UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JUNE YOXALL,	:	
Plaintiff,	:	
	:	
v.	:	NO. 3:99-CV-656 (SRU)
	:	
KENNETH S. APFEL,	:	
COMMISSIONER OF	:	
SOCIAL SECURITY,	:	
Defendant.	:	

RULING ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS AND MOTION TO REMAND FOR CONSIDERATION OF NEW MEDICAL EVIDENCE

Plaintiff, June Yoxall, seeks review of the denial by defendant, Kenneth S. Apfel, Commissioner of Social Security ("Commissioner"), of her claims for Disability Insurance benefits and Supplemental Security Income benefits under section 205(g) of the Social Security Act, 42 U.S.C. 405(g). Pending are plaintiff's motions for Judgment on the Pleadings (doc. # 8-1), to Reverse the Commissioner (doc. #8-2), to Remand (doc. # 8-3) and to Remand for Consideration of New Medical Evidence (doc. #12), and defendant's motion for Order Affirming the Decision of the Commissioner (doc. #10).

As explained more fully below, the Administrative Law Judge ("ALJ") erred by failing to adhere to the treating-physician rule and by improperly dismissing Yoxall's subjective complaints of pain. Accordingly, there is not substantial evidence to support the ALJ's decision that Yoxall was not disabled within the meaning of the Social Security Act. In addition, once the proper legal standards are applied, the record contains substantial evidence that Yoxall is disabled. Therefore, the decision of the Commissioner is reversed and the case is remanded for calculation of benefits.

I. PROCEDURAL BACKGROUND

June Yoxall claims she sustained a back injury after falling at work on December 11, 1991. On May 13, 1996, Yoxall filed an application for disability insurance benefits, alleging an inability to work beginning on December 11, 1991. The Social Security Administration denied her application both initially and on reconsideration. On April 29, 1997, Administrative Law Judge ("ALJ") Bruce H. Zwecker held a hearing upon Yoxall's filed request. On May 29, 1997, the ALJ issued a decision that Yoxall was not disabled.

On June 23, 1997, Yoxall filed a request for review with the Appeals Council. Prior to the Appeals Council's issuance of a decision regarding Yoxall's request, Yoxall submitted additional evidence concerning her claim. Record of Proceedings ("R.") at 273, 275, 277, 279-83, 285. On February 22, 1999, the Appeals Council denied Yoxall's request for review, rendering the ALJ's May 29, 1997 decision final.

On April 13, 1999, Yoxall filed a complaint in this court pursuant to section 205(g) of the Social Security Act, 42 U.S.C. § 405(g). On May 22, 2000, Yoxall moved for an Order Reversing the Decision of the Commissioner or, in the alternative, a Remand for Consideration of New and Material Evidence (doc. # 8). On June 13, 2000, the Commissioner filed a cross-motion for an Order Affirming the Decision of the Commissioner (doc. # 10). Thereafter, on January 17, 2001, Yoxall moved for Remand for Consideration of New Medical Evidence (doc. #12). Now pending are the cross-motions for judgment on the pleadings and Yoxall's motion for Remand. (Docs. ## 8, 10, 12).

II. EVIDENCE CONTAINED IN THE RECORD

A. Medical Information

1. Treating Physicians

a) Dr. Harry Engel (December 1991- June 1992)

Dr. Engel, a neurosurgeon, saw Yoxall on December 16, 1991, five days after her accident, and continued to see her until June 1992. R. at 135. Over this eight-month period, Engel provided eleven reports concerning Yoxall's condition. In July 1992, Engel referred Yoxall to another neurosurgeon, due to Yoxall's non-improvement. R. at 23. Engel's specific notations during the time he treated Yoxall include the following:[1]

> 12/16/91 - old fracture suggested; degenerative disc disease at L5/S1; considerable pain in her back with coughing, bending and straining; muscle spasm and tenderness at L5 with significant restriction of flexion and extension of lumbar spine; straight leg 80 degrees gives pain. OPINION - acute lumbosacral strain; start medication and physical therapy ("PT"). R. at 164-65.
>
> 12/26/91 - persists with pain in back; suggest nerve compression II. R. at 166.
>
> 12/31/91 - persists with significant back and leg pain; CT scan showed disc bulge at L4-5 producing some mass effect quite consistent with her symptomatology, L5/S1 slight protrusion but asymptomatic; persists with limited straight leg raising and posterior thigh pain; lumbar discomfort; left sciatic tenderness; continue PT. R. at 166.
>
> 1/9/92 - still significant left leg pain; more pain with significant straight leg raising limitation indicating further disc herniation; medication and PT. R at 166.
>
> 1/20/92 - continued significant discomfort and pain; continue on present conservative measures. R. at 167.

[1] These notations represent partial quotes from the medical records. Omitted words, however, are not indicated by ellipses.

2/12/92 - Persists left paresthesias and numbness in leg with back pain- MRI no focal herniation; EMG; obtain neurological consult. R. at 168.

3/3/92 - EMG shows definite left L5/S1 radiculopathy with abnormal resting activity in the paraspinal muscles; persists with symptoms; very uncomfortable although PT does give symptomatic relief. Myelogram and CT scheduled. R. at 169.

3/17/92 - complete evaluation in hospital because of persistent back pain, left leg pain; Myelogram showed disc bulge L4-5; CT scan showed degenerative disc disease at L5/S1 with Grade I anterior spondylothesis and vacuum disc phenomenon at L5/S1; no evidence of disc herniation; persist with back discomfort; difficulty on extension and flexion; PT and medication. R. at 169.

4/20/92 - improving, though setback with coughing giving increasing left leg paresthesias; can be on feet for two hours a day before back pain; taking medication. "A decision will be made in the near future about a possible return to light and/or selected work, but lifting not to exceed 20 lbs." R. at 170.

5/17/93 - summarized past findings in letter- myelogram showed disc bulge at L4-5; CT showed degenerative disc disease at L5/S1 with Grade I anterior spondylothesis and vacuum disc phenomenon at L5/S1. "These are the factors that are responsible for her back pain and the left radiculopathy;" symptoms were precipitated when she slipped and fell at work on 12/11/91. R. at 171.

b) Dr. Phillip Dickey (July 1992 - Present)

Dr. Dickey, a neurosurgeon, saw Yoxall on July 15, 1992. R 135. He continued to see and treat her regularly over a period of more than six years. Dickey's specific findings in more than forty reports contained in the record include the following:[2]

7/16/92 - Noted Engel treated her; EMG- showing abnormality on left side but had no formal report. Physical examination ("PE") reveals lumbar paravertebral spasm on left with some scoliosis; straight leg lifting causes pain at 30 degrees on left and sixty degrees on right. CT scan reveals bulging disc L4-5. Lumbar myelogram with post CT scan reveals central bulging disc, which may be a frank herniation. MRI suggests a central herniation; X-rays mild retrolisthesis of

[2] These notations represent partial quotes from the medical records. Omitted words, however, are not indicated by ellipses. Certain notable excerpts are set out using quotation marks.

L4 on L5 and some decreased disc height; still having a lot of discomfort, not improved over long course of conservative management. PT and meds; obtain SPECT scan. R. at 184.

7/31/92 - more back discomfort and more episodes of leg numbness; neurologic and PE today are unchanged; EMG revealed denervation in paraspinous muscles at L5 and S1; SPECT scan reveals abnormal activity at L4-5 by report, "but I think that there is also some activity at L5-S1." Recommend PT for one month, then possible lumbar fusion. R. at 186.

8/27/92- increase in pain with pool therapy; now substantial low back pain which restricts her motion to 15 degrees from neutral in both directions; straight leg raises produce leg pain at 30 degrees; neurologic exam is within normal limits; failed PT again; brace for two weeks. R. at 188.

10/8/92 - "substantial though incomplete relief of her pain with the brace;" proceed with lumbar fusion. R. at 189.

11/16/92 - admitted to hospital; discharged 12/2/92. R 156. Underwent lumbar fusion procedure (L4 and sacrum screwed together). R. at 156-59. Continue to wear brace. R at 156. Medical findings; EMG- L5S1 radiculopathy CT scan bulging disc L4-L5. MRI suggested central herniation at L4-5. Xrays reveal mild retrolisthesis of L4-5; decreased disc space; (resulting colitis); preoperative lumbar instability - post op same. "multiple studies showing a bulging L4-5 disc with substantial back pain that was relieved by a brace." R. at 159.

12/16/92 - no numbness and substantially less pain; wound healed; wears brace; continues to be temporarily disabled until [Dickey] sees her again. R. at 190.

