UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Donna S. *Plaintiff*,	)	3:20-CV-01404 (KAD)
v.	)	
Kilolo KIJAKAZI,[1] Acting Commissioner of the Social Security Administration, *Defendant*.	)	JANUARY 28, 2022

MEMORANDUM OF DECISION

Kari A. Dooley, United States District Judge:

The Plaintiff, Donna Soufrine ("Plaintiff"), brings this administrative appeal pursuant to 42 U.S.C. § 405(g). She appeals the decision of defendant Kilolo Kijakazi, Acting Commissioner of the Social Security Administration ("Commissioner"), denying her application for disability insurance pursuant to Title II of the Social Security Act (the "Act"). Plaintiff moves to reverse the Commissioner's decision because she argues that the Commissioner's findings are not supported by substantial evidence in the record and/or that the Commissioner did not render a decision in accordance with applicable law. Alternatively, she seeks a remand for further proceedings before the Commissioner. In response, the Commissioner asserts that the decision is supported by substantial evidence in the record, and accordingly moves for an order affirming the decision. For the reasons set forth below, the Plaintiff's Motion to Reverse, ECF No. 21, is GRANTED in part and the matter is remanded to the Commissioner for further proceedings consistent with this decision. The Commissioner's Motion to Affirm, ECF No. 29, is DENIED.

[1]At the time the Plaintiff commenced this action, Andrew Saul was the Commissioner of Social Security. On July 9, 2021, Kilolo Kijakazi became the Acting Commissioner of Social Security and is replaced as the defendant in this action. *See* Fed. R. Civ. P. 25(d).

Standard of Review

A person is "disabled" under the Act if that person is unable to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(a). A physical or mental impairment is one "that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." *Id.* § 423(d)(3). In addition, a claimant must establish that their physical or mental impairment or impairments are of such severity that they are not only unable to do their previous work but "cannot, considering [their] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . ." *Id.* § 423(d)(2)(A).

Pursuant to regulations promulgated by the Commissioner, a five-step sequential evaluation process is used to determine whether a claimant's condition meets the Act's definition of disability. *See* 20 C.F.R. § 404.1520. In brief, the five steps are as follows: (1) the Commissioner determines whether the claimant is currently engaged in substantial gainful activity; (2) if not, the Commissioner determines whether the claimant has "a severe medically determinable physical or mental impairment that meets the duration requirement in § 404.1509" or a combination of impairments that is severe and meets the duration requirements; (3) if such a severe impairment is identified, the Commissioner next determines whether the medical evidence establishes that the claimant's impairment "meets or equals" an impairment listed in Appendix 1 of the regulations[2]; (4) if the claimant does not establish the "meets or equals" requirement, the Commissioner must then determine the claimant's residual functional capacity ("RFC") to perform his past relevant

[2] Appendix 1 to Subpart P of Part 404 of C.F.R. 20 is the "Listing of Impairments."

work; and (5) if the claimant is unable to perform his past work, the Commissioner must finally determine whether there is other work in the national economy which the claimant can perform in light of their RFC, education, age, and work experience. *Id.* §§ 404.1520(a)(4)(i)-(v); 404.1509. The claimant bears the burden of proof with respect to Steps One through Four and the Commissioner bears the burden of proof as to Step Five. *See McIntyre v. Colvin*, 758 F.3d 146, 150 (2d Cir. 2014).

The fourth sentence of Section 405(g) of the Act provides that a "court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Commissioner. . . with or without remanding the case for a rehearing." 42 U.S.C. § 405(g). And it is well-settled that a district court will reverse the decision of the Commissioner only when it is based upon legal error or when it is not supported by substantial evidence in the record. *See Beauvoir v. Chater*, 104 F.3d 1432, 1433 (2d Cir. 1997); *see also* 42 U.S.C. § 405(g) ("The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive. . ."). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Talavera v. Astrue*, 697 F.3d 145, 151 (2d Cir. 2012) (internal quotations omitted). The court does not inquire as to whether the record might also support the plaintiff's claims but only whether there is substantial evidence to support the Commissioner's decision. *Bonet ex rel. T.B. v. Colvin*, 523 Fed. Appx. 58, 59 (2d Cir. 2013). Thus, substantial evidence can support the Commissioner's findings even if there is the potential for drawing more than one conclusion from the record. *See Vance v. Berryhill*, 860 F.3d 1114, 1120 (8th Cir. 2017). The court can only reject the Commissioner's findings of facts "if a reasonable factfinder would have to conclude otherwise." *Brault v. Social Sec. Admin.*, 683 F.3d 443, 448 (2d Cir. 2012). Stated simply, "if there is

