec., 848 F. App'x 470 (May 25, 2021) – court affirmed where the ALJ adequately explained his reasons for the relative weight he assigned to opinion evidence. The record supported a finding of sedentary work. Also, the record was adequately developed. Although the ALJ failed to identify a doctor whose signature was illegible, he nonetheless considered the opinion.

Talyosef v. Saul, 848 F. App'x 47 (May 21, 2021) – court affirmed where *pro se* plaintiff appealed district court's decision upholding the ALJ's determination of RFC but remanding for further consideration of available jobs. The Court of Appeals agreed that substantial evidence supported that the plaintiff's conditions did not meet the orthopedic listing, she could perform light work, and the record was adequately developed.

Curry v. Comm'r of Soc. Sec., --- F. App'x ---, 2021 WL 1942331 (May 14, 2021) – court affirmed magistrate's decision, finding the ALJ did not err in assigning controlling weight to the opinion of a treating orthopedic surgeon where, *inter alia*, there were gaps in treatment. Nor did the ALJ err in assigning limited weight where the ALJ properly considered the *Burgess* factors and provided good reasons, including citing treatment records indicating the plaintiff did not need further treatment.

Holler v. Saul, --- F. App'x ---, 2021 WL 1621304 (2d Cir. April 27, 2021) – court affirmed, finding the ALJ did not err in failing to accord the opinion of the treating psychologist controlling weight. The court agreed the psychologist's report was not supported by his treatment records or a check box form without providing the requested explanation. The ALJ's failure to address all the factors set forth in the prior treating physician regulations was justified where the ALJ did address three of the factors but gave a detailed explanation for her decision to give less than controlling weight.

Barrere v. Saul, --- F. App'x ---, 2021 WL 1590047 (2d Cir. April 23, 2021) - court affirmed, rejecting the plaintiff's argument that the ALJ ignored relevant evidence. The court reiterated that the ALJ need not reiterate every piece of evidence. The court deferred to the ALJ's resolution of conflicting evidence. The Appeals Council also properly rejected new evidence that did not relate to time before the ALJ's decision and was not likely to change the outcome of the decision.

Snyder v. Saul, 840 F. App'x 641 (Mar. 24, 2021) – court affirmed, finding the ALJ had complied with a prior remand order to consider mental health limitations. The ALJ also properly weighed the opinion of the treating nurse practitioner, who had only seen the plaintiff twice before issuing her opinion. The ALJ properly explained that the opinion was inconsistent with evidence of record, including the fact that Snyder's mental impairments were well managed with conservative treatment. Similarly, the ALJ properly weighed the medical opinions as to Snyder's physical limitations. The ALJ appropriately noted Snyder's pain control and activities of daily living.

Medina v. Comm'r of Soc. Sec., 831 F. App'x. 35 (Dec. 18, 2020) – court affirmed, finding the ALJ's opinion giving little weight to the treating physician was supported by substantial evidence. The opinion was inconsistent with treatment notes revealing the plaintiff's improved mood and her ability to manage independently activities of daily living, including cooking, cleaning, self-care, banking, shopping, and driving without assistance. She had regularly volunteered in a dog shelter and engaged in activities requiring concentration and the ability to stay on task.

Ramsey v. Comm'r of Soc. Sec., 830 F. App'x 37 (Oct. 30, 2020) – the court affirmed, finding the ALJ properly considered the medical opinions of record in concluding the plaintiff has an RFC to perform sedentary work. It is the ALJ's responsibility to determine RFC. Here, he did not forge his own medial opinions based on raw data or reject medical diagnoses. He accurately summarized medical notes and provided sufficient reasons for discounting portions of medical opinions. Nor did the Appeals Council err in failing to consider new evidence. The opinion evidence was not entitled to deference as the physician did not have an ongoing treatment relationship with the plaintiff. Further the new evidence was outside the period on or before the ALJ's decision and was duplicative of evidence of record.