01/06/93 - little pain in low back and occasional pain in leg; neurologic exam normal; doing reasonably well; positive response to fusion; one month follow-up ("FU") and consider PT at that time. R. at 191.

2/18/93 - sneezed and has had lots of back pain since then - no leg pain but "cannot wean herself out of the brace because of back pain." Examination is unchanged; one month FU-consider PT. R. at 192.

3/19/93 - hip pain, no leg pain, back pain under control; wean out of brace in next month- try aquatherapy. FU one month. R. at 193.

4/22/93 - continues low back pain, right buttock pain, and occasional pain in right leg; neurologic exam is normal; PT and FU one month. R. at 194.

5/11/93 - lot of back pain and mild leg pain since getting out of car few days ago; back spasms

as well. Examination today reveals negative straight leg raising and neurologic examination normal; much tenderness and spasm over lumbar region. X-rays today show loosening of screw on left of S1; hardware failure, but seems to be developing fusion nonetheless. Instructed her to stop therapy and go back to brace, more meds. R. at 195.

6/25/93 - lots of back pain and left leg numbness; "neurologic examination reveals no abnormal findings, but she still has markedly restricted motions of the lumbar spine." Rest for 1 mos. R. at 196.

8/12/93 - pain right leg, cramping; substantial amount of back pain; worse when lying down; examination reveals still in brace; straight leg lifting pain at 60 degrees; neurologic exam "continues to be remarkable only for nondermatomal sensory loss in lower right region." AP and lateral x-rays ordered; give 2-3 months to see if fusions matures. 1 mos FU. R. at 197.

9/29/93 - still lot of low back pain and right leg pain; "neurologic examination reveals nondermatomal sensory loss in right lower extremity but she has marked restriction of lumbar spine." Not reached maximum improvement since only one year since surgery. 1 mos. FU. R. at 199.

10/14/93 - doing reasonably well over last several days; examination revealed improved range of motion ("ROM") in lumbar and no neurological defect; not reached maximal improvement. R. at 200.

11/4/93 - feeling substantially better, less low back pain; flexion limited by pain 40 degrees, extension limited to 15 degrees; neurological examination normal. Get x-rays. R. at 201.

12/21/93 - low back pain quite a lot and leg pain; examination reveals extension limited to approximately 10 degrees by pain, flexion limited to 40 degrees by pain; straight leg raising reduced to 30 degrees on left and 20 degrees on right because of back pain. Neurological reveals no deficit; lumbar spine x-rays reveal probable non-union of fusion; reached maximum level of improvement; no repeat surgery because of past gastrointestinal problems; permanent partial disability of 30% of the lumbar spine based upon disc injury at L4-5 requiring lumbar fusion with resultant restriction of back motions; due in total to work injury. "I think she should be retrained to a light-duty job, which involves primarily sitting, such as computer work." Need medical supervision, periodic visits and PT. 1 mos FU. R. at 203.

3/3/94 - quite a bit of low back pain and leg; examination reveals continued restricted motion of lumbar spine but normal neurologic function. 6 wks FU. R. at 204.

4/25/94- more back pain on sneezing; examination continues to reveal restricted motion but normal neurological examination; X-rays reveal no gross motion or any other change from past

films. 6 wks FU. R. at 205.

6/23/94 - worsening of back pain over past week; examination reveals continued pain in bone graft area, restriction of motion and back tenderness; 6 wks FU. R. at 206.

9/22/94 - lots of pain and left leg pain; neurologic examination reveals no deficit but continues to have marked restriction of motion including almost no motion in extension due to pain; 2 mos FU. R. at 207.

11/28/94 - quite a bit of pain, worse due to sneezing from upper respiratory illness; examination reveals marked restriction of lumbar spine, but no neurologic deficit. 2 mos FU. R. at 208.

1/18/95 - about the same; some increase in pain; neurological examination unchanged; 2 months FU. R. at 209.

3/23/95 - quite a bit of pain over last few days; neurological examination unchanged; continues to have marked restriction in motion of spine; 2 mos. FU. R. at 210.

5/30/95- a lot of low back pain; lifting boxes at home; examination reveals marked tenderness lumbar region and marked restriction of motion of spine; neurological examination normal; doing reasonably well with present activity. R. at 211.

7/12/95 - lot of low back pain as before; difficulty when sneezes or coughs; examination reveals marked restriction of spine and lumbar tenderness diffusely; 2 mos FU. R. at 212.

9/6/95 - unchanged though increasing pain in buttock and right leg; examination continues to reveal extreme restriction of spine, but normal neurologic function; Yoxall said applying for social security disability; think that is good idea; 2 months FU. R. at 213.

12/12/95 - lifted small box few weeks ago; marked increase in her pain; some occasional numbness in leg mostly low back; examination revealed even further restriction of motion of spine; neurological examination normal. PT at Gavin Rehab to try to get motion in lumbar. R. at 214.

2/9/96 - complaining "bitterly of low back pain;" neurological examination normal; continues to have marked restriction of motion of the spine; concerned about medication overuse. FU 6 wks. R. at 216.

3/27/96- unchanged; sneezing and coughing produced much pain; examination reveals marked restriction and normal neurological examination; doing reasonably well in PT 1 mos FU. R. at 217.

4/29/96 - pain because out due to mother's illness; examination revealed marked restriction and normal neurological examination. 6 wks FU. R. at 218.

6/20/96 - complains dragging left foot; caused her to fall; neurological examination no appreciable weakness; gait appears normal; no obvious neurologic deficiency. R. at 219.
7/30/96- pain in leg and dragging, pain worse after activity; marked restriction on examination; of note, she also has atrophy of left calf muscles, particularly of the gastrocnemius with apparent weakness in muscle at 4+/5; has mild EHL weakness on left and diffuse hyporeflexia in lower extremities although normal in upper. Assessments and recommendations -- "June continues to be completely disabled from any type of work. She does have evidence of chronic nerve injury to the sciatic nerve on the left with muscle atrophy, pain, and dragging of the foot. Again, I think she is completely disabled from any type of work and has been so for many years. She likely will be this way for years to come." 6 weeks FU. R. at 220.

10/14/96 - little better with PT; still constant low back pain; overall neurological report is unchanged since 9/3/96 as is spinal exam; improving slowly. R. at 232.

11/25/96 - complains bitterly of low back pain; no change in advanced restriction of motion of her spine; neurological normal; same; 2 mos FU. R. at 231.[3]

1/16/97- same; continued pain in the back and occasional pain in the leg; examination revealed marked restriction, bilateral paravertebral tenderness and spasm, but no neurological defect; making no progress at all; dependency to drugs caused by work injury; recommend psychiatrist; psych referral. R. at 230.

3/20/97 - no change; continues to reveal severe restriction of spine; no neurological deficit. Go to Pain Center. R. at 229.

7/18/97 - "it is my opinion that June would have to" rest for at least 5 minutes 2 or 3 times an hour, regularly lie down and change positions as much as twice an hour to function in any sort of job. "This woman can barely sit for a few minutes in our office awaiting appointments." Because of medication, falls asleep and will probably be likely do so at work; meds impair

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[3] Yoxall does not dispute the ALJ's determination that Yoxall must prove that she was under a disability on or before December 31, 1996. R. at 19. Shaw, 221 F.3d at 131 (citing 20 § C.F.R. 404.131(a) (claimant must have disability insured status in quarter became disabled)). The court, however, reviews evidence concerning Yoxall's disability created after December 31, 1996 and supplied to the Appeals Council before the Appeals Council denied Yoxall's request for review. *See* Arnone v. Brown, 882 F.2d 34, 39 (2d Cir. 1989) (Evidence regarding the claimant's condition after the period for which the claimant is seeking disability can be relevant to the question of whether the claimant was disabled prior to the date last insured.); Brown v. Apfel, 174 F.3d 59, 62 (2d Cir. 1999) (review includes "new evidence submitted to the Appeals Council following the ALJ's decision.").

memory. "Again, it is my opinion that it would be essentially impossible for this woman to hold down any sort of job because of her limitations due to pain and sleeplessness." R. at 279.

10/21/97 - medically probable that due to her medical condition, Yoxall wakes up and moves from chair to chair; needs frequent rest and would need to leave job on an hourly basis; would lose work because of pain, fall asleep because of lack of sleep; work impaired by medication she takes; narcotics and muscle relaxers affect ability to perform a job; need more than one type of chair, sitting in one position makes her uncomfortable; all have existed for several years. R. at 275.

11/18/97 - continues to have low back pain and bilateral leg pain; especially worse because of coughing spells; marked restriction of spine but no focal neurologic deficits; essentially stable, FU 3 mos. and "continues to be unable to perform any type of work." R. at 273.

