

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LOVIE MORGAN o/b/o
ANTONIO MORGAN,

Plaintiff,

v.

JO ANNE B. BARNHART, Commissioner,
Social Security Administration,

Defendant.

Civil Action No. 02-552
JR/DAR

REPORT AND RECOMMENDATION

Plaintiff Lovie Morgan brings this action on behalf of her son, Antonio Morgan, for judicial review pursuant to 42 U.S.C. § 405(g), of the final decision of the Commissioner of the Social Security Administration terminating Antonio's supplemental security income ("SSI") benefits under the Social Security Act, 42 U.S.C. §§ 1381, 1382c (a)(3)(C), effective July 1, 1997. Plaintiff's Motion for Judgment of Reversal (Docket No. 7), and Defendant's Motion for Judgment of Affirmance (Docket No. 10), are pending for consideration by the undersigned.¹ Upon consideration of the parties' submissions, the administrative record, and the entire record herein, the undersigned will recommend that Plaintiff's motion be granted; that Defendant's motion be denied; and that this action be remanded to the Commissioner for further proceedings.

BACKGROUND

Plaintiff's son, Antonio, was born on February 9, 1990. R. at 12. Antonio was awarded

¹This action was referred to the undersigned "for the preparation of a report and recommendation on the merits of plaintiff's action for judicial review." October 2, 2002 Order (Docket No. 12).

SSI benefits effective November 1, 1993, based upon a determination that he was disabled as a result of a severe speech impediment and a learning disorder. R. at 10, 43-46. On July 31, 1997, Plaintiff received notice from the Social Security Administration that Antonio “no longer qualifie[d]” for SSI benefits as of July 1, 1997, and was scheduled to receive his last payment in September, 1997. R. at 50-51.² On August 21, 1997, Plaintiff requested reconsideration of the determination that Antonio would no longer be qualified for SSI benefits. R. at 53-54. A hearing was conducted on June 17, 1998, and on July 9, 1998, the hearing officer determined that Antonio was not disabled. R. at 55-61. Plaintiff sought reconsideration of the July 9, 1998 determination, and on February 13, 1999, requested a hearing before an Administrative Law Judge (“ALJ”). R. at 62. The hearing before the ALJ was conducted on September 9, 1999. R. at 10. In a decision rendered on November 22, 1999, the ALJ found that Antonio was not disabled for the purposes of eligibility for SSI benefits. R. at 10-22. Plaintiff’s subsequent request for review by the Appeals Council was denied on January 17, 2002. R. at 2-3. Plaintiff timely filed this action on March 21, 2002.

STANDARD OF REVIEW

A. Scope of Review

The applicable standard of review requires considerable deference to the decision

² On August 22, 1996, Congress enacted the amendments to the Social Security Act contained in the Public Law 104-193. The Social Security Administration then “adopted final regulations in implementation of changes in the definition of childhood disability made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193, §§ 211-212.” Keys v. Barnhart, 347 F.3d 990, 992 (7th Cir. 2003). In the July 31, 1997 notice to Plaintiff, the Social Security Administration advised that it had been “reviewing [Antonio’s] case to see if he is disabled under the new disability for children” and had decided that “he no longer qualifies for Supplemental Security Income (SSI).” R. at 150.

rendered by the administrative law judge. Davis v. Shalala, 862 F. Supp. 1, 4 (D.D.C. 1994).

The issue before this court is whether the Administrative Law Judge's findings, which have been adopted by the Commissioner, are supported by substantial evidence. See 42 U.S.C. § 405(g); see also Jackson v. Barnhart, 271 F. Supp. 2d 30, 33 (D.D.C. 2002). If the findings are (1) supported by substantial evidence and (2) not tainted by error of law, then the district court must affirm the Commissioner's decision. Id.; see Davis, 862 F. Supp. at 4. Thus, when a claimant challenges the decision of the Commissioner, judicial review is limited to ensuring that the decision rendered is in accordance with applicable law and rests upon substantial evidence. Id. "Substantial evidence" is that evidence which "a reasonable mind might accept to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). Substantial evidence need not be a large amount, but must be more than a scintilla. See Pierce v. Underwood, 487 U.S. 552, 565 (1988).

