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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THOMAS D. SERPE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. NO.: 12-570-LPS
	)	
MICHAEL J. ASTRUE, Commissioner of Social Security,	)	
	)	
Defendant.	)	

Stephen A. Hampton, Grady & Hampton, Dover, DE.

Attorney for Plaintiff.

Charles M. Oberly, III, United States Attorney, District of Delaware, Wilmington, DE.
Eric Kressman, Charles J. Kawas, and Patricia A. Stewart, Social Security Administration, Philadelphia, PA.

Attorneys for Defendant.

MEMORANDUM OPINION

March 24, 2014
Wilmington, Delaware

STARK, U.S. District Judge:

Plaintiff, Thomas D. Serpe ("Serpe" or "Plaintiff"), appeals from a decision of Defendant, Michael J. Astrue, the Commissioner of Social Security ("Commissioner" or "Defendant"), denying his application for Child's Supplemental Security Income ("SSI") benefits on behalf of his minor son, "T.S.," under Title XVI of the Social Security Act (the "Act"), 42 U.S.C. §1381-1383f. The Court has jurisdiction pursuant to 42 U.S.C. § 405(g).

Pending before the Court are cross-motions for summary judgment filed by Serpe and the Commissioner. (D.I. 13, 17) Plaintiff asks the Court to reverse the Commissioner's final decision and to remand to the Commissioner for an award of SSI benefits, or in the alternative, to remand for a new hearing and decision. (D.I. 14) Defendant asks that the Court affirm his decision denying the requested benefits. For the reasons set forth below, the Court will grant in part and deny in part Plaintiff's motion and deny Defendant's motion.

I. BACKGROUND

A. Procedural History

On September 15, 2006, Serpe filed his application for SSI on behalf of T.S., claiming that T.S. has suffered disability since October 7, 2005, due to problems related to attention deficit hyperactivity disorder, emotional and psychological difficulties, and impaired vision. (D.I. 8) ("Tr.") at 38, 65-70, 80) Serpe's application initially was denied on July 6, 2007. On March 7, 2008, after reconsideration, the petition was again denied. (Tr. at 40-50) Serpe subsequently requested a hearing before an Administrative Law Judge ("ALJ"), which was held on on January 28, 2009. (Tr. at 51-53, 62)

On October 5, 2009, the ALJ found that T.S. is not disabled and denied the request for

SSI benefits. (Tr. at 16-37) On November 24, 2009, Serpe requested review of the ALJ's decision. (Tr. at 10-15, 520-24) On February 15, 2012, the appeals council considered and denied the request. (Tr. at 5-9) Thus, the ALJ's October 5, 2009 decision became the Commissioner's final decision. *See* 20 C.F.R. §§ 404.955, 404.981; *Sims v. Apfel*, 530 U.S. 103, 107 (2000).

On May 4, 2012, Serpe filed a complaint with this Court seeking review of the ALJ's decision. (D.I. 1) Serpe moved for summary judgment on November 28, 2012. (13) Defendant filed a cross-motion for summary judgment on January 30, 2013. (D.I. 17) The matter is fully briefed. (*See* D.I. 14, 18, 19)

B. Factual Background

T.S. was first diagnosed with ADHD at age seven. (Tr. at 305) He was again diagnosed with ADHD on August 10, 2005.[1] (Tr. at 252) This diagnosis has been confirmed by Dr. Richard Cruz of the Terry Children's Psychiatric Center, as well as various other medical institutions to which T.S. has been admitted. (Tr. at 203, 218, 231, 234, 280-81, 309) It appears that T.S. is or has been prescribed Adderall as treatment for his symptoms. (Tr. at 271, 274)

On July 2, 2007, Dr. Brian Simon evaluated T.S. and concluded that the "vast majority of [T.S.]'s symptoms of [ADHD] appear to be well controlled through medication at this time." (Tr. at 308) Conversely, case workers at The Jewish Family Services familiar with T.S. describe