2/17/98 - no change in pain, neurologic symptoms or functional status. Still needs meds. Examination reveals marked restriction of spine and no neurologic deficits. "June continues disabled from all types of work" R. at 285.

In addition, diagnostic test records are interspersed throughout the record. *See, e.g.*, R. at 222-26, 248.

2. **Examining Medical Consultant**

Dr. Gregory Criscuolo

Dr. Criscuolo is a medical doctor, who examined Yoxall once on January 23, 1998. R. at 280-83. Criscuolo recited Dickey's past findings in detail and Yoxall's current complaints of pain. Criscuolo performed a general physical exam. He found that examination and Yoxall's neurological examination to be consistent with Dickey's findings. Criscuolo noted in his section on recommendations and impressions that Yoxall was "suffering from failed back syndrome . . . failed to make significant progress and has had stable amount of pain for a number of years now. . . . She appears to be completely disabled at this time."

Criscuolo further concluded that Yoxall had reached maximum medical improvement and

"based on current level of functioning it certainly does not appear that she is capable of working at this time full or part time duty due to an excessive number of restrictions that would be required." He suggested more detailed RFC's be conducted and a proper interpretation be obtained from Yoxall's treating physician. Criscuolo noted that "I am in agreement with all the measures that have been attempted up to this point."

3. **Non-Examining State Medical Consultants**

a) Dr. Kenneth Knox

Dr. Knox, a state medical consultant, completed an RFC assessment concerning Yoxall on July 3, 1996. R. 118-125. Knox did not examine Yoxall and performed his assessment without the treating or examining sources' statements regarding the claimant's physical capacity. R. at 124. Knox concluded that Yoxall could occasionally lift or carry a maximum of 20 pounds; frequently lift or carry a maximum of ten pounds; stand and/or walk for a total of six hours in an eight-hour workday; sit for a total of six hours in an eight-hour workday; was unlimited in her capacity to push and/or pull; can occasionally climb, balance, stoop, kneel, crouch, and crawl, and had no other limitations.

b) Dr. Marie Morticciollo

Dr. Morticciollo, a state medical consultant, completed an RFC assessment concerning Yoxall on September 9, 1996. R. 126-133. Morticiollo did not examine Yoxall, but, unlike Knox, she did have the treating or examining sources' statements regarding the claimant's physical capacity. R. at 132. Morticiollo concluded that Yoxall had the RFC to occasionally lift and/or carry a maximum of ten pounds; frequently lift and/or carry ten pounds; stand/walk for two hours in an eight-hour day; sit for a

total of six hours in an eight-hour day; and Yoxall had limited capacity to push/pull in her lower extremities; could never climb ladders, ropes or scaffolds, could frequently balance, stoop, kneel, and occasionally crouch and crawl, and had no other limitations.

Morticciollo also noted that Yoxall had 2% chronic nerve injury, had a normal neurological finding and a normal gait. R. at 127-28. Morticiollo noted that Yoxall's physician's follow-up exam of July 30, 1996 revealed a marked decrease in the range of motion of Yoxall's lumbar spine, atrophy in her left calf muscle, muscle weakness and diffuse hypoflexia. R. at 128. Morticciollo reported that Yoxall's treating physician reported Yoxall as totally disabled. R. at 128. Morticciollo, however, did not concur and reported on page 2 and 3 of her report that the "objective findings" did not support a finding of total disability and that Yoxall "can perform a full range of sedentary work." R. at 128. In addition, Morticciollo noted in the space provided for explaining the difference between the treating physician's findings and her own, that the treating physician "states cl. is incapable of any work however objective findings support the ability to perform sedentary work, see p. 2 and 3. Pt makes other inconsistent work determination over the past 8 years." R. at 132.

B. ALJ's Decision

The ALJ ultimately found thatYoxall was not disabled. R. at 19-20. The ALJ stated that "[t]he evidence supports the finding that the claimant is status post lumbar fusion, and has chronic sciatic nerve injury, impairments which cause significant vocationally relevant limitations." R. at 20. The ALJ cited the treating-physician rule accurately and the five factors that he must consider in evaluating the claimant's subjective complaints under Social Security Ruling ("SSR") 96-7p. Id. The ALJ fairly accurately described Yoxall's activities as supported by the record. R. at 21-22. The ALJ provided a

fairly accurate representation of the record in terms of Engel's and Dickey's findings. R. at 22-24.

As to Yoxall's subjective complaints, the ALJ then found that, "in view of the claimant's diagnosed impairments, she could reasonably be expected to experience pain upon the performance of activities such as heavy lifting, and frequent bending, crawling, crouching, climbing, or frequent pushing and pulling with the hands or feet." R. at 24.

> Although she has significant functional limitations there is no evidence that her impairments produce pain of the chronicity and intensity alleged in her testimony and recorded statements. Therefore, her allegations regarding her subjective complaints can only be credited to the extent that her functional limitations prevent her from performing some types of work but that they do not preclude the performance of work at all levels of exertion.

R. at 24.

The ALJ found that the RFC established by the state agency non-examining medical consultants "is well supported and consistent with the evidence, including reports received after their determinations were made." R. at 25. The ALJ found that Yoxall had the RFC to "perform the exertional demands of sedentary work, or work which requires maximum lifting of ten pounds and involves primarily sitting with occasional walking or standing. The evidence supports a finding that Yoxall is able to occasionally lift and or carry ten pounds, sit for a total of six hours out of an eight hour work day and stand and or walk for a total of two hours out of an eight hour day. She is unable to climb ladders, ropes, and scaffolds. In addition, the claimant must frequently change positions and needs the option to sit or stand." R. at 25.

The ALJ noted that, although Dickey had reported that claimant had reached maximum medical improvement in December 1993 and should be retrained for a light duty position primarily involving

sitting, in July 1996, Dickey stated that Yoxall was unable to perform any work. R. at 25. The ALJ then concluded that Dickey based his opinion that Yoxall was disabled on Yoxall's persistent subjective complaints because "in all previous and subsequent reports, Dickey stated there were no neurological abnormalities." The ALJ also stated that there were no measurements to support Dickey's July 1993 finding of muscle atrophy and that Dickey's description of decreased muscle strength as 4+ out of 5 was "close to normal." The ALJ noted that Dickey also "used 'mild' and 'diffuse' to describe the other abnormalities." R. at 25. For those reasons, the ALJ concluded that "Dr. Dickey's opinion regarding the claimant's disability is not supported or consistent with the objective clinical findings and is rejected." Id.

Further, the ALJ based his opinion that Yoxall was able to perform sedentary work on the opinion of Dr. Blank, a vocational expert. R. at 26. Dr. Blank's opinion was based on a hypothetical of a person who was able "to lift and carry up to ten pounds, sit for six hours out of an eight hour day, [and] stand and walk for two hours out of an eight hour work day." Id. Blank opined that such a person could perform the job of telephone salesclerk and telephone telemarketer. Id.

In response to Yoxall's attorney's hypotheticals, however, Blank stated that a person who needed to take rest periods or leave to take medications two to three times an hour for five minutes could not perform any of those jobs. R. at 26-7. Blank further opined that a person who missed one day a week, nodded off during the job, and had impaired memory could not perform any of those jobs either. R. at 27. The ALJ, however, gave no weight to that testimony because he concluded that "none of the limitations cited in [Yoxall's attorney's] hypotheticals are based on objective findings." Id. The ALJ stated that Yoxall's attorney's "argument that the claimant cannot sustain any activity for

longer than 45 minutes due to constant pain is not supported by the medical evidence of record and is rejected." R. at 25. The ALJ concluded that Yoxall was not disabled. R. at 27.

III. STANDARD OF REVIEW

"A district court may set aside the Commissioner's determination that a claimant is not disabled only if the factual findings are not supported by 'substantial evidence' or if the decision is based on legal error." Shaw v. Chater, 221 F.3d 126, 131 (2d Cir. 2000) (*citing* 42 U.S.C. § 405 (g); Bubnis v. Apfel, 150 F.3d 177, 181 (2d Cir. 1998)). Substantial evidence is "more than a mere scintilla." Schaal v. Apfel, 134 F.3d 496, 501 (2d Cir. 1998). It is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Shaw, 221 F.3d at 131.

"To determine whether the findings are supported by substantial evidence, the reviewing court is required to examine the entire record, including contradictory evidence and evidence from which conflicting inferences can be drawn." Brown v. Apfel, 174 F.3d 59, 61-62 (2d Cir. 1999) (quoting Mongeur v. Heckler, 722 F.2d 1033, 1038 (2d Cir.1983) (per curiam)). "For errors of law, by contrast [to the substantial evidence standard], a deferential standard is not applied." Rosario v. Chater, 1997 WL 167044 at *2 (S.D.N.Y. 1997) (citing Townley v. Heckler, 748 F.2d 109, 112 (2d Cir. 1984) (stating that "[w]here an error of law has been made that might have affected the disposition of the case, this court cannot fulfill its statutory and constitutional duty to review the decision of the administrative agency by simply deferring to the factual findings of the ALJ.")).