The District of Columbia Circuit has held that "Section 405(g), which governs judicial review of final SSA decisions, authorizes only two types of remands: those pursuant to sentence four and those pursuant to sentence six." Krishnan v. Barnhart, 328 F.3d 685, 691 (D.C. Cir. 2003) (citing Melkonyan v. Sullivan, 501 U.S. 89, 99-100 (1991)). Upon a finding by the district court that the Commissioner's decision does not rest upon substantial evidence, "sentence four" provides that the court may remand the case to the Commissioner for further proceedings, but requires the court to enter "a judgment affirming, modifying, or reversing the decision of the Commissioner." 42 U.S.C. § 405(g); see Melkonyan, 501 U.S. at 98. Alternatively, a district court may retain jurisdiction over the case while remanding it to the Commissioner when either "(1) the Commissioner requested a remand before filing his answer, or (2) there is 'new evidence

which is material and [] there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.” Krishnan, 328 F.3d at 691 (quoting 42 U.S.C. § 405(g)).

B. Eligibility Standard

Section 1381a of the Social Security Act provides that every eligible “aged, blind, or disabled individual” shall be awarded benefits by the Commissioner of Social Security. 42 U.S.C. § 1381a; Morales v. Barnhardt, 2002 WL 31729526, at *5 (S.D.N.Y. December 5, 2002).

On August 22, 1996, Congress enacted the 1996 Personal Responsibility and Work Opportunity Reconciliation Act (“PRWORA” or “the Act”). The PRWORA set forth new standards for determining whether a child is “disabled” for purposes of eligibility for supplemental security income benefits. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193, §§ 211-212. The Act provides, in pertinent part, that

[a]n individual under the age of 18 shall be considered disabled for the purposes of this subchapter if that individual has a medically determinable physical or mental impairment, which results in marked or severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. § 1382c(a)(3)(C)(i)(1997); see also Rodriguez v. Barnhart, 2003 WL 22709204, at *2 (E.D.N.Y. November 7, 2003).

PRWORA further mandated that within one year of its date of enactment, the Commissioner “redetermine the eligibility of individuals under the age of 18 who qualified for SSI based on disability as of August 22, 1996, and whose eligibility might terminate because of changes made by Public Law 104-193.” Supplemental Security Income; Determining Disability for a Child Under Age 18, 65 Fed.Reg. 54,747-48 (Sept. 11, 2000). It was in accordance with this

provision that the Social Security Administration determined that Antonio was no longer eligible for SSI benefits as of July 1, 1997.

The Social Security Administration promulgated new regulations to conform to the requirements of the new legislation, and issued “interim final regulations,” effective April 14, 1997. Childhood Disability Provisions, 62 Fed.Reg. 6408; see Keys, 347 F.3d at 992. The interim final regulations (“interim regulations”) established a three-step sequential evaluation process pursuant to which the Commissioner inquired whether a child: (1) had engaged in substantial gainful activity; (2) suffered from one or more severe impairments; (3) and had an impairment or combination of impairments that met, medically equaled or functionally equaled the Listing of Impairments for childhood disability. 20 C.F.R. § 416.924(a) (2000) (codifying interim final regulations); see also Morales, 2002 WL 31729526, at *5-6. At step three, the child’s impairment(s) would be found functionally equal to a listed impairment if the child’s condition: (1) resulted in “extreme limitation of one specific function, such as walking or talking” or “extreme limitation in one area of functioning or marked limitation in two areas of functioning[;]” (2) subjected the child to “episodic” limitations such as “frequent illnesses or attacks[;]” or (3) required treatment that “cause [d] marked and severe functional limitations.” 20 C.F.R. § 416.926a(b)(1)- (4)(2000); Booker-Shelton v. Barnhart, 266 F. Supp. 2d 818, 821 (N.D.Ill. 2003). “Broad areas of functioning” for children between the ages of three and 18 were defined as: (1) cognition/communication; (2) motor; (3) social;(4) personal; and (5) concentration, persistence, or pace. 20 C.F.R. § 416.926a(c)(4)(2000); Morales, 2002 WL 31729526, at *6. The interim regulations were in effect on November 22, 1999, at the time of the ALJ’s decision that Antonio was not disabled for the purposes of SSI benefits. R. at 10.