substantial evidence to support the [Commissioner's] determination, it must be upheld." *Selian v. Astrue*, 708 F.3d 409, 417 (2d Cir. 2013).

Factual and Procedural History

On January 9, 2018, Plaintiff filed an application for disability insurance benefits[3] pursuant to Title II of the Act, alleging an onset date of June 14, 2011. The claim was initially denied on February 28, 2018 and upon reconsideration on July 19, 2018. Thereafter, a hearing was held before Administrative Law Judge (ALJ) Deirdre R. Horton on May 7, 2019. A vocational expert, Dennis J. King, testified at the hearing and an attorney, Justin Raymond, represented Plaintiff. On May 29, 2019, the ALJ issued a written decision denying Plaintiff's application for benefits.

In her decision, the ALJ followed the sequential evaluation process for assessing disability claims.[4] At Step One, the ALJ found that Plaintiff had not been engaged in substantial gainful activity between June 14, 2011, the alleged onset date, and December 31, 2016, the date last insured. At Step Two, the ALJ determined that Plaintiff had a severe combination of impairments, which included Patellofemoral Degenerative Joint Disease of the left knee, asthma, depressive disorder, generalized anxiety disorder, and trauma disorder. At Step Three, however, the ALJ concluded that Plaintiff did not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in Appendix 1. At Step Four, the ALJ found that Plaintiff has the RFC to perform medium work[5] subject to several limitations, to include that Plaintiff could perform simple, routine tasks with no more than occasional interaction with others; that Plaintiff should have no concentrated exposures to respiratory irritants such as dusts, fumes,

[3] The regulations for disability and disability insurance are found at 20 C.F.R. § 404.900, *et seq.*
[4] *See supra.*
[5] Medium work involves lifting no more than 50 pounds at a time with frequent lifting or carrying of objects weighing up to 25 pounds. If someone can do medium work, it is determined that they can also do sedentary and light work. *See* 20 C.F.R. § 404.1567(c).

and gases; and that Plaintiff's work should include only moderate noise levels. Lastly, at Step Five, the ALJ determined that Plaintiff does not have the RFC to perform her past relevant work as a licensed practical nurse, but based on testimony from Mr. King, that there are a significant number of jobs in the national economy that Plaintiff can perform. Accordingly, the ALJ concluded that the Plaintiff was not disabled under Sections 216(i) and 223(d) of the Act. This timely appeal followed.

Discussion

Plaintiff advances three arguments in her appeal. First, that the administrative record was not adequately developed. Second, that the ALJ's findings at Step Two, namely, that Plaintiff's Carpo-metacarpal joint issues, sinus infections, temporomandibular ("TMJ") dysfunction, irritable bowel syndrome, obesity, and hearing loss are non-severe impairments, are unsupported by the record. And third, that the ALJ's findings at Step Five, which determined that Plaintiff could perform medium-level work in multiple occupations in the national economy, are likewise unsupported by the record.

The Commissioner contests each of these assertions. First, the Commissioner argues that the ALJ properly developed the administrative record. Second, that the ALJ was correct in finding that Plaintiff's osteoarthritis, TMJ disorder, and irritable bowel syndrome[6] were non-severe impairments. And, finally, that there is substantial evidence in the record, including the testimony of Mr. King, to support the finding at Step Five that there are a significant number of jobs in the national economy that the Plaintiff could perform, and therefore that she was not disabled under the Act.

[6] These are the only three conditions Plaintiff specifically addresses in her memorandum in support of the Motion to Reverse, so these are likewise the only three conditions addressed by the Commissioner and by the Court.