Dunn v. Comm'r of Soc. Sec., 832 F. App'x 62 (Oct. 26, 2020) - the court affirmed the district court's dismissal of the plaintiff's complaint based on her failure to exhaust administrative remedies. The district court did not convert the Commissioner's Motion to Dismiss into a summary judgment motion because it considered materials outside the pleadings.

Harrington v. Saul, 827 F. App'x 146 (Oct. 20, 2020) – court affirmed, finding the ALJ did not err in concluding the plaintiff had the RFC to perform light work. The ALJ correctly determined the opinion of the treating physician was inconsistent with his treatment notes, including his recommendation of a conservative course of treatment, and inconsistent with the opinion of the consultative examiner. Nor did the ALJ err in failing to find obesity a severe impairment. The Court of Appeals refused to consider a new report unavailable to the ALJ, as the plaintiff offered no justification for her failure to mention the document to the district court.

Yucekus v. Comm'r of Soc. Sec., 829 F. App'x 553(Oct. 9, 2020) (*pro se*) – court affirmed, finding substantial evidence supported the ALJ's sedentary RFC. Treatment records did not support the claimant's allegations of psychiatric impairments and other impairments. Nor did the ALJ err in giving limited weight to certain physician opinions that the claimant could not work or was temporarily disabled, as the opinions were not supported by the medical evidence and contradicted by the rest of the record. The ALJ also properly gave limited weight to a PA's

medical source statement, who was not an acceptable medical source under the then-applicable regulations. Finally, the court found the claimant had not shown good cause for new and material evidence.

Skoric v. Saul, 821 F. App'x 62 (September 18, 2020) (*pro se*) – court affirmed, finding substantial evidence supported the ALJ's decision that the claimant is not disabled. The court found the ALJ did not misrepresent or cherry-pick statements from the record. The ALJ properly found that evidence of deterioration of the claimant's condition was not material. Finally, the court held that the plaintiff's personal opinion that the sequential evaluation process is inherently flawed is not sufficient to prove the process is arbitrary and capricious, or exceeded the Commissioner's authority.

Valentin v. Comm'r of Soc. Sec., 820 F. App'x 71 (September 9, 2020) (*pro se*) – court affirmed, finding new evidence of the deterioration of the plaintiff's condition was not material and thus did not justify remand. The plaintiff did not explain why the evidence was not incorporated in the record earlier, nor does the evidence relate to the time period prior to the expiration of her insured status. The court found the plaintiff's claims that the record understates her limitations were not supported by substantial evidence. The plaintiff's assertion that the ALJ's RFC for occasional use of her dominant had was not contradicted by her claim that she could not use it "excessively." Finally, the plaintiff's claim that the ALJ was biased was not supported.

Cook v. Comm'r of Soc. Sec., 818 F. App'x 108 (August 28, 2020) – court affirmed, finding substantial evidence supported the ALJ's RFC determination. No medical evidence of record indicated the plaintiff faced limitations not reflected in the RFC. The court also found that although there was no specific medical opinion supporting the RFC, one was not required because the record contained sufficient evidence in the form of treatment notes for the ALJ to assess RFC. Finally, the court found that there was no reasonable probability that evidence proffered to the Appeals Council regarding subsequent surgery to control an infection resulting from prior surgery would change the ALJ's decision; the surgery did not undermine the conclusion that the prior surgery had resulted in improvement of the plaintiff's knee.

Grega v. Saul, 816 F. App'x 580 (June 8, 2020) – court affirmed, finding remand was not necessary where evidence or opinions that the ALJ failed to consider were not significantly more favorable to the claimant or were essentially duplicative of other evidence. The purported excluded evidence was consistent with the ALJ's finding that the claimant could perform simple, routine task at the light exertional level. Nor did the ALJ err in relying on the opinion of the consultative examiner. And the ALJ properly accorded limited weight to the opinions of the plaintiff's nurse practitioner and social worker. Neither one qualified as an acceptable medical source. Further, the ALJ gave sufficient reasons for discounting their opinions.