On appeal, the reviewing court "conduct[s] a plenary review of the administrative

record to determine if there is substantial evidence, considering the record as a whole, to support the Commissioner's decision and if the correct legal standards have been applied." Shaw, 221 F.3d at 131. This review includes "new evidence submitted to the Appeals Council following the ALJ's decision." Brown, 174 F.3d at 62 (citing Perez v. Chater, 77 F.3d 41, 46 (2d Cir. 1996)). The court's responsibility "is always to ensure that a claim has been fairly evaluated." Id. (quoting Grey v. Heckler, 721 F.2d 41, 46 (2d Cir. 1983)). "Although the standard of review generally implies a deference to the expertise of the agency, the 'courts retain a responsibility . . . to reverse and remand if the Secretary's decision is not supported by substantial evidence.'" Rivera v. Schweiker, 717 F.2d 719, 723 (2d Cir. 1983) (quoting Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981)). The reviewing court "should remember that the [ ] Act is a remedial statute which must be liberally applied; its intent is inclusion rather than exclusion." Rivera, 717 F.2d at 723 (internal quotations omitted).

IV. DISABILITY LAW

The Social Security Act (the "Act") guarantees disability insurance benefits to every disabled individual. Rosa v. Callahan, 168 F.3d 72, 77 (2d Cir. 1999). The Act defines disability as "an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . which has lasted or can be expected to last for a continuous period of not less than 12 months." Shaw, 221 F.3d at 131 (citing 42 U.S.C. § 423(d)(1)(A)). The individual's impairment must be so severe that he is unable to do his previous job and cannot, "considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." Id. at 131-32.

Turning now to the Agency's familiar five-step analysis[4] used to determine a claimant's disability, the parties here focus on the fifth step. *See* Shaw, 221 F.3d at 132. The ALJ concluded that Yoxall met her burden at the fourth step to show that she did not have the residual functional capacity ("RFC")[5] to perform her past work. Tr. at 23. Accordingly, Yoxall contests the ALJ's findings and conclusions at the fifth step of this analysis -- that Yoxall could perform sedentary work with a sit/stand option and was, therefore, not disabled.

At the fifth step, the burden shifts to the Commissioner to prove that the claimant has the RFC to perform other jobs in the national economy. Shaw, 221 at 132; Curry v. Apfel, 209 F.3d 117, 122 & 123n.1 (2d Cir. 2000) ("law requires the Commissioner to prove that [claimant] can sit for the requisite number of hours each day"); Rosa, 168 F.3d at 77, 80; Balsamo v. Chater, 142 F.3d 75, 80 (2d Cir. 1998). RFC is "what you can still do despite your limitations." Tejada v. Apfel, 167 F.3d 770, 774 n.3 (2d Cir. 1999) (citing 20 C.F.R. § 416.945a). In determining the claimant's RFC, "the Secretary must consider objective medical facts, diagnoses and medical opinions based on such facts, and subjective evidence of pain or disability testified to by the claimant or others." Ferraris v. Heckler,

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[4] First, the Commissioner determines whether the claimant is presently employed. If the claimant is working, the claim is unaccepted. If the claimant is not working, the claimant must demonstrate that he has either a mental or physical impairment that limits his ability to do basic work activities. If the agency finds that the claimant fails in doing so, the claim is disapproved. If the agency finds that the claimant has a 'severe impairment,' the Commissioner must consider, based solely on medical evidence, whether the claimant's impairment is listed in the Appendix 1 of the Social Security Regulations. If it is present in the appendix, the Commissioner will automatically consider the claimant disabled, without considering vocational factors, such as age, education, and work experience. If the impairment is not listed, then the claimant must show that he is unable to perform his past work. If the claimant meets this burden, then the Commissioner must show that there is other work that the claimant could perform. Shaw, 221 F.3d at 132; 20 C.F.R. §§ 404.1520, 416.920.

[5] "'Residual Functional Capacity' refers to the claimant's maximum sustained work capability for sedentary, light, medium, heavy or very heavy work." Michaels v. Apfel, 46 F. Supp. 2d 126, 135 n.15 (D. Conn. 1999) (*citing* 20 C.F.R. § 200.00(c)).

728 F.2d 582, 585 (2d Cir. 1984); *see also* 20 C.F.R. § 416.929; Carroll v. Secretary of Health and Human Services, 705 F.2d 638, 642 (2d Cir. 1983); Parker v. Harris, 626 F.2d 225, 231 (2d Cir. 1980); Marcus v. Califano, 615 F.2d 23, 26 n.2 (2d Cir. 1979).

V. ANALYSIS

Before deciding Yoxall's motion to remand for consideration of new evidence,[6] the court must consider whether the ALJ's decision that Yoxall is not disabled, made without the proposed new information, is free of legal error and supported by substantial evidence. *Cf.* Jones v. Sullivan, 949 F.2d 57, 58 (2d Cir. 1991).

The court must first determine whether the ALJ applied the correct legal standard in reviewing Yoxall's case. Tejada, 167 F.3d at 773; Johnson v. Bowen, 817 F.2d 983, 985 (2d Cir. 1987). The court must then examine the record to determine if the ALJ's findings are supported by substantial evidence on the record as a whole. Johnson, 817 F.2d at 985.

Yoxall argues that the ALJ "improperly evaluated [her] ability to perform substantial gainful activity by summarily dismissing both the opinion of the claimant's treating physicians and the claimant's subjective complaints of pain and disability." Plaintiff's Memorandum dated June 13, 2000 ("Pl. Mem.") at 3.[7]

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[6] The court refers to the January 17, 2001 motion. Yoxall's first motion for remand to consider new medical evidence, dated May 22, 2000, involved evidence that Yoxall had submitted to the Appeals Council following the ALJ's decision. The Appeals Council denied Yoxall's request for review. Accordingly, the court has incorporated that evidence into its review. *See* Perez v. Chater, 77 F.3d 41, 46 (2d Cir.1996) ("new evidence submitted to the Appeals Council following the ALJ's decision becomes part of the administrative record for judicial review when the Appeals Council denies review of the ALJ's decision.").

[7] Yoxall does not dispute the ALJ's determination that Yoxall must prove that she was under a disability on or before December 31, 1996. R. at 19. Shaw, 221 F.3d at 131 (citing 20 C.F.R. 404.131(a) (claimant must have disability insured status in quarter she became disabled)).

A. Treating-Physician Rule

The ALJ's failure to give Dickey's opinion controlling weight, or indeed any weight, violated the Second Circuit's treating-physician rule and constitutes legal error. *See* Shaw, 221 F.3d at 134.

"According to the 'treating physician rule,' the medical opinions of a claimant's treating physicians are given 'special evidentiary weight' in disability benefits cases." Gonzalez v. Apfel, 113 F. Supp. 2d 580, 588 (S.D.N.Y. 2000) (quoting Clark v. Commissioner of Social Security, 143 F.3d 115, 118 (2d Cir. 1998)).[8] The treating-physician rule "mandates that the medical opinion of a claimant's treating physician is given controlling weight if it is well supported by medical findings and not inconsistent with other substantial record evidence." Shaw, 221 F.3d at 134. The Social Security Administration regulations specifically state: "Generally, we give more weight to opinions from your treating sources. . . . If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight." 20 C.F.R.
§ 416.927(d)(2); *see also* Shaw, 221 F.3d at 134; Rosa, 168 F.3d at 78-79; Clark, 143 F.3d at 118; Diaz v. Shalala, 59 F.3d 307, 312, 313 (2d Cir. 1995).