Although the Court disagrees with Plaintiff as to her first and second arguments regarding the adequacy of the record and the severity of some of her conditions, the Court agrees that the ALJ erred in her analysis at Step Five. Specifically, the Court finds that Mr. King's testimony on job incidence numbers was wholly conclusory and unsupported. It was therefore not substantial evidence on which the ALJ could rely.

1. The Vocational Expert's Testimony was Inadequate

The Court begins with the error on which this case turns. At Step Five, an ALJ must determine that significant numbers of jobs exist in the national economy that a claimant can perform.[7] The ALJ can make this determination by either applying the Medical Vocational Guidelines—not applicable here—or by adducing testimony of a vocational expert. *See McIntyre*, F.3d 146 at 151 (citation omitted). A vocational expert's testimony may constitute substantial evidence where the vocational expert has "identified the sources he generally consulted to determine such figures" but there is no requirement for the vocational expert to "identify with greater specificity the source of his figures or to provide supporting documentation." *Seneschal v. Berryhill*, No. 3:18-cv-00015 (RMS), 2019 WL 1075606, at *4 (D. Conn. Mar. 7, 2019) (quoting *Brault*, 683 F.3d 443 at 450). For example, an ALJ does not err when he relies on a vocational expert's testimony that is based on "personal experience, labor market surveys, and published statistical sources in determining the number of jobs available." *Martinez v. Berryhill*, No. 3:17-cv-00843 (SRU), 2019 WL 1199393, at *18 (D. Conn. Mar. 14, 2019); *see also Debiase v. Saul*, No. 3:19CV00068(RMS), 2019 WL 5485269, at *11 (D. Conn. Oct. 25, 2019).

[7] Because the Court's decision to remand concerns the substantial evidence standard, the Court declines to address the additional Step Five arguments made by Plaintiff, which challenge the propriety of the hypotheticals posed by the ALJ, the mathematical possibility of the job incidence numbers, and the finding that Plaintiff could perform medium-level work.

In *Biestek v. Berryhill*, the Supreme Court addressed the contours of a vocational expert's testimony and the circumstances under which it could constitute substantial evidence to support an ALJ's Step Five determination. *See Biestek v. Berryhill*, 139 S. Ct. 1148 (2019). There, the vocational expert had attested that his testimony as to the nature and number of jobs in the national economy which the plaintiff could perform derived from Department of Labor statistics as well as surveys she had conducted with her own clientele. *Id.* at 1153. The expert balked when asked to produce the data from the private survey, and the ALJ interjected that the data need not be provided. *Id.* On appeal, the disability claimant asserted that because the vocational expert refused to provide the requested data, as a matter of law, the testimony could not "clear the substantial evidence bar." *Id*. The Supreme Court rejected this categorical approach:

> Sometimes, an expert's withholding of such data, when combined with other aspects of the record, will prevent her testimony from qualifying as substantial evidence. That would be so, for example, if the expert has no good reason to keep the data private and her testimony lacks other markers of reliability. But sometimes the reservation of data will have no such effect. Even though the applicant might wish for the data, the expert's testimony still will clear (even handily so) the more-than-a-mere-scintilla threshold. The inquiry as is usually true in determining the substantiality of evidence, is case by case.

Id. at 1157. And in dicta, the Supreme Court confirmed that even "assuming no demand, a vocational expert's testimony *may* count as substantial evidence even when unaccompanied by supporting data." *Id.* at 1155 (emphasis added).[8] The reviewing court must consider "all features of the vocational expert's testimony, as well as the rest of the administrative record." *Id.* at 1157. And although the ALJ's analysis deserves a certain amount of deference, *Brault* establishes that

[8] In rejecting the proposed categorical rule urged by the plaintiff, the Court envisioned several hypothetical cases which counseled against such an approach. In one such hypothetical a vocational expert has "top-of-the-line credentials, including professional qualifications and many years' experience…a history of giving sound testimony about job availability in similar cases" and she "explains that she arrived at her figures by serving a range of representative employers; amassing specific information about their labor needs…and extrapolating those findings to the national economy by means of a well-accepted methodology." *Id.* These bases for the expert's testimony are illustrative of the kinds of sources that can support a vocational expert's testimony regarding job incidence numbers. As discussed below, none of these hypothetical sources are present (or at least identified) in the instant case.