On September 11, 2000, the Social Security Administration published final regulations implementing PRWORA, effective January 2, 2001. 65 Fed.Reg. at 54,747. The final regulations provide for substantially the same three-step sequential analysis for the determination of whether a child is “disabled” as the analysis for which interim regulations provided. 20 C.F.R. § 416.924(a). First, the ALJ must determine whether the child is engaged in substantial gainful activity. Id. If the ALJ finds that the child is engaged in substantial gainful activity, then he or she is not entitled to SSI benefits. 20 C.F.R. § 416.924(b). Next, the ALJ must determine whether the child has a severe impairment. 20 C.F.R. § 416.924. If the ALJ finds the child’s impairment to be severe, then step three requires the ALJ to consider whether the child’s impairment “meets, medically equals, or functionally equals the listing” and “meets the duration requirement.” 20 C.F.R. § 416.924(a).

The most significant change in the final regulations is with respect to the analysis required for the determination of whether the child’s impairment results in a limitation that is “functionally equal” to the listings. Compare 20 C.F.R. 416.926a, and 20 C.F.R. 416.926a (c)(4)(2000). Pursuant to the final regulations, the Commissioner will consider how the child “function[s] in [] activities in terms of six domains.” 20 C.F.R. § 416.926a(b)(1). Those domains are: “(i) Acquiring and using information; (ii) Attending and completing tasks; (iii) Interacting and relating with others; (iv) Moving about and manipulating objects; (v) Caring for yourself; and (vi) Health and physical well-being.” 20 C.F.R. § 416.926a(b); Keys, 347 F.3d at 994.

A child will be found to have a “marked” limitation where the impairment interferes seriously with child’s ability to “independently initiate, sustain, or complete activities.” 20 C.F.R. § 416.926a(e)(2). Further, “[m]arked’ limitation also means a limitation that is ‘more than

moderate’ but ‘less than extreme.’” Id. A child will be found to have an “extreme” limitation where the impairment “interferes very seriously with [the child’s] ability to independently initiate, sustain, or complete activities.” 20 C.F.R. § 416.926a(e)(3). Although “marked” and “extreme” limitations can be established by standardized test scores, “the bulk of 20 C.F.R. § 416.926a is devoted to ‘general descriptions of each domain’ against which a claimant’s functioning may be compared[.]” Keys, 347 F.3d at 994. These final regulations became effective on January 2, 2001, after the ALJ’s decision in this case, but before the Appeals Council denied Plaintiff’s request for review on January 17, 2002. R. at 2-3.

In the commentary to the final regulations, the Social Security Administration explained that the “final rules would ‘apply to the entire period at issue for claims that are pending at any stage of [SSA’s] administrative review process, including claims that are pending administrative review after remand from a [f]ederal court.’” Booker-Shelton v. Barnhart, 266 F. Supp. 2d at 821 (quoting 65 Fed.Reg. 54751). Further, “[w]ith respect to claims in which there was a final decision, and that are pending judicial review in [f]ederal court, the SSA ‘expect[ed] that the court’s review of the Commissioner’s final decision would be made in accordance with the rules in effect at the time of the final decision.’” Id. (quoting 65 Fed.Reg. 54751).

At the time the Appeals Council denied Plaintiff’s request for review on January 17, 2002, the final regulations had already become effective, and in accordance with 65 Fed.Reg. 54751, the final regulations were to have been applied. In denying Plaintiff’s request for review of the ALJ’s decision, the Appeals Council “considered the final regulations, effective January 2, 2001, implementing the childhood disability provisions of Public Law 104-193.” R. at 2. The Appeals Council concluded that “[t]he new regulations do not provide a basis to change the Administrative

Law Judge's decision." Id.