Cherry v. Commissioner of Soc. Sec., 813 F. App'x 658 (May 20, 2020) – court affirmed, holding the ALJ did not err in finding plaintiff's bi-polar disorder non-severe. The ALJ properly discounted the opinion of the plaintiff's nurse practitioner, as she was not considered an acceptable medical source when the decision was issued. Also, other evidence of record supported the ALJ's findings of mild limitations. The ALJ was not required to consider other barriers to plaintiff's employment, such as his incarceration. Although the district court relied on

non-binding decisions in finding the ALJ's failure to add plaintiff's limits in bending and stooping in his hypothetical questions to the VE was harmless error, it cited SSR 83-15, which was sufficient. The court also relied on its own precedent in *McIntyre v. Colvin.*

Parenteau v. Saul, 803 F. App'x 557 (May 8, 2020) – court affirmed district court determination that the Commissioner had properly deemed plaintiff's wife's income in finding him ineligible for SSI. The court also found that the magistrate judge was not biased, noting that adverse rulings do not constitute bias.

Curley v. Commissioner of Soc. Sec, 808 F. App'x 41 (April 21, 2020) – court affirmed, finding the ALJ's determination that the plaintiff's condition did not meet Listing 1.04A for spinal disorders was supported by substantial evidence. Curley did not demonstrate his condition met all the requirements of the listing. Nor was the ALJ required to obtain all of the plaintiff's physical therapy records, as neither the plaintiff nor his attorney informed the ALJ of them. The ALJ based his sedentary RFC determination on substantial evidence and not substitute his judgment for that of a treating nurse practitioner. The ALJ was not required to seek an opinion from the nurse practitioner, who was not considered an acceptable medical source at the time the decision was rendered.

Juarez o/b/o R.R.O. v. Saul, 800 F. App'x 63 (2d Cir. Apr. 9, 2020) – court affirmed, admitting the agency's reasoning was "thin," and finding the ALJ offered little explanation of his assessment of the evidence. It nonetheless rejected the plaintiff's claim that the minor's CELF-4, which were two standard deviations below the mean, demonstrated a marked limitation. It agreed that the regulations do not rely just on test scores but require the Commissioner to take into account whether a claimant's day-to-day functioning is consistent with the scores.

Hyshaw v. Comm'r of Soc. Sec., 797 F. App'x 671 (2d Cir. Mar 19, 2020) – court affirmed, finding the ALJ did not err in failing to order additional intelligence testing. Despite plaintiff's argument that her 2007 intelligence testing was outdated, the court relied on a 2011 psychological report noting the previous testing continued to be reliable.

Campbell v. Saul, 805 F. App'x 23 (2d Cir. Mar. 11, 2020) – court affirmed, finding that the claimant's earning record contradicted his testimony that he had not earned substantial gainful activity after this alleged onset of disability.

Johnson v. Comm'r of Soc. Sec. Admin., 790 F. App'x 325 (2d Cir. Jan. 22, 2020) (*pro se*) – court affirmed, finding the ALJ had properly considered the factors of the treating physician rule, even if not explicitly. The ALJ had observed that the treating physician had 1) seen the plaintiff on few occasions, 2) the opinion was not supported by treatment notes, 3) the functional limitations were not supported by record evident and were inconsistent with treatment notes, and 4) the treating physician specialized in internal medicine. The ALJ's failure to mention the factors explicitly was harmless error. New disability opinions submitted to the Court of Appeals but not to the District Court were not found to be new and material.

Henderson v. Saul, 788 F. App'x 86 (Dec. 20, 2019) – court affirmed, finding ALJ's decision plaintiff could return to past work supported by substantial evidence. The ALJ relied on

assessments from the consultative examiner and the treating orthopedist to discount the opinion of another treating physician. It also found that evidence submitted to the Appeals Council of procedures that postdated the hearing by six months was not probative.

Lau v. Commissioner of Social Sec., 787 F. App'x 59 (Dec. 13, 2019) (*pro se)* – court affirmed, finding the ALJ's decision was supported by substantial evidence. It found the ALJ properly gave little weight to records from psychiatrists who did see the plaintiff during the relevant time period. It also agreed that the ALJ properly accounted for occasional exposure to pulmonary irritants.