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[1]Plaintiff filed his claim for SSI benefits on behalf of his minor son, who was thirteen years old at the onset of his alleged disability. (Tr. at 65) For purposes of SSI, T.S. is a "younger individual." *See* 20 C.F.R. § 416.963(c). At the time of the ALJ's decision, T.S. was sixteen years old. (Tr. at 16) As of the completion of briefing in this Court, T.S. was in high school, and, according to the SSI application, had previously attended special education classes. (Tr. at 85-86) He is able to speak and understand English. (Tr. at 79)

him as "impulsive," "bored," "indifferen[t] to school," and unhygienic. (*See* Tr. at 466-81) In January of 2007, T.S. claimed that he often felt that he "can't seem to sit still, [and has] too much energy" "all of the time." (Tr. at 285)

It is also reported that T.S. has had suicidal tendencies. (Tr. at 219, 242) On July 20, 2005, T.S. threatened to kill himself with a knife during a "home visit" from the Children's Home where he had been residing. (Tr. at 257) As a result, T.S. was involuntarily admitted to the Rockford Center psychiatric facility. (Tr. at 219) T.S. next attempted suicide on December 8, 2005. He attempted to jump from a window, but was restrained and sedated. He was again transferred to the Rockford Center by a State Police escort. (Tr. at 244-48)

In 2005, T.S. had been diagnosed with either Bipolar Disorder or Depressive Disorder. (Tr. at 234, 238) He was prescribed Wellbutrin to manage the symptoms of his depression. (Tr. at 83) Due to the manner in which the medication "made his heart feel," the prescription was discontinued beginning in February 2007. (Tr. at 419) In 2008, Counselors at Christiana Counseling diagnosed T.S. with depression and anxiety problems. (Tr. at 517-19)

T.S. has additionally been diagnosed multiple times between 2005 to 2007 with Oppositional Defiant Disorder, Mood Disorder NOS, and Anger Management issues. (Tr. at 218-84) Health care professionals have noted that T.S. has "unresolved issues with grief and loss," relating to his abandonment by his biological mother. (Tr. at 237, 311) T.S. has been prescribed medications such as Abilify and Vistaril for these symptoms. (Tr. at 298)

The New Behavioral Network treated him from August 2006 to October 2007. T.S. (Tr. at 321-461) Jewish Family Services then treated him November 2007 to February 2008. (Tr. at 462-84) Christiana Counseling treated T.S. from March 2008 to January 2009. (Tr. at 489-515)

There are several psychological evaluation reports in the record. On July 2, 2007, Dr. Brian Simon, Psy. D., performed a consultative examination of T.S., which determined that he exhibited average intelligence and low to average attentional and concentration abilities. Moreover, he appeared to possess limited abstraction abilities, demonstrate poor insight and judgment skills, and suffer from a history of significant interpersonal problems. (*Id.*) Dr. Simon noted a global assessment of function (GAF) score of only 44, suggesting serious impairments. (Tr. at 309; *see also* D.I. 14 at 4) Finally, Dr. Simon opined that T.S.'s ADHD symptoms appeared to be controlled well with medication. (Tr. at 304-09)

T.S. was also examined on July 6, 2007 by Dr. Douglas Fugate, who found that T.S. had either less than marked or no limitations in all six functional domains used to determine functional equivalence under 20 C.F.R. § 416.926. (Tr. at 310-14) In contrast, when T.S. was later examined in January 2009, Catherine Doty, a nurse practitioner, and Carol Harrington, a certified counselor, both at Christiana Counseling and Psychiatric Association, found marked limitations in four of these six domains. (Tr. at 29, 514-15, 518)

Finally, in December 2007, G. Tonogbanua, M.D., performed another psychiatric examination of T.S. (Tr. at 472-73) Dr. Tonogbanua found that T.S. has poor interpersonal relationships, a history of impulsive behavior, a history of depression, and poor insight and judgment. (Tr. at 473) He confirmed the previous diagnoses of Attention Deficit Disorder, assessed a GAF of 45-50, and continued T.S. on Adderall, Wellbutrin, Abilify, and Vistaril. (Tr. at 472-73)[2]

[2]Dr. Tonogbanua spent approximately 50 minutes assessing T.S. during the December 19, 2007 appointment with Jewish Family Services. (Tr. at 472-73) The records indicate that T.S. was a "no show" for a January 16, 2008 appointment with Dr. Tonogbanua. (Tr. at 469) On