The United States Court of Appeals for the Seventh Circuit, in the only published circuit court opinion addressing the very issue presented in this action, concluded that the final regulations govern the court's review of the Commissioner's decision. Keys, 347 F.3d at 994. The facts presented in the instant action are similar in many respects to the facts presented in Keys. With respect to both cases, the ALJ evaluated the child's claim for SSI benefits by applying the interim regulations; the final regulations went into effect while the appeal of the ALJ's decision was pending before the Appeals Council; and the Appeals Council, in denying the plaintiff's request for review of the ALJ's decision, concluded that "[t]he new regulations do not provide a basis to change the Administrative Law Judge's decision." Id. at 992. In reviewing the evidence in the record in the context of the final regulations, the court in Keys found that "[i]n the six domains of functioning, [the claimant] is extremely deficient in none and markedly deficient only in only in one[.]" and concluded that "[t]he denial of benefits was therefore reasonable and must stand." Id. at 994. In so finding, the court questioned "the propriety of reviewing an administrative law judge's decision when it was based on [] inapplicable old regulations[.]" but concluded that "when it is plain, as it is in this case, that the administrative law judge's factual determinations would compel a denial of benefits under the new regulations as well as under the old, the doctrine of harmless error, which is fully applicable to judicial review of administrative decisions, would spare us from having to order a remand in any event." Id. at 994-95 (citations omitted).

Upon consideration of the commentary to the final regulations issued by the Social Security Administration, the Seventh Circuit's thorough decision in Keys, and the procedural

posture of the instant action, undersigned finds that the final regulations govern the Court's review of the ALJ's determination.

DISCUSSION

In the instant case, the ALJ applied the three-step sequential analysis outlined in the interim regulations, and first determined that Antonio was not engaged in substantial gainful activity. R. at 12. Second, the ALJ found that Antonio's attention deficit hyperactivity disorder is a "severe" impairment within the meaning of 20 C.F.R. § 416.924(c)(2000). Id. Third, the ALJ concluded that "the child does not have a listed impairment or an impairment (or combination of impairments) which medically 'equals' the severity of a listed impairment." Id. The ALJ evaluated the functional limitations of Antonio's impairment to determine whether it was functionally equivalent in severity to any listed impairment, and concluded that it was not. R. at 12, 17.

Plaintiff, in her motion for judgment of reversal, contends that the Commissioner's final decision was not supported by substantial evidence, and is erroneous as a matter of law. More specifically, Plaintiff maintains that the ALJ (1) failed to properly evaluate the child's impairments at the third step of the sequential evaluation process, and (2) erroneously determined that the child's impairment was not functionally equivalent to a listing. Memorandum in Support of Plaintiff's Motion for Judgment of Reversal ("Plaintiff's Memorandum") at 9-11, 14-15. Plaintiff seeks a judgment of reversal, or, in the alternative, a remand to the Social Security Administration for a new administrative hearing. Id. at 15.

Defendant opposes Plaintiff's motion, and moves for a judgment of affirmance on the

ground that the ALJ's findings were supported by substantial evidence. Defendant does not address Plaintiff's alternative request for a remand for a new administrative hearing.

Plaintiff filed an opposition to Defendant's motion; neither party filed a reply.

A. Plaintiff's Contention that the ALJ Erred in Failing to Consider Whether Antonio's Impairment Meets the Requirements of Listing 112.11

Plaintiff asserts that the ALJ "failed to articulate any reason to support his determination that the Plaintiff's condition did not meet the requirements of Listing 112.11[,] [20 C.F.R. Pt. 4, Subpt. P, App. 1, 112.11.,] . . . [and] has therefore failed in his duty of explanation." Plaintiff's Memorandum at 9. Further, Plaintiff contends that "the medical evidence reveals that the Plaintiff's impairment meets or equals listing 112.11" and that the ALJ erred by failing "to mention the State Agency physicians' opinions, the Plaintiff's Bender-Gestalt or WIAT scores, or the Plaintiff's hearing testimony, all of which demonstrate that the Plaintiff has a marked cognitive impairment, as well as marked impairment in concentration, persistence, and pace." *Id.* at 9, 11.