If, however, a treating physician's opinion is not given controlling weight, the Commissioner must consider the following factors in deciding how much weight to assign it: "(i) the frequency of

[8] A doctor is a treating physician where a continuous physician/patient relationship develops. *See* Mongeur v. Heckler, 722 F.2d 1033, 1039 n.2 (2d Cir. 1983); Poole v. Railroad Retirement Board, 905 F.2d 654, 656 (2d Cir. 1990) (citing Schisler v. Bowen, 851 F.2d 43, 47 (2d Cir. 1988) (existence of "an ongoing treatment and physician-patient relationship with the claimant" is a predicate for application of the treating-physician rule)).

examination and the length, nature, and extent of the treatment relationship; (ii) the evidence in support of the opinion; (iii) the opinion's consistency with the record as a whole; (iv) whether the opinion is from a specialist; and (v) other relevant factors." Schaal, 134 F.3d at 503; *see also* Shaw, 221 F.3d at 133; Gonzalez, 113 F. Supp. 2d at 588 (citing Clark, 143 F.3d at 118 (citing 20 C.F.R. § 416.927(d)(2)). "The regulations also state that the agency 'will always give good reasons in [its] notice of determination or decision for the weight [it] gives [claimant's] treating source's opinion.'" Clark, 143 F.3d at 118 (brackets in original); *see also* Schaal, 134 F.3d at 504; 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

A licensed medical doctor's opinion is a "medical opinion" under to 20 C.F.R. § 404.1527(a)(2), even if the doctor merely consults, but does not treat, the claimant. Diaz, 59 F.3d at 312, 313; 20 C.F.R. §§ 404.1513(a)(1) & (e), 404.1527(a)(2)). "[I]n evaluating a claimant's disability, a consulting physician's opinions or report should be given limited weight. This is justified because 'consultative exams are often brief, are generally performed without benefit or review of claimant's medical history and, at best, only give a glimpse of the claimant on a single day. Often, consultative reports ignore or give only passing consideration to subjective symptoms without stated reasons.'" Simmons v. United States Railroad Retirement Board, 982 F.2d 49, 55 (2d Cir. 1995) (citing Cruz v. Sullivan, 912 F.2d 8, 13 (2d Cir.1990) (citations omitted)). Although not entitled to controlling weight, the ALJ must consider those factors enumerated in the regulation when assessing the weight to be given the opinions of consulting physicians. Diaz, 59 F.3d at 312, 313 (*citing* 20 C.F.R. §§ 404.1513(e), 404.1527(a)(2)).

Both examining and non-examining medical consultants' opinions are entitled to evidentiary

weight. SSR 96-6p; 20 C.F.R §§ 404.1527(a)(2), 404.1513(a)(1). In light of the aforementioned factors and all else being equal, a non-examining physician's opinion, however, is afforded less weight than a treating or examining-consulting physician's opinion in the evaluation of the claimant's disability. Schisler v. Sullivan, 3 F.3d 563, 567 (2d Cir. 1993); *see also* Vargas v. Sullivan, 898 F.2d 293, 295-96 (2d Cir. 1990) (in elevating opinion of medical adviser, who never had examined claimant, over that of her treating physician, the ALJ violated general rule adopted in all, or virtually all, of the circuits; the general rule being that "the written reports of medical advisors who have not personally examined the claimant deserve little weight in the overall evaluation of disability. The advisers' assessment of what other doctors find is hardly a basis for competent evaluation without a personal examination of the claimant."(citations omitted)); *see also* Schisler v. Bowen, 851 F.2d 43, 47 (2d Cir. 1988), *superseded by regulation*, Schisler v. Sullivan, 3 F.3d 563, 567 (2d Cir. 1993); Whitney v. Schweiker, 695 F.2d 784, 789 (7th Cir. 1982). The regulations permit the opinions of non-examining physicians to override treating sources' opinions only when they are supported by evidence in the record. Diaz, 59 F.3d at 313 n.5; Schisler v. Sullivan, 3 F.3d at 567 (citing 20 C.F.R. §§ 404.1527(f), 416.927(f)).

Here, the ALJ expressly rejected the opinion of Dickey, the physician who treated Yoxall longest, and implicitly rejected the findings of Engel, a shorter-term treating physician, and Criscuolo, a one-time examining physician. The ALJ, instead, relied on the opinions of Knox and Morticciollo, the one-time, non-examining state consultants. In doing so, the ALJ erred.

1. Controlling Weight

Dickey is one of Yoxall's treating physicians. His opinion is therefore entitled to special weight

under the Second Circuit's "treating-physician rule" and is subject to 20 C.F.R. § 404.1527(d)(2). Once the court determines that a doctor is a treating physician, whose opinion is entitled to special weight, the court looks only to see "whether the other substantial evidence rebut[s] the [physician's] conclusions." Diaz, 59 F.3d at 314. The record contains no indication that Dr. Dickey's observations are not well supported by medical evidence or that his opinion was inconsistent with other substantial evidence in the record as a whole.

Throughout the six years[9] that Dickey treated Yoxall, his more than forty reports and the findings therein are consistently supported by medical diagnostic tests; including MRI's, EMG's, CT scans, SPECT scans, x-rays, and myelograms; and clinical techniques; including physical examinations, straight leg tests, and various range-of-motion tests. Despite the fact that the neurological examinations were, for the most part, consistently normal since 1992, other medical tests specifically suggested the existence of many problems, including a central bulging disc, possible herniation, and disc degeneration. The clinical techniques revealed a variety of problems over the course of the treatment, including muscle spasms, scoliosis, and a restricted range of motion.

Over the course of Yoxall's back injury, she consistently sought and received treatment from Dr. Dickey. The following is a summary of the treatment Yoxall received and its effect on her as gleaned from the record. In 1991, following her injury, Yoxall wore a back brace and attempted pool therapy. Having no relief from her symptoms, in December 1992, Yoxall underwent a lumbar fusion,

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[9] Evidence regarding the claimant's condition after the period for which the claimant is seeking disability can be relevant to the question of whether the claimant was disabled prior to the date last insured. *See* Arnone v. Brown, 882 F.2d 34, 39 (2d Cir. 1989).

during which Yoxall's 4th lumbar disc and sacrum were screwed together with a metal screw. Immediately following her surgery, Yoxall was placed in a back brace and Dickey reported that she was temporarily disabled. Yoxall progressed somewhat and eventually weaned herself from the back brace over the next few months. In May 1993, however, Yoxall experienced more pain and aggravated symptoms. At that time, Dickey reported that x-rays showed a "loosening of screw on left of S1." He further reported that there was a "hardware failure, but seems to be developing fusion nonetheless." Dickey then recommended that Yoxall discontinue therapy, resume wearing the back brace, and continue on medication.

Following that protocol, Yoxall improved. In December 1993, Dickey reported that there was a probable "non-union of the fusion." At that point, more than one year post surgery, Dickey opined that Yoxall had reached maximal medical improvement, recommended no further surgery due to Yoxall's stomach complications, and recommended that Yoxall be retrained for light work duty. After that report, Yoxall's condition deteriorated. In September 1995, Yoxall informed Dickey that she was applying for social security benefits. Dickey supported that action.

In June 1996, Yoxall complained of aggravation of her prior symptoms and additional problems, such as dragging of her left foot. Dickey reported that Yoxall's gait then appeared normal. One month later, on July 30, 1996, Dickey reported that Yoxall had marked restriction of movement on examination, and that "of note, she also has atrophy of left calf muscle part at gastrocnemius with apparent weakness in muscle at 4+/5; has mild EHL weakness on left and diffuse hyporeflexia in lower extremities although normal in upper." Dickey then opined that Yoxall "continues to be completely disabled from any type of work. She does have evidence of chronic nerve injury to the sciatic nerve on

the left with muscle atrophy, pain, and dragging of the foot. Again, I think she is completely disabled from any type of work and has been so for many years. She likely will be this way for years to come." After that time, Dickey continued to treat Yoxall. He consistently reported through November 18, 1997, that Yoxall's condition did not change and that Yoxall was disabled from any type of work.

a) Medically Acceptable Clinical and Diagnostic Techniques.

The ALJ identified essentially three grounds for rejecting Dickey's opinion regarding Yoxall's disability as "not supported or consistent with the objective clinical findings." For the reasons discussed below, none of those reasons provide a sufficient basis to reject Dickey's opinion. *See* Shaw, 221 F.3d at 134 (a treating physician's opinion is entitled to "controlling weight if it is well supported by medical findings and not inconsistent with other substantial record evidence.").

i. First reason

In rejecting Dickey's opinion, the ALJ apparently relied, in part, on a perceived inconsistency between Dickey's December 1993 report that Yoxall had reached maximum medical improvement and should be retrained for a light duty position and Dickey's July 1996 report, in which Dickey stated that Yoxall was unable to perform any work.

The ALJ's first basis for rejecting Dickey's opinion is insufficient. It is not unusual for a patient recovering from back injuries to suffer relapse or deterioration of her conditions, particularly when the patient suffers from degenerative disease. *See* Snell v. Apfel, 177 F.3d 128, 130 (2d Cir. 1999) (treating physician initially identified claimant as capable of doing part-time restricted work and then later as totally disabled); Poole v. Railroad Retirement Board, 905 F.2d 654, 656 (2d Cir. 1990) (claimant's condition deteriorated over time); Ferraris, 728 F.2d at 583 (claimant with herniated disc

from car accident returned to work for ten days, found it too painful to continue, worked part-time and then stopped working altogether entitled to benefits).