"[a]s deferential as the 'substantial evidence' standard is, it is also extremely flexible" because it "gives federal courts the freedom to take a case-specific, comprehensive view of the administrative proceedings, weighing all the evidence to determine whether it was 'substantial.'" *See Brault,* 683 F.3d at 449. Since *Biestek,* at least one court in this District has opined that factors other than source data, including the vocational expert's "credentials, history of testimony…ability to answer the ALJ and attorney's questions, and the alleged basis for her testimony," may be relevant in determining whether the substantial evidence standard is met. *Keovilay v. Berryhill*, No. 3:19-cv-0735 (RAR), 2020 WL 3989567, at *9 (D. Conn. Jul. 15, 2020).

As to whether the ALJ considered any of the above factors in accepting the vocational expert's testimony in this case, the Court has no way of knowing because the ALJ does not explain her decision to do so. And the record itself is devoid of ***any*** basis upon which the vocational expert based his conclusory opinion regarding the number of jobs available to the Plaintiff in the national economy.[9] In combination, there is but one conclusion—the ALJ's determination at Step Five is not supported by substantial evidence.[10]

As indicated, Mr. King did not identify any source that he consulted to establish the job incidence numbers to which he testified. Nor did Mr. King suggest his findings were based on any personal experience or history of testifying specifically on job incidence data. At the hearing, Mr. King testified, in relevant part:

[9] This is not to criticize the vocational expert. The ALJ did not ask Mr. King the source of his testimony regarding the number of jobs available of the type identified as within the Plaintiff's capacity.

[10] Contrary to the Commissioner's contention, *Biestek* did not establish a bright-line rule defining when evidence upon which an ALJ relies is sufficiently substantial. And the Court rejects the Commissioner's argument that *Biestek* establishes a presumption that Mr. King's testimony cleared the substantial evidence bar. *Biestek's* narrow holding does not dictate when the substantial evidence bar is met, it only forecloses a rule that underlying data supporting source information is a *necessary* condition for satisfying that bar. The Court also observes that *Biestek* is not as on point as the Commissioner posits. In *Biestek,* the vocational expert identified two sources as supporting the job incidence testimony–the Department of Labor statistics and the results of a private internal survey she had conducted with her clients. It was the data underlying the survey which was withheld. Here, the sources themselves remain a complete mystery, a scenario that *Biestek* does not address.

ALJ: Are there jobs in the national economy such an individual could perform?

VE: Yes, your honor. Give me a moment. Okay. Eight and—oh another [INAUIDBLE]. One would be a dietary aide. Dietary aide is DOT[11] 319.677-014. This is medium, with an SVP[12] of 2. Number in the United States: 873,900. Another would be a sandwich maker. Sandwich maker is DOT 317.664-010. This is medium, with an SVP of 2. Number in the United States: 836,700. And finally, a packer. Packer is 920.587-018. This is also medium, with an SVP of 2. Number in the United States: 700,560.

Tr. of ALJ Hr'g. R. at 184–85. The transcript reveals no further questions by the ALJ as to the source or basis for the job incidence numbers provided. After this exchange, Attorney Raymond questioned Mr. King about an employer's tolerance for off task behavior and absenteeism. Attorney Raymond did not inquire as to the source of the expert's testimony regarding job incidence numbers. Attorney Raymond likewise did not challenge Mr. King's credentials or qualifications. Thus, at no point during the hearing were *any* evidentiary sources for the job incidence numbers offered or discussed. The ALJ then asked whether the testimony had "been consistent with the DOT and its companion publications." Tr. of ALJ Hr'g, R. at 188. Mr. King affirmed that the information he had provided was "consistent." *Id.*

Following the testimony regarding an employer's likely tolerance for off task behavior (10% or more would not be tolerated) and absenteeism (two days a month would not be tolerated), the following exchange occurred between Plaintiff's counsel and the vocational expert:

Q: And Mr. King, what's the basis of your testimony with respect to these figures?

[11] The *Dictionary of Occupation Titles*, commonly referred to as the "DOT," defines types of jobs in the national economy but does not speak to how many of those jobs are available. *See Brault*, 683 F.2d 443 at 446.
[12] Specific Vocational Preparation as defined by the DOT.