Defendant, in its motion and opposition, does not expressly dispute Plaintiff's contention that the ALJ failed to adequately support his finding that Antonio's condition did not meet the requirements of Listing 112.11. *See* Memorandum of Points and Authorities in Support of Defendant's Motion for Judgment of Affirmance and in Opposition to Plaintiff's Motion for Judgment of Reversal ("Defendant's Memorandum") at 8-10. Instead, Defendant submits that the "analysis is, practically speaking, substantially the same for both finding that an impairment meets or equals a listed impairment and for finding that an impairment has functional limitations that equal a listed impairment." *Id.* at 9. Defendant disputes Plaintiff's contention that a consultative

examiner showed that Antonio's impairment met the criteria of Listing 112.11A. However, Defendant does not address the other evidence on which Plaintiff relies in support of her contention that the ALJ erroneously found that Antonio's condition did not fall within the parameters of the condition listed at 20 C.F.R. Pt. 4, Subpt. P, App. 1, 112.11. Id.

Plaintiff, in her opposition to Defendant's motion, submits that the ALJ's failure to provide a rationale to support his decision that the child's condition did not meet a Listed Impairment should preclude the Court from affirming the ALJ's determination. Plaintiff's Opposition to Defendant's Motion for Judgment of Affirmance ("Plaintiff's Opposition") at 2-4. Plaintiff further contends that she relied upon more than the report of the consultative examiner, and that "Defendant has failed to address in any manner the other evidence cited by the Plaintiff, and its impact on the evaluation of the Plaintiff's impairment at step three of the sequential evaluation process." Id. at 5.

Pursuant to the final regulations, consideration of whether an impairment "meets" a "listing" requires consultation of the Listing of Impairments in 20 C.F.R. Pt. 404, Subpt. P, App.1.³ 20 C.F.R. § 416.925. Attention Deficit Hyperactivity Disorder is an impairment listed in 20 C.F.R Pt. 404, Subpt. P, App. 1, 112.11. The regulation provides that "[t]he required level of severity for these disorders is met when the requirements in both A and B are satisfied." 20 C.F.R. Pt. 404, Subpt. P, App. 1, 112.11. "A" requires "[m]edically documented findings of all three of the following: (1) [m]arked inattention; and (2) [m]arked impulsiveness; and (3) [m]arked hyperactivity." Id. "B" provides, with respect to children ages three through 18, the impairment

³The analysis is identical to the analysis provided for in the interim regulations.

must “[result] in at least two of the appropriate age-group criteria in paragraph B2 of 112.02.” Id. The relevant criteria listed in paragraph B2 of 112.02 are “(a) marked impairment in age-appropriate cognitive/communicative function. . . (b) marked impairment in age-appropriate social functioning . . . (c) marked impairment in age-appropriate personal functioning . . . (d) marked difficulties in maintaining concentration, persistence, or pace.” Id. at 112.02(B)(2).

Here, the ALJ concluded that “[t]he impairment does not meet or equal in severity the criteria for any impairment listed at 20 C.F.R., part 404, subpart P, appendix 1[,]” and that “[l]isted impairments related to mental impairment at listings 112.02 through 112.12 have been considered.” R. at 12. The ALJ further found that “[s]ince it has been concluded that the child does not have a listed impairment or an impairment (or combination of impairments) which medically ‘equals’ the severity of a listed impairment, it must now be determined whether the child has an impairment which is functionally equivalent in severity to any listed impairment.” Id. The ALJ made no finding regarding the criteria listed in section “A” of 20 C.F.R. Pt. 404, Subpt. P, App. 1, 112.11.

“If there is one fundamental principle guiding judicial review of an ALJ decision in a Social Security case, it is that the ALJ may not ignore evidence inconsistent with his opinion without explanation.” Martin v. Apfel, 118 F. Supp. 2d 9, 15 (D.D.C. 2000). Given the probative medical evidence in the record that Plaintiff has “marked” levels of inattention, impulsiveness and hyperactivity, the undersigned finds that the ALJ failed to articulate the weight he afforded the medical evidence that Antonio has marked levels of inattention, impulsiveness and hyperactivity. First, Dr. Neil Schiff, the consultative examiner who evaluated Antonio, found that he is “hyperkinetic and easily distracted[,]” and observed that he has “considerable difficulty

maintaining a focus on the testing tasks.” R. at 146. Further, Dr. Schiff observed that Antonio “had trouble concentrating or sustaining his effort on any task for more than a very brief period[,]” and had “significant difficulties with hyperactivity and impulsiveness, which interfere with his optimum functioning.” R. at 146-47. Additionally, two other physicians concluded that Antonio had “marked” impairment with respect to his “concentration, persistence, or pace.” R. at 150, 169. A fourth physician observed that Antonio was “very hyper” and “goes from chair to chair.” R. at 154. In a childhood Disability Evaluation Form completed by Patricia Cott, PhD., Dr. Cott found Antonio’s “impulsive, inattentive, hyperactive behavior deems marked [impairment] on pace/[concentration].” R. at 171.