At the time of Dickey's December 1993 report, Yoxall was recovering from a partially unsuccessful back surgery and had not attempted any type of work since her back injury. Under the circumstances, it is not surprising that Yoxall failed to improve and actually deteriorated over a period of three years and thus was unable to attain Dickey's initial December 1993 projection of her potential ability to work. *See* Shaw, 221 F.3d at 334 ("The facts that [claimant's] condition did not improve, and that there was no suitable treatment other than physical therapy, bolster the argument that [claimant's] impairments were permanent and that he was unlikely to recover from them.").

More importantly, however, the ALJ has a duty to supplement the record when there are inconsistencies in a treating physician's reports. Rosa, 168 F.3d at 79 (when there are deficiencies in the record, ALJ is under "affirmative obligation to develop a claimant's medical history even when the claimant is represented by counsel"); Perez, 77 F.3d at 47 ("when evidence we receive from your treating physician . .. or other medical source is inadequate for us to determine whether you are disabled . . .we will first recontact your treating physician . . . to determine whether the additional information we need is readily available. 20 C.F.R. § 404.1512(e)."). The ALJ could have requested that Dickey provide an explanation for Yoxall's apparent failure to improve over time and should have done so, rather than rejecting Dickey's opinion on that ground. Clark, 143 F.3d at 118 (serious question whether duty to develop the record satisfied when ALJ did not affirmatively seek from treating physician a medical explanation why claimant's condition deteriorated over time). The ALJ's perceived inconsistency in Dickey's reports, therefore, is not a sufficient basis to reject Dickey's opinion.

ii. Second reason

The ALJ also based his rejection of Dickey's opinion on an implicit finding that Dickey relied exclusively on Yoxall's persistent subjective complaints because "in all previous and subsequent reports, Dickey stated there were no neurological abnormalities." There is no evidence to support this conclusion. Mimms v. Heckler, 750 F.2d 180, 186 (2d Cir. 1984) ("an ALJ is not free to assume that a factor, such as pain, was considered in formulating a medical opinion when there is no evidence that such was the case"). In the same reports that included normal neurological findings, Dickey included additional detailed objective medical findings and based his opinion on those findings.

Further, from the beginning and throughout his reports, Dickey relied on objective medical evidence, such as x-rays, MRI's, CT scans and clinical tests, and stated numerous times that "his objective findings did not change." *See, e.g.*, R. at 186, 192, 205, 209, 213, 217, 232, 285. Although Dickey may have taken account of Yoxall's subjective complaints, Dickey's opinion regarding Yoxall's disability is well supported by medically acceptable clinical and diagnostic techniques and tests other than the test that revealed normal neurological function.

The diagnostic and clinical medical findings contained in Dickey's reports support Dickey's opinion of disability. Rather than accepting those diagnostic and clinical findings, the ALJ improperly rejected Dickey's opinion in favor of his own opinion -- that the normal neurological findings contained in those same reports by themselves were enough to undermine Dickey's finding that Yoxall was disabled. The ALJ's approach is not the "overwhelmingly compelling type of critique that would permit the Commissioner to overcome an otherwise valid medical opinion." Shaw, 221 F.3d at 134 (citing Wagner v. Secretary of Health and Human Servs., 906 F.2d 856, 862 (2d Cir.1990) (although a

physician's opinion might contain inconsistencies and be subject to attack, "a circumstantial critique by non-physicians, however thorough or responsible, must be overwhelmingly compelling in order to overcome a medical opinion"); *see also* Rosa, 168 F.3d at 77 ("In analyzing a treating physician's report, 'the ALJ cannot arbitrarily substitute his own judgment for competent medical opinion.' McBrayer v. Secretary of Health and Human Servs., 712 F.2d 795, 799 (2d Cir. 1983).").[10]

iii. Third reason

The ALJ also rejected Dickey's opinion because it contained no measurements to support Dickey's July 1993 finding of muscle atrophy, because Dickey's description of decreased muscle strength as 4+ out of 5 was, in the ALJ's opinion, "close to normal," and because Dickey also "used 'mild' and 'diffuse' to describe the other abnormalities." Again, the ALJ erred by substituting his own judgment -- that measurements of muscle atrophy were necessary, that 4+ out of 5 was insufficient to show decreased muscle strength, and that "mild" and "diffuse" abnormalities are insufficient for a finding of disability -- for that of a medical opinion. *See, e.g.*, Balsamo, 142 F.3d at 80 (ALJ improperly made a medical determination by concluding that an absence of "atrophy of any muscle groups" was inconsistent with a finding of disability); Wagner, 906 F.2d at 861 (ALJ had no sufficient basis for concluding that a treating physician's failure to report that a claimant suffered from "headaches and left-sided weakness" precluded a diagnosis of "hemiplegic migraine.").

Here again, the ALJ erred by failing to fulfill his duty to supplement the record by requesting

[10] Even though the ALJ did not merely substitute his own opinion, but instead relied on Knox's and Morticciollo's opinions, those opinions are not enough, by themselves, to override Dickey's opinion. *See* Havas v. Bowen, 804 F.2d 783, 786 (2d Cir. 1986) ("opinions of non-examining medical personnel cannot in themselves constitute substantial evidence overriding the opinions of examining physicians").

that Dickey provide a medical explanation for his findings or, if necessary, that Dickey provide any additional evidence necessary to permit the ALJ to determine whether Yoxall was disabled. Because the ALJ did not supplement the record, there is no basis for the ALJ's finding that Dickey's opinion is not supported by objective clinical findings.

b) Other Substantial Evidence

Dickey's findings and opinion are consistent with other substantial evidence, including the findings and opinions of other physicians -- Engel, another treating physician, and Criscuolo, an examining-consulting physician -- and Yoxall's subjective complaints. *See* Shaw, 221 F.3d at 134 (a treating physician's opinion is entitled to "controlling weight if it is well supported by medical findings and not inconsistent with other substantial record evidence."). Engel treated Yoxall from December 1991 through June 1992. In April 1992, Engel indicated that Yoxall was improving and could then "be on [her] feet for two hours a day before back pain." Engel's April 1992 report also notes that a "decision will be made in the near future about a possible return to light and/or selected work, but lifting not to exceed 20 lbs."

Because Yoxall had not improved and because the tests indicated a bulging disc and possible herniation, in June 1992 Yoxall was referred to Dickey. R. at 23. Nothing in any of Engel's eleven reports is inconsistent with Dickey's medical findings or eventual conclusion that Yoxall was disabled. In fact, Dickey relied on Engel's laboratory and clinical tests and findings to treat Yoxall. R. at 184. Moreover, as a treating physician, Engel's opinion must be given evidentiary weight.

Dr. Criscuolo, a consulting physician, examined Yoxall in December 1998. Under the circumstances of this case, Criscuolo's opinion is not afforded the same weight as the opinions of

Dickey or Engel, Yoxall's treating physicians, but is afforded more weight than the opinions of Knox and Morticciollo, the non-examining-consulting physicians. Here, Dr. Criscuolo explicitly supported Dickey's past findings and treatment protocol, and also supported Dickey's finding of total disability.

In addition, Dickey's opinion is consistent with Yoxall's subjective complaints. The record indicates that Yoxall consistently complained that she was unable to perform sedentary work of any type. *See* Curry, 209 F.2d at 123 (sedentary work "generally involves up to two hours of standing or walking and six hours of sitting in an eight-hour day."); *see also* Diaz, 59 F.3d at 315 n.13 (in determining whether the claimant could perform sedentary work, "the ALJ should consider the Secretary's suggestion in a Ruling, SSR 83-10, that sedentary work involves sitting for six hours out of an eight hour day."); Ferraris, 728 F.2d at 587 (the concept of sedentary work contemplates substantial sitting).

The ALJ fairly characterized Yoxall's subjective complaints of pain and descriptions of her daily activities. R. at 24-27. Nothing in the record suggests that Yoxall's subjective complaints would permit her to sit and/or stand for any substantial period of time. *See* Poole, 905 F.2d at 664 (claimant need not be a complete invalid to be entitled to benefits); Balsamo, 142 F.3d at 81 (where claimant engages in variety of activities such as driving, watching t.v., riding buses and subways, attending church and helping his wife shop, Commissioner did not sustain burden of establishing plaintiff's ability to perform sedentary work because there was no evidence that claimant "engaged in any of these activities for sustained periods comparable to those required to hold a sedentary job").