Meyer v. Commissioner of Soc. Sec., 794 F. App'x 23 (Nov. 25, 2019) – court affirmed, finding substantial evidence supported the ALJ's RFC for sedentary work in light the claimant's own testimony about his activities and evidence from his surgeon of some improvement. Although the ALJ did not specifically recognize the specialty of a treating source, he gave good reasons discounting the opinion because it was based largely on self-reports and was contradicted by the claimant's symptomatic improvement. Finally, the court found the ALJ's credibility determination was entitled to deference. The ALJ had considered the claimant's daily activities were inconsistent with debilitating pain and that his treatment was conservative.

Miller v. Commissioner Soc. Sec., 784 F App'x 837 (Nov. 19, 2019) – court affirmed, finding plaintiff had not demonstrated good cause for failing to appear at her hearing where she had only told her attorney she wished to appear by telephone, but neither she nor her attorney requested that accommodation. Nor was the ALJ required to subpoena plaintiff's work and eviction records, as the 20 C.F.R. §404.1512(b) only requires the Commissioner to develop a complete *medical* record.

Guerra v. Saul, 778 F. App'x 75 (Oct. 10, 2019) – court affirmed, finding the ALJ did not err in discounting the treating source opinion despite not explicitly considering the four factors discussed in *Estrella*, because a search of the record demonstrated the ALJ had provided good reasons. The opinions in workers compensation forms were meritless, conclusory, vague, and contradicted by other evidence, including the claimant's testimony. The psychiatric opinions were belied by other evidence. The ALJ appropriately accorded weight to the consultative examiner.

Bachand v. Saul, 778 F. App'x 74 (Oct. 4, 2019) – court affirmed the District Court's refusal to equitably toll the statute of limitations where complaint was untimely filed. The plaintiff mischaracterized the Appeals Council unintentional ambiguous statements as misconduct. And his attorney's miscalculation was a garden variety claim of excusable neglect that did not warrant equitable tolling.

Salinovich v. Comm'r of Soc. Sec. Admin., 783 F. App'x 67, 2019 WL 4743723 (Sept. 30, 2019) – court affirmed, finding the ALJ did not err in according only some weight to the treating source and significant weight to the consultative examiner, where the treating source's opinion was inconsistent with the treatment notes and the plaintiff's testimony. Nor was the hypothetical posed to the vocational witness error where it tracked the RFC.

Wetzel v. Berryhill, 783 F. App'x. 44 (2d Cir. Sept. 5, 2019) – court affirmed, finding the opinion of non-examining review physician was entitled to more weight where the treating source had not offered an opinion. ALJ did not err in failing to find equivalency to Listing 1.04A. Nor the ALJ err in discounting the plaintiff's subjective complaints, where pain was well-managed by medications without significant side-effects. Although the ALJ assigned a light RFC, his error in finding plaintiff could return to his medium past relevant work as a welder was harmless where he identified other jobs the plaintiff could perform.

Rushforth v. Berryhill, 771 F. App'x. 125 (2d Cir. July 2, 2019) – court affirmed, summarily finding the ALJ did not violate the treating physician rule or improperly find the claimant only partially credible.

Barnaby v. Berryhill, 773 F. App'x. 642 (2d Cir. May 17, 2019) – court affirmed, rejecting claimant's arguments on the merits even though several were arguably waived by failure to raise them in the District Court. The ALJ's finding that the claimant could perform light work was supported by substantial evidence, particularly testimony regarding daily activities. The ALJ had properly considered the combined effect of all the impairments. The claimant cited to no evidence to demonstrate his condition met the respiratory listing, nor evidence of the impairments the ALJ failed to find severe. The court also found the District Court had properly rejected new evidence, since the claimant did not demonstrate good cause for not submitting it earlier. And the District Court did not err in refusing to consider the claimant's partial approval on a later application, citing *Cage v.Comm'r of Soc. Sec*., 692 F.3d 118,127 (2d Cir. 2012).