“In a disability proceeding, the ALJ ‘has the power and the duty to investigate fully all matters in issue, and to develop the comprehensive record required for a fair determination of disability.’” Simms v. Sullivan, 877 F.2d 1047, 1050 (D.C. Cir. 1989)(quoting Diablo v. Sec’y of HEW, 627 F.2d 278, 281 (D.C. Cir. 1980)). Because the ALJ, at stage three, failed to articulate the weight he afforded the medical evidence that Antonio has marked levels of inattention, impulsiveness and hyperactivity, the undersigned will recommend that this action be remanded for the ALJ to “explain what weight he attaches to [the physicians’] conclusions, or if he attached none, his reason therefor.” Butler v. Barnhart, 2004 WL 51116, at *8 (D.C. Cir. January 13, 2004) (quoting Simms, 877 F.2d at 1053); see also Jackson v. Barnhart, 271 F. Supp. 2d 30, 36 (D.D.C. 2002); cf. Morales, 2002 WL 31729526, at *7 (holding that the ALJ is required “to consider ‘all of the relevant evidence in the record, including: (1) the objective medical facts; (2) the medical opinions of the examining or treating physicians; (3) the subjective evidence of the claimant’s symptoms submitted by the claimant, [her] family, and others; and (4) the claimant’s

educational background, age, and . . . experience.”).

B. Plaintiff’s Contention that the ALJ Erred in Concluding That Antonio’s Impairment was not Functionally Equivalent.

Plaintiff contends that “[i]n order to have an impairment that is functionally equivalent to a Listed Impairment, one must have a marked impairment in two areas of function, or an extreme impairment in one area of function.” Plaintiff’s Memorandum at 14. Plaintiff submits that the evidence demonstrates that Antonio has “a marked impairment of concentration, persistence, and pace[,]” as well as a “marked impairment in cognitive function.” *Id.* at 14-15. Plaintiff submits that the evidence also shows, contrary to the ALJ’s determination, that Antonio’s weakness in fine motor skills result in a “limitation of function.” *Id.* at 15.

Defendant submits that “[i]t is important to note that, in order to be found to have an impairment functionally equivalent to a listed impairment, a child would have to be found to have a marked impairment in two areas, not just one.” Defendant’s Memorandum at 14 (citation omitted). Defendant contends that Antonio does not have more than moderate cognitive limitation, and that the evidence suggests that “Antonio was able to function in a normal manner, apparently without behavioral problems, as long as he took his medication.” *Id.* at 15 (citation omitted). Defendant further submits that substantial evidence supports the ALJ’s determination “that Antonio had no limitations in the motor area of development.” *Id.* at 16.

Plaintiff, in her opposition to Defendant’s motion, contends that the Defendant and the ALJ both relied only on the report of Ryland Randolph to support the conclusion that Antonio did not have more than a moderate impairment of his cognitive functioning, but that significant evidence in the record, including Plaintiff’s test results and hearing testimony, demonstrate the

contrary conclusion. Plaintiff's Opposition at 6-7. With respect to Defendant's arguments regarding Antonio's failure to follow prescribed treatment, Plaintiff submits that Defendant has failed to discharge its burden to establish noncompliance by substantial evidence. *Id.* at 8-9.