> A: Well, basically 40 years of experience working and placing people with employers. This is how I determined what their tolerance will be when I do select the placements and, you know, what the employers are telling is what's the point at which they'd, you know. They've either got to correct it or, you know, they're going to be out of here." [13]

Id.

The Commissioner argues that the vocational expert's assertion that his testimony was consistent with the DOT provided substantial evidence for the ALJ's determination. The Court disagrees. Confirming consistency with the DOT is insufficient. The DOT may be an appropriate basis for a vocational expert's opinion regarding the *type* of job available to a claimant, but not regarding the *number* of available jobs of that type. *See Martinez*, 2019 WL 1199393, at *18 (emphasis in original). In sum, the record is simply silent as to the source or sources the vocational expert consulted or the method of analysis he used to support his job incidence testimony. His testimony did therefore not pass, an albeit low, substantial evidence bar. *See id.* (finding a vocational expert's testimony was inadequate because he failed to identify any sources or method of analysis other than mentioning that his testimony was consistent with the DOT).

Nevertheless, the Commissioner cites to several cases in its memorandum to support a conclusion that the ALJ did not err at Step Five. First, the Commissioner cites to *Jones-Reid v. Astrue*, 934 F. Supp. 2d 381, 407 (D. Conn. 2012), *aff'd*, 515 F. App'x 32 (2d Cir. 2013), and argues that a vocational expert is not required to provide a step-by-step description of the methodology used for the ALJ to find the testimony reliable. The Court has no quarrel with this

[13] The Commissioner argues that this exchange provides the missing source information for the job incidence numbers. The transcript is unambiguous however that the "figures" referenced in counsel's question are those relating to the employer's tolerance for off task behavior and absenteeism and not, as urged, a reference to the job incidence numbers.

assertion but that is not the infirmity at issue here. In this case, there was no testimony regarding methodology, largely because there was no source identified against which to employ any methodology. The Commissioner also relies upon *Debiase*, *see supra*, which explains that an ALJ does not err when he relies on the expert's personal experience, labor market surveys, and published statistical sources for job incidence numbers. Further, that an identification of the general sources and consideration of the experience and skill of the expert suffices. *Id.* Again, not this case. The record does not reveal that any of these accepted sources were identified as a basis for the expert's opinion regarding job incidence numbers.

Finally, the Commissioner relies upon *Crespo v. Comm'r of Soc. Sec.*, No. 3:18CV00435(JAM), 2019 WL 4686763, at *9 (D. Conn. Sept. 25, 2019), which allows an ALJ to rely on the expertise of the vocational expert and to do so without requiring them to lay a further foundation about the sources relied upon. Again, while an ALJ may not be foreclosed from doing so, the Court must assess the substantiality of the evidence on a case-by-case basis. In this case, absent any identifiable source of the expert's opinion and absent any identifiable basis upon which the ALJ credited the opinion, the Court determines that there was not substantial evidence to support the ALJ's Step Five conclusions.[14] And there is no question that the ALJ did rely upon Mr. King's job incidence testimony in determining Plaintiff's disability status as her conclusions mirror the testimony of Mr. King. ALJ's Decision, R. at 22. Accordingly, at the only Step in the evaluation process in which the Commissioner bears the burden, that burden is not met. In making this determination, the Court is not applying a bright li ne rule regarding when a vocational expert's

[14] To the extent relied upon by the Commissioner, the statement by Mr. King, in a completely different context that he has "basically 40 years of experience working and placing people with employers"— is too vague and untethered to the opinion at issue to support the ALJ's conclusion. Tr. of ALJ Hr'g, R. at 188.

testimony provides substantial evidence, but determines only that in this case, the ALJ did not have substantial evidence upon which to rely at Step Five.