The ALJ apparently relied solely on the two non-examining medical consultants' opinions when deciding that Yoxall could perform sedentary work and was not disabled. Def. Mem. at 8. The ALJ

found that the RFC established by Knox and Morticciollo "is well supported and consistent with the evidence, including reports received after their determinations were made." The ALJ then found that Yoxall had the "RFC to perform the exertional demands of sedentary work, or work which requires maximum lifting of ten pounds and involves primarily sitting with occasional walking or standing. The evidence supports a finding that Yoxall is able to occasionally lift and or carry ten pounds, sit for a total of six hours out of an eight hour work day, and stand and/or walk for a total of two hours out of an eight hour day. She is unable to climb ladders, ropes, and scaffolds. In addition, the claimant must frequently change positions and needs the option to sit or stand." The ALJ erred in relying on Knox and Morticciollo's opinions to conclude that Yoxall was not disabled.

Dr. Knox, one of the state medical consultants, completed an RFC assessment concerning Yoxall on July 3, 1996. Knox did not examine Yoxall and performed his assessment without the treating or examining sources' statements regarding Yoxall's physical capacity. Dr. Morticciollo, the second state medical consultant, completed an RFC on September 9, 1996. Morticciollo did not examine Yoxall, but, unlike Knox, she did have the treating or examining sources' statements regarding Yoxall's physical capacity. Although both Knox and Morticciollo found that Yoxall was not disabled, the doctors' RFC's differed. Knox found that Yoxall could occasionally lift a maximum of 20 pounds, stand and/or walk for a total of six hours in an eight hour day and that Yoxall was unlimited in her capacity to push/pull; yet Morticciollo found that Yoxall could only occasionally lift a maximum of ten pounds, stand and/or walk for a total of two hours in an eight hour day, and that Yoxall was limited in her capacity to push/pull in her lower extremities.

Morticciollo found, in addition, that Yoxall had two percent chronic nerve injury, a normal

neurological finding and a normal gait, and that Dickey's follow-up exam revealed a marked decrease in the range of motion of her lumbar spine, atrophy in her left calf muscle and muscle weakness. Morticciollo, however, discounted Dickey's conclusion of disability by reporting in a conclusory fashion that the "objective findings" did not support a finding of total disability and that Yoxall "can perform full range of sedentary work."

Knox's and Morticciollo's opinions are entirely inconsistent with Dickey's opinion and are even partially inconsistent with each other. By itself, a non-examining physician's opinion is afforded little weight in the determination of disability. *See* Havas v. Bowen, 804 F.2d 783, 786 (2d Cir. 1986) ("opinions of non-examining medical personnel cannot in themselves constitute substantial evidence overriding the opinions of examining physicians"). Further, Dickey's opinion is consistent with the two other examining doctors' reports, Yoxall's subjective complaints, and medically acceptable clinical and laboratory diagnostic techniques. Therefore, in the face of the significant record evidence of Yoxall's disability, Knox's and Morticciollo's findings are entitled to relatively little weight. Their findings cannot constitute substantial evidence to overcome a consensus among Yoxall's examining doctors -- including two treating physicians -- that she was unable to perform sedentary work. *See, e.g.*, Simmons, 982 F.2d at 56 (doctor never examined claimant; he merely reviewed the medical file -- not substantial evidence to override treating physician's opinion); Hidalgo, 822 F.2d at 298 (testimony of non-examining medical advisor "does not constitute evidence sufficient to override the treating physician's diagnosis"). In light of those facts, the ALJ erred by failing to afford controlling weight to Dickey's opinion that Yoxall was disabled.

2. Reasons for Rejecting Treating Physicians' Opinions.

Even if Dickey's opinion were not entitled to controlling weight, the ALJ erred by failing to give good reasons for rejecting Dickey's opinion, failing to properly consider the five factors required by the regulations, and then by failing to afford Dickey's opinion some weight.

The ALJ rejected Dickey's opinion regarding Yoxall's disability because it was "not supported or consistent with the objective clinical findings." The ALJ specifically pointed to a lack of abnormal neurological findings, a lack of measurements to support Dickey's findings of muscle atrophy, a lack of a stronger measure of decreased muscle strength, and a lack of stronger words to describe Yoxall's other abnormalities. In general, "the lack of clinical findings in the treating physician's report [does] not, standing by itself, justify the ALJ's failure to credit the physician's opinion." Clark, 143 F.3d at 118 (citing Schaal v. Apfel, 134 F.3d 496 (2d Cir. 1998)). "[E]ven if the clinical findings [are] inadequate, it [is] the ALJ's duty to seek additional information from the [treating] physician sua sponte." Id. (citing Perez v. Chater, 77 F.3d 41, 47 (2d Cir. 1996) ("[T]he ALJ generally has an affirmative obligation to develop the administrative record. This duty exists even when the claimant is represented by counsel.")).

Here, there was no lack of clinical findings. To the contrary, as discussed above, there were numerous clinical findings that supported Dickey's opinion. The ALJ, instead, specifically pointed to a lack of abnormal neurological findings, separate and apart from the medical findings supportive of Dickey's opinion, to justify his rejection of Dickey's opinion. In this case, the ALJ erred by failing to request additional explanatory medical information from Dickey regarding the perceived deficiencies in Dickey's findings and then by rejecting Dickey's opinion on the basis of those "deficiencies." 20 C.F.R. § 404.1527; *see also* Snell, 177 F.3d at 133 (failure to give good reasons for not crediting

treating or non-treating physicians' opinions sufficient ground for remand.).

Moreover, a lack of abnormal neurological findings, particularly in light of the detailed clinical and laboratory tests and findings contained in Dickey's reports that support his opinion, did not justify the ALJ's failure to assign at least some weight to the Dickey's opinion. In assigning weight, there are five factors that the ALJ should consider: (i) the frequency of examination and the length, nature, and extent of the treatment relationship; (ii) the evidence in support of the opinion; (iii) the opinion's consistency with the record as a whole; (iv) whether the opinion is from a specialist; and (v) other relevant factors. Schaal, 134 F.3d at 503. These factors favor giving Dickey's opinion at least some weight.

Dickey is a neurological specialist to whom Yoxall was referred. Dickey consistently met with and examined Yoxall once every month or two for a period of more than six years. He became the primary physician dealing with her injury, performed her surgery, and attempted different types of treatment protocols with Yoxall. Moreover, Dickey's opinion, as noted above, was consistent with the opinions of the other examining doctors, Yoxall's subjective complaints, and medical tests. Therefore, the ALJ erred by failing to give Dickey's opinion any weight.[11]

B. Subjective Complaints of Pain

The ALJ also erred in his determination that Yoxall's subjective complaints were not supported by the record evidence. Although an ALJ properly assesses a claimant's credibility and arrives at an

[11] In addition, the ALJ also did not explain the weight he gave to Drs. Engel's, Criscuolo's, Knox's or Morticciollo's opinions or his reasons for giving them that weight in light of various factors, such as whether the doctor actually diagnosed the claimant, whether the treating physician offered an opinion in his specialty area, the length of treatment, the frequency of visits, the medical evidence, including the laboratory tests, x-rays, and so forth.

independent judgment of the true extent of the claimant's pain, he must do so in light of the medical findings and other evidence. Mimms, 750 F.2d at 186; Tejada, 167 F.3d at 776 (overlooking objective medical evidence supporting the claimant's poor physical condition, then determining that claimant could return to work, constitutes both legal error and supports conclusion that decision not supported by substantial evidence).

The ALJ's reasons for rejecting a claimant's credibility should be explained, and his reasoning should be consistent with the medical evidence in the record. Snell, 177 F.3d at 134. In addition, the Second Circuit has "long held that the subjective element of pain is an important factor to be considered in determining disability." Mimms, 750 F.2d at 185-86. The subjective experience of pain can support a finding of disability when "medical signs and laboratory findings . . . show that the claimant has a medical impairment(s) which could reasonably be expected to produce the pain." Snell, 177 F.3d at 135; 20 C.F.R. § 416.929.

Here, the ALJ correctly recognized that he must give consideration to the claimant's subjective complaints and, in that evaluation, the ALJ must carefully consider the five factors in 20 C.F.R. § 404.1529 and SSR 96-7p. Tr. at 20-21. The record, however, conflicts with the ALJ's findings that Yoxall's subjective complaints of pain were not supported by the medical evidence. The ALJ stated that, "although [Yoxall] has significant functional limitations, there is no evidence that her impairments produce pain of the chronicity and intensity alleged in her testimony and recorded statements." He then concluded, "[t]herefore, her allegations regarding her subjective complaints can only be credited to the extent that her functional limitations prevent her from performing some types of work but that they do not preclude the performance of work at all levels of exertion." The ALJ also stated that "Attorney

Margolis' argument that the claimant cannot sustain any activity for longer than 45 minutes due to constant pain is not supported by the medical evidence of record and is rejected."