Stone v. Comm'r of Soc. Sec. Admin., 767 F. App'x. 207 (2d Cir. Apr. 25, 2019) - court affirmed, finding the ALJ did not err in failing to solicit a retrospective medical opinion from the claimant's treating physician, citing *Perez v. Chater*, 77 F.3d 41 (2d Cir. 1996).

Banyai v. Berryhill, 767 F. App'x. 176 (2d Cir. Apr. 24, 2019), *as amended* (Apr. 30, 2019) – court affirmed ALJ's determination that the claimant had not established an impairment (intellectual disability) before his date last insured (DLI). Since the ALJ had sufficient evidence the impairment had not begun before the DLI, the ALJ was not required to call a medical expert per SSR 83-20 to infer an onset date.

Heaman v. Berryhill, 765 F. App'x. 498 (2d Cir. Mar. 13, 2019) – court affirmed, finding the ALJ properly relied on the opinions of the consultative examiner and the medical expert, not his own lay opinion, to reject the opinions of the claimant's treating sources. The ALJ also gave good reasons for discounting the treating physicians' opinions, including that they were merely checkbox forms.

Suttles v. Berryhill, 756 F. App'x. 77 (2d Cir. Feb. 28, 2019) – court affirmed, finding the ALJ properly assessed the assessments of the claimant's medical providers, including the nurse practitioner, who was not an acceptable medical source and whose opinions were inconsistent with the medical records. Nor did the ALJ err in finding the claimant's impairments did not satisfy the respiratory listing.

Abarzua v. Berryhill, 754 F. App'x. 70 (2d Cir. Feb. 27, 2019) – court affirmed, finding the ALJ did not err in concluding the treating physician's opinion was contradicted by substantial

evidence as well as the claimant's daily activities. The court also rejected the claimant's argument that the Commissioner was obligated to show the claimant could adjust to other work.

White v. Berryhill, 753 F. App'x. 80 (2d Cir. Feb. 7, 2019) - court affirmed, finding although the ALJ did not explicitly discuss obesity, the ALJ implicitly factored it into the decision. Further, any error on the ALJ's part was harmless because the claimant never specified how his obesity limited him. The claimant waived any arguments that his impairments met listings, as he either conceded otherwise in District Court or waived his arguments by failing to raise them in District Court.

Corbiere v. Berryhill, 760 F. App'x. 54 (2d Cir. Jan. 23, 2019) - the court affirmed, finding the ALJ did not err in according controlling weight to the opinions of three medical professionals who were not acceptable medical sources. Nor did the ALJ err in giving less weight to the opinions of mental health professionals, where at least one questioned the claimant's self-reported symptoms. The Court of Appeals declined to second-guess the ALJ's credibility determination.

Mauro v. Comm'r of Soc. Sec. Admin., 746 F. App'x. 83 (2d Cir. 2019) – court affirmed, agreeing the claimant had not demonstrated she was disabled by breast cancer prior to her date last insured. Symptoms alone without corroborating medical evidence are insufficient to prove disability. The Court of Appeals also held the claimant had not shown good cause for why she had not submitted evidence to the ALJ court stating she had cancer before her DLI. Further, the evidence was not material in that none of the letters addressed whether she was disabled before the DLI.

Trepanier v. Comm'r of Soc. Sec. Admin., 752 F. App'x. 75 (2d Cir. 2018) - court affirmed, finding claimant's ability to do medium work was supported by substantial evidence. Also, the treating physician's opinion that claimant is "disabled" is an administrative finding, not a medical one. Therefore, the ALJ did not err in refusing to accord any weight to the treating source's conclusory finding.

Rotolo v. Berryhill, 741 F. App'x. 851 (2d Cir. 2018) – court affirmed, finding claimant waived the issue of an incorrect onset date by not raising it in District Court. It also rejected claimant's claims of ineffective counsel, since ineffective assistance of counsel is not a cognizable claim in civil cases.