2. The Administrative Record was Adequately Developed

The Court agrees with the Commissioner that the ALJ adequately developed the administrative record. First, Plaintiff argues that various facts, including Plaintiff's multiple references to mental health treatment (including medication prescriptions) "should have given" the ALJ reason to believe that there were mental health treatment records at least dating back to June 2011, the alleged onset date, and the time at which Plaintiff learned about the death of her son. Plf.'s Mot. to Reverse, ECF No. 21 at 2. Although Plaintiff argues that "no effort whatsoever appears to have been undertaken" by the ALJ to retrieve these possible records, such an undertaking was not required under these circumstances. *Id.* Upon inquiry, Attorney Raymond confirmed to the ALJ that the record was complete. Tr. of ALJ Hr'g, R. at 160. While the Commissioner undoubtedly has an obligation to affirmatively develop the record, such an obligation arises where there are some indicia that the record is not, in fact, complete. *See e.g.*, *Perez v. Chater*, 77 F.3d 41, 48 (2d Cir. 1996) (finding that when there is an "adequate" record upon which to make a disability determination, an ALJ does not fail to develop the record by not soliciting more information); *Rusin v. Berryhill*, 726 F. App'x. 837, 840 (2d Cir. 2018) (finding where there are no obvious gaps in the administrative record, and where the ALJ already possesses a complete medical history, the ALJ has no obligation to seek additional information). But an ALJ may rely on assurances from Plaintiff's attorney that the administrative record is complete. *See Jason C. v. Berryhill*, No. 6:17-CV-01106 (TWD), 2019 WL 1409804, at *5 (N.D.N.Y. Mar. 28, 2019) ("An ALJ has taken reasonable steps to complete the medical record when she asks claimant's attorney at a hearing if the medical records before her are complete, and the attorney

answers affirmatively."); *see also, Zabala v. Astrue*, 595 F.3d 402, 408 (2d Cir. 2010) (finding that an ALJ's duty to develop the record does not include anticipating that a claimant will change their mind that they submitted all evidence in support of the disability claim). And here, neither Plaintiff nor her attorney made any attempt after the hearing to advise the ALJ of missing medical records. Def.'s Mot. to Affirm, ECF No. 29 at 7.

Moreover, Plaintiff referenced only one mental-health provider, Dr. Hamdheydari, in her application for benefits. Attorney Raymond acknowledged in a letter to the ALJ that both he and the Social Security Administration had tried to request records from Dr. Hamdheydari. Def.'s Mot. to Affirm, ECF No. 29 at 4; *see Rivera v. Comm'r of Soc. Sec.,* 728 F. Supp. 2d 297, 330 (S.D.N.Y. 2010) (finding that courts do not necessarily require ALJs to develop the record by obtaining additional evidence themselves, but often permit them to seek it through the claimant or his counsel) (citations omitted). It is not visited upon the ALJ, however, if the provider eschews those efforts. *See Drake v. Astrue*, 443 F. App'x 653, 656 (2d Cir. 2011) (finding that a hospital's failure to provide its records does not mean the ALJ did not exercise reasonable efforts to develop the record). So, an ALJ does not err when he attempts to obtain records from the only mental-health provider specified by the Plaintiff and those records are admitted into evidence. *See Vella v. Comm'r of Soc. Sec.,* 394 F. App'x 755, 758 (2d Cir. 2011) (finding the record was properly developed where the record contained available medical records from sources identified by the plaintiff).[15]

[15] In addition, a Plaintiff who asserts that the ALJ failed to develop the record with respect to certain records bears the additional burden of demonstrating that the records, had they been obtained, would have undermined the ALJ's decision. *See Lena v. Astrue*, No. 3:10CV893 SRU, 2012 WL 171305, at *9 (D. Conn. Jan. 20, 2012); *see also Bailey v. Saul*, 3:20-CV-00051 (KAD), 2021 WL 797833, at *3 (D. Conn. Mar. 2, 2021) Here, although Plaintiff identifies missing records, she does not reveal what those records might show or why they would in turn undermine or alter the ALJ's decision.