In determining whether a child's impairment is functionally equivalent to a listed impairment, an ALJ, pursuant to the interim regulations, was required to consider whether a child had two "marked" limitations or one "extreme" limitation in a broad area of functioning, such as cognition/communication; motor; social; personal; and concentration, persistence and pace. 20 C.F.R. § 416.926a (2000). Applying the interim regulations, the ALJ assessed "five areas of development of functioning," R. at 13, and determined that in the "cognition/communication area of development[,]" social functioning, and the concentration, persistence or pace area of development, Antonio had moderate but less than marked limitation of functioning. R. at 14-17. Further, with respect to motor and personal functioning, the ALJ found that Antonio had no limitation. R. at 15, 17. The ALJ concluded that "the claimant does not have 'extreme' limitation in one area of functioning or 'marked' limitation in two areas[.]" and accordingly, was not disabled. R. at 18.

The final regulations encompass numerous substantive changes with respect to the determination of functional equivalence, *see Kittles v. Barnhart*, 245 F. Supp. 2d 479, 489 (E.D.N.Y. 2003), that have a profound implication on the Court's evaluation of the instant action. First, while the interim regulations required the ALJ to consider five "broad areas of functioning" for children between the ages of three and 18, 20 C.F.R. § 416.926a(c)(4)(2000), the final regulations contain six domains which the ALJ must consider in evaluating the claimant's functioning. 20 C.F.R. § 416.926a(b)(1). Second, while some of the "domains" may correlate to

the “broad areas of functioning,” e.g., “attending and completing tasks” and “concentration, persistence, or pace,” “the name change also reflects some substantive differences.” Kittles, 245 F. Supp. 2d at 489. Of particular significance is that “elements from the former ‘cognition/communication’ category are now split between two domains: ‘acquiring and using information’ and ‘interacting and relating[.]’” Id. Third, the final regulations clarify the criteria included in each of the domains, and provide new definitions for terms. Id. at 489. For instance, the domain “attending and completing tasks” includes “a new definition of ‘attention’ as ‘level of alertness, concentration, and the initiating, sustaining, and changing of focus needed to perform tasks.’” Id. (quoting 65 Fed.Reg. at 54,759).

“The Commissioner’s ultimate determination will not be disturbed if it is based on substantial evidence in the record and correctly applies the relevant legal standards.” Butler v. Barnhart, 2004 WL 51116, at *8 (D.C. Cir. January 13, 2004) (quoting 42 U.S.C. §§ 405(g), 1383(c)(3); Craig v. Chater, 76 F.3d 585, 589 (4th Cir.1996)). Another court, confronted with the same issue that is now before this Court, concluded that a remand was necessary “because it is unclear to this Court how exactly it should engage in a substantial evidence review.” Kittles, 245 F. Supp. 2d at 492 (finding that an “attempt to review the Commissioner’s decision for substantial evidence utilizing the Final Rules is a bit like comparing apples and oranges, since the ALJ’s decision was made under a completely different rule regime- namely, the Interim Rules.”) See also Booker-Shelton v. Barnhart, 266 F. Supp. 2d at 823 (remanding the action to the Commissioner and finding that “the court is precluded from conducting a meaningful review of the plaintiff’s case”).

Upon consideration of the substantial modifications of the analysis governing the

determination of whether a child is disabled, as well as the ALJ's failure to articulate the weight accorded to all of the relevant evidence, the undersigned will recommend that this action be remanded to the Commissioner for rehearing and findings in accordance with the applicable regulations. Butler v. Barnhart, 2004 WL 51116, at *8 (D.C. Cir. January 13, 2004) (quoting Simms, 877 F.2d at 1053).

CONCLUSION

For the foregoing reasons, and in accordance with the District of Columbia Court of Appeals decision in Krishnan, 328 F.3d at 691, it is, this 4th day of February, 2004,

RECOMMENDED that Plaintiff's Motion for Judgment of Reversal (Docket No. 7) be **GRANTED**, and (1) that the Commissioner's final decision be **REVERSED** and (2) that this case be **REMANDED** to the Commissioner, pursuant to sentence four of 42 U.S.C. § 405(g), for a rehearing and further findings in accordance with the applicable regulations; and it is

FURTHER RECOMMENDED that Defendant's Motion for Judgment of Affirmance (Docket No. 10) be **DENIED**.

February 4, 2004

Deborah A. Robinson
United States Magistrate Judge

Within ten days after being served with a copy, either party may file written objections to this report and recommendation. The objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for the objection. In the absence of timely objections, further review of issues decided by this report and recommendation may be deemed waived.