Cappetta v. Comm'r of Soc. Sec. Admin., 904 F.3d 158 (2d Cir. 2018) – Court of Appeals affirmed the District Court's decision to remand to assess the amount of penalty assessed against the claimant for his failure to report work activity. Claimant can be penalized for each month that he did not tell the SSA about his activities, because 42 U.S.C. § 1320a-8(a) authorizes SSA to penalize for "omission" of material facts, such as is the case here. But there is not substantial evidence that SSA suffered damages as a result of the claimant's failure to report. Therefore the penalty assessed must be reviewed on remand.

Johnson v. Berryhill, 736 F. App'x. 27 (2d Cir. 2018) - court affirmed the District Court's dismissal for lack of subject matter jurisdiction. The claimant had previously received a

"partially favorable" decision finding he had not proven disability before his DLI, a decision he did not appeal. After a subsequent application was denied on *res judicata* grounds, the claimant appealed, claiming the original notice was defective. The court found the notice was clear and not constitutionally defective.

Smith v. Berryhill, 740 F. App'x. 721 (2d Cir. 2018) – court affirmed where the ALJ found the opinions of the treating sources as to time off task and absenteeism offered lacked support in their own treatment notes. One physician expressed doubt as to the claimant's disability and had only been treating him for a short time. Another's records showed the claimant's knee had healed post-surgery and he was doing well. The ALJ found the opinion of a third treating sources as to pace and concentration fell outside her specialization. Further there was gap in treatment. The court also held the ALJ was not required to identify evidence explicitly rebutting the opinions of the treating physicians before discounting or rejecting them.

Bushey v. Berryhill, 739 F. App'x. 668 (2d Cir. 2018) – court affirmed, agreeing that the claimant had failed to demonstrate deficits in adaptive functioning required to meet the version of Listing 12.05C in effect at the time of adjudication, citing *Talavera.* The court also discussed issue preclusion.

Anselm v. Comm'r of Soc. Sec., 737 F. App'x. 552 (2d Cir. 2018) - court affirmed, finding tthe opinions of the treating sources were not entitled to greater weight, where the opinions were conclusory and contradicted by treatment notes and other medical professionals. The court also dismissed the claimant's argument that the VE gave consideration to workplace accommodations, finding any accommodations proposed by the VE were in relation to a hypothetical claimant who did not share the claimant's RFC.

Colvin v. Berryhill, 734 F. App'x. 756 (2d Cir. 2018) – court affirmed, refusing to excuse the claimant's waiver of arguments concerning RFC. The court also rejected arguments that the Commissioner failed to satisfy her burden of proving the claimant would work despite missing the distal tips of three fingers on his non-dominant hand.

Watson v. Berryhill, 732 F. App'x. 48 (2d Cir. 2018) – court affirmed, finding the ALJ did not err in concluding the claimant's impairments did not meet a mental listing, and upholding the ALJ's credibility determination. The court agreed the ALJ had considered the proper factors for assessing credibility and had refuted the claimant's testimony with citations to contradictory evidence.

Negron v. Berryhill, 733 F. App'x. 1 (2d Cir. 2018) – court affirmed, finding that although the ALJ did not explicitly discuss the treating physician rule, the substance of the rule was not traversed, citing *Halloran v. Barnhart*, 362 F.3d 28, 32 (2d Cir. 2004).

Smith v. Comm'r of Soc. Sec. Admin., 731 F. App'x. 28 (2d Cir. 2018) – the court affirmed, upholding the Commissioner's finding that alcohol abuse was material. It also found the ALJ had properly afforded little weight to the treating physician's opinion, where the opinion was based on subjective complaints, not supported by objective evidence, and rendered by a doctor who had only seen the claimant four times.

Rusin v. Berryhill, 726 F. App'x. 837 (2d Cir. 2018) – court affirmed, finding that although claimant had waived several arguments, the ALJ did not err in applying minimal weight to the treating psychiatrist's opinion. It was inconsistent with treatment notes, other medical evidence, and testimony about the claimant's daily life. Nor did the ALJ err in failing to recontact the psychiatrist or call upon an independent medical expert. The ALJ's credibility determination was supported by substantial evidence, especially testimony about daily activities.

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