3. The ALJ's Step Three Findings were Supported by Substantial Evidence

Plaintiff also challenges the ALJ's findings that her Carpo-metacarpal joint issues, sinus infections, TMJ dysfunction, irritable bowel syndrome, obesity and hearing loss are non-severe impairments. She argues that these conditions were not meaningfully considered. The court disagrees. To be severe, an impairment or combination of impairments "must cause 'more than minimal limitations in [a claimant's] ability to perform work-related functions.'" *Windom v. Berryhill*, No. 6:17-cv-06720-MAT, 2018 WL 4960491, at *3 (W.D.N.Y. Oct. 14, 2018) (alteration in original) (quoting *Donahue v. Colvin*, No. 6:17-CV-06838(MAT), 2018 WL 2354986, at *5 (W.D.N.Y. May 24, 2018)). It is the claimant who bears the burden of providing evidence establishing the severity of the condition. *See Bailey v. Berryhill*, No. 3:18-cv-00013 (WIG), 2019 WL 427320, at *3 (D. Conn. Feb. 4, 2019). Although Plaintiff initially identified multiple impairments in this argument, in her memorandum, she only addresses in any detail the ALJ's analysis of the joint issues, the TMJ dysfunction, and the irritable bowel syndrome.[16]

As to the joint issues, contrary to Plaintiff's assertion, the ALJ did meaningfully address them in the record. The ALJ relied on the recommendation of Dr. Richard Bernstein, who in 2012 advised that Plaintiff should not undergo surgery due to the stress associated with the procedure.[17] Following the discharge from Dr. Bernstein, Plaintiff neither sought follow-up treatment nor revisited the idea of surgery. *See Arnone v. Bowen*, 882 F.2d 34, 39 (2d Cir. 1989) (finding that claimant's failure to seek medical attention does not preclude a finding of disability but it does "seriously undermine" such a finding); *see also Diaz-Sanchez v. Berryhill*, 295 F. Supp. 3d 302,

[16] Plaintiff refers to the joint impairment as osteoarthritis while the ALJ refers to it as CMC joint inflammation. Both describe the same condition.

[17] Plaintiff asserts that Dr. Bernstein's recommendation not to undergo surgery was based on her inability to handle the associated stress at the time and was not based on her medical need for the surgery. Either way, the surgeon did not believe he could do anything to treat her and advised her to follow up if any of her symptoms changed. Plaintiff has not done do.

306 (W.D.N.Y. 2018) ("where…a claimant has sought little-to-no treatment for an allegedly disabling condition…inaction may appropriately be construed as evidence that the condition did not pose serious limitations.")

Regarding the TMJ condition, Plaintiff acknowledges that the existing records from her dentist, Dr. Howard Charney, are "uninformative" and that there is "neither a narrative nor a medical source statement explaining" the condition. Plf.'s Mot. to Reverse, ECF No. 21 at 14. With only a mention of—and no record of complaints or treatment concerning—the TMJ, the ALJ could not have determined that the condition was sufficiently limiting as to be classified as severe. *See Bailey*, 2019 WL 427320, *at 3 (finding that the "mere presence of a disease or impairment…is not, by itself, sufficient to render a condition severe") (quoting *Taylor v. Astrue*, 32 F. Supp. 3d 253, 265 (N.D.N.Y. 2012)).

Finally, Plaintiff argues that although her irritable bowel syndrome symptoms improved, they persisted. As the Commissioner avers, however, Plaintiff made no attempt to identify how this condition affected her ability to work and did not submit any medical evidence to support the finding that the condition was severe. *See supra*, *Bailey*, 2019 WL 427320, at *3. Moreover, the record demonstrates that by the end of 2012, the irritable bowel syndrome symptoms improved and were managed effectively with medication. Def.'s Mot. to Affirm, ECF No. 29 at 14. Therefore, Plaintiff has not established that the ALJ erred at Step Three in determining that Plaintiff had not met her burden of demonstrating that any of these three conditions are severe.

Conclusion

For the foregoing reasons, the Plaintiff's Motion to Reverse (or in the alternative for remand), ECF No. 21, is GRANTED in part and the Commissioner's Motion to Affirm, ECF No. 29, is DENIED. The case is REMANDED for further articulation and/or development of the ALJ's

determination at Step Five. Further, on remand, Plaintiff may submit any additional medical records she deems relevant to her application for disability benefits. The Clerk of the Court is directed to enter Judgment in favor of Plaintiff and close the file.

SO ORDERED at Bridgeport, Connecticut, this 28th day of January 2022.

/s/ Kari A. Dooley
KARI A. DOOLEY
UNITED STATES DISTRICT JUDGE