The Commissioner argues that the ALJ generally relied on the pain questionnaire and the activities-of-daily-living questionnaire that Yoxall completed, and that the ALJ "considered her testimony at the ALJ hearing, the medications she takes and her response and the medical record" to find that Yoxall's testimony was not credible. Defendant's Memorandum dated July 13, 2000 ("Def. Mem.") at 9-10. The Commissioner did not point to any specific findings in the record to support his conclusion.

The questionnaires and the paperwork that Yoxall completed, her testimony, and the three examining doctors' reports and opinions consistently support Yoxall's subjective complaints that she was in constant pain, had trouble sleeping, did not perform household chores, did not cook, made sandwiches, did not shop, could drive, but had others drive her, and could not sit for a prolonged period of time. None of Yoxall's representations in the record suggest she was able to perform sedentary work of any type. *See* Poole, 905 F.2d at 664; Balsamo, 142 F.3d at 80.

The medical findings made by Engel, Dickey and Criscuolo following examinations of Yoxall lend credibility to Yoxall's claims of her inability to sit or stand for prolonged periods, either by affirmatively describing that inability or, at the least, by failing to contradict Yoxall's subjective complaints and description of her lifestyle and activities prior to December 1996. Rosa, 168 F.3d at 82 (concluding ALJ was incorrect in her assessment of the medical evidence, court did not accept ALJ's conclusion that claimant was not credible as unsupported by the medical evidence). All three examining doctors noted and recited Yoxall's subjective complaints in their reports and did not discount

them. *See* Poole, 905 F.2d at 663 (claimant's complaints about pain and his limitations were consistent when noticed, but not contradicted, by doctors).

On April 4, 1992, Engel opined that Yoxall "can be on feet for two hours a day before back pain." On May 17, 1993, Engel noted that a myelogram showed a disc bulge at L4-L5 and a CT scan showed degenerative disc disease at L5/S1 with Grade I anterior spondylothesis and vacuum disc phenomenon at L5/S1. Engel then stated that "these are the factors that are responsible for [Yoxall's] back pain." That statement accompanied months of findings that Yoxall was experiencing "significant discomfort and pain." The medical and laboratory findings show that Yoxall has a medical condition that could reasonably be expected to produce the pain. Therefore, in this case, Yoxall's subjective experience of pain can support a finding of disability. *See* Snell, 177 F.3d at 135; 20 C.F.R. § 416.929; Gallagher v. Schweiker, 697 F.2d 82, 84-85 (2d Cir. 1983) (claimants' complaints can provide the basis for entitlement to benefits when associated with evidence of a medically determinable impairment).

Dickey did not offer any opinion about how long Yoxall could sit or stand. Nothing in his opinion, however, contradicts Yoxall's claims of her inability to sit or stand for the time required to perform sedentary work. Dickey consistently noted Yoxall's pain and discomfort alongside his medical findings. Dickey did state on December 21, 1993, that Yoxall should be retrained for light duty, including primarily sitting. This, however, was an estimate of future progress that Yoxall never attained.

Moreover, Dickey explicitly stated, though in a somewhat conclusory fashion, that Yoxall was disabled and could perform no job. On July 30, 1996, Dickey noted " I think she is completely

disabled from any type of work and has been so for many years. She likely will be this way for years to come." Dickey had relied on Engel's tests and reports, in addition to conducting his own additional diagnostic laboratory and clinical tests. Although Dickey did not state explicitly that those tests supported Yoxall's subjective complaints, he did so implicitly by consistently reciting Yoxall's complaints in his notes, without contradiction, alongside test results, including tests revealing a failed lumbar fusion, that led him to conclude that Yoxall was disabled. *See* Gallagher, 697 F.2d at 84-85.

Criscuolo's findings also lent credibility to Yoxall's subjective complaints. Criscuolo noted, after examination, that Yoxall "had a stable amount of pain for a number of years now," concurred with Dickey's approach and findings, and concluded that Yoxall was disabled. As discussed above, Dickey's, Engel's and Criscuolo's opinions were supported by substantial evidence, but Knox's and Morticciollo's were not. Because Yoxall's subjective complaints are consistent with Dickey's, Engel's and Criscuolo's opinions and, therefore, are consistent with the objective medical evidence, the ALJ's determination that Yoxall's subjective complaints are not credible is not supported by substantial evidence. *See* Donahue v. Shalala, 851 F. Supp. 27, 34 (D. Conn. 1994) (no substantial evidence to support the Secretary's determination that claimant is not credible when, among other things, claimant's testimony is consistent with objective medical evidence and the opinions of experts).

C. Vocational Expert's Testimony

The ALJ's determination that Yoxall is not disabled fails for another reason. The ALJ based his opinion that Yoxall was able to perform sedentary work on the opinion of Dr. Blank, a vocational expert. Blank's opinion was based on a hypothetical of a person who was able to lift up to ten pounds, sit for six hours a day, and stand and walk for two hours out of an eight-hour work day. The ALJ

apparently based this hypothetical primarily on Knox's opinion, which was not entitled to much weight and was contrary to the substantial evidence on the record as a whole. Accordingly, the assumption underlying the hypothetical is invalid, rendering Blank's opinion meaningless. *See, e.g.*, Dumas v. Schweiker, 712 F.2d 1545, 1554 (2d Cir. 1983) (where no evidence supports the assumption underlying the hypothetical, a VE' s testimony is not helpful if it does not address whether the "particular claimant, with his limitations and capabilities, can realistically perform a particular job"); Brittingham v. Weinberger, 408 F. Supp. 606, 614 (E.D. Pa. 1976) (vocational expert's testimony is meaningless unless there is record evidence to support assumption upon which opinion is based). The ALJ erred in supplying an erroneous assumption upon which Blank based his opinion. Because the ALJ then relied on Blank's opinion to conclude that Yoxall was not disabled, the ALJ's conclusion is erroneous.

VI. CONCLUSION

First, when the correct legal principles are applied, the record does not contain substantial evidence to support the ALJ's finding that Yoxall can perform sedentary work and is, therefore, not disabled. Schaal,134 F.3d at 504 (where there is a reasonable basis for doubt whether the ALJ applied correct legal principles, application of the substantial evidence standard to uphold a finding of no disability creates an unacceptable risk that a claimant will be deprived of the right to have her disability determination made according to the correct legal principles).

Second, because of the significant, consistent evidence that Yoxall cannot sit or stand for the requisite time to perform sedentary work, the court concludes that there is substantial evidence to show that Yoxall is disabled. Applying the proper legal standards, and for all of the foregoing reasons, the

substantial evidence on the record as whole supports the conclusion that Dickey's opinion must be given controlling weight. That leads inexorably to one conclusion -- that Yoxall was disabled prior to December 1996.

It has now been over four years since Yoxall applied for disability benefits. Therefore, the order of the commissioner is reversed and the court remands this case solely for the calculation of benefits.[12] See Schaal,134 F.3d at 504 (even though the court does not reweigh evidence, "where application of the correct legal standard could lead to only one conclusion, we need not remand."); Curry, 209 F.3d at 124 (reverse when Secretary's finding that claimant can engage in sedentary work is not supported by substantial evidence and it had been six years since claimant applied for benefits); Rosa, 168 F.3d at 83 (where no apparent basis to conclude that more complete record might support the Commissioner's decision, opt to remand for calculation of benefits rather than further development of record); Carroll, 705 F.2d at 644 (reverse when Secretary's finding that claimant can engage in sedentary work is not supported by substantial evidence and it had been four years since claimant applied for benefits).

Therefore, the decision of the Commissioner is REVERSED and the case is REMANDED solely for calculation of benefits. Plaintiff's motions for Judgment on the Pleadings (doc. # 8-1) and to Reverse the Decision of the Commissioner are GRANTED (doc. # 8-2) and defendant's motion to Affirm the Decision of the Commissioner (doc. #10) is DENIED. Accordingly, plaintiff's motions to Remand (doc. # 8-3) and to Remand for Consideration of New Medical Evidence (doc. # 12) are

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[12] The Commissioner retains the option to file, in this court, a motion under 42 U.S.C . § 405(g) requesting the matter be remanded for further proceedings before the Commissioner for consideration of new and material evidence omitted from the record. *See* Rosa, 168 F.3d at 83 n.8.

denied without prejudice as moot in light of this ruling. The clerk shall close this file.

SO ORDERED this _____ day of March 2001 at Bridgeport, Connecticut.

_____

Stefan R. Underhill
United States District Judge

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