T.S. has also undergone intelligence testing. He was first referred for intelligence testing in 2003; the results revealed that he did not have a learning disability and that his intellectual functioning was average. (Tr. at 293-94) Dr. Simon tested T.S. again in 2007, obtaining roughly the same results: T.S. was in the low average range for intelligence, without any signs of significant cognitive issues. (Tr. at 308)

At the January 2009 hearing before the ALJ, T.S. testified that he was sixteen years old and a student at Central School in Stanton, Delaware. (Tr. at 532-33) T.S. stated that he was in ninth grade because he was repeating a grade. (Tr. at 533) T.S. explained that the entire school was considered special education. (Tr. at 534) His grades at the beginning of the school year had mostly been D's and F's. (*Id.*) T.S. stated that he had trouble paying attention to the teachers and that he did not pay much attention in classes he disliked. (Tr. at 535) But he could pay attention most of the time in the classes he like. (Tr. at 536)

T.S. further claimed that he usually did his own laundry and chores around the house, as long as he was reminded to do so. (Tr. at 537) He did, however, note a tendency to easily forget and lose focus or attention on tasks. (Tr. at 537-38) T.S. stated that family visits consisted of meeting with only his father because his mother was "not in the picture," and his siblings were absent. (Tr. at 539) T.S. opined that he had been subject to suspension from school in the past year "more [times] than [he] can count" (Tr. at 540) Suspensions appear to have resulted from (physically) fighting, disrupting class, using computer systems without permission, and "stuff

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February 6, 2008, T.S. was seen – for approximately 20 minutes – by S. Gupta, M.D., also through Jewish Family Services. (Tr. at 467) On remand, the ALJ may need to make findings as to whether Drs. Tonogbanua and Gupta are appropriately viewed as "treating physicians" consistent with the "treating physician" doctrine, as more fully described in the Discussion section of this Opinion.

like that." (Tr. at 541)

T.S. testified that he regularly saw Carol Harrington for counseling sessions. (Tr. at 541-42) T.S. stated that he did not usually feel depressed or sad, and that his suicidal tendencies were "quite a long time ago." (Tr. at 543-44) T.S. expressed interest in computers and games and said he was good at caring for his hygiene. (Tr. at 543, 545) T.S. testified that he tended to overeat and had trouble sleeping if he did not take his sleeping pills. (Tr. at 546) He noted that a side effect of the medication he was taking was that when he "get[s] up really fast or slow, [he] starts to black out quite easily." (Tr. at 547) When asked about future ambitions related to computers or attending college, he explained he was thinking about "something like that, yes." (Tr. at 548)

Serpe, T.S.'s father, testified that T.S. had been removed from his home because he needed respite care. (Tr. at 551) He further indicated that T.S.'s sister was in custody, and T.S.'s brother was in a detention center. (Tr. at 551) Serpe raised T.S. as a single parent, but he had a caregiver who "assisted greatly." (Tr. at 552)

Serpe confirmed that T.S. had been held back in school "a couple times." (Tr. at 552) He also verified T.S.'s periodic enrollment in special education since the fifth or sixth grade. (Tr. at 553) Serpe regularly spoke with T.S.'s teacher at least three times a month about T.S.'s performance. (Tr. at 554) These conversations revealed that T.S. had numerous problems with other students and would walk out of class without permission. (Tr. at 554-55) Serpe substantiated T.S.'s allegation that he had been suspended at least ten times in the past year. (Tr. at 562)

Serpe also noted that T.S. had few friends (Tr. at 556), suggesting that this was a result, in part, of T.S.'s inappropriately childish behavior while among peers (Tr. at 558). Evidently, this

behavior was less common at the time of the hearing. (Tr. at 558) Serpe added that T.S. refuses to communicate with strangers and views them as a threat. (Tr. at 562-63)

Serpe verified that T.S. could do chores and care for his basic hygiene, but only if he were "hand held" or constantly prompted to act. (Tr. at 557-58) Serpe testified that sometimes over the previous three years T.S. had expressed feelings of depression or anxiety. (Tr. at 561) Serpe added that T.S.'s current functioning might be impacted by the fact that he is close to Serpe's caretaker and would prefer to live at home. (Tr. at 563-64)

On October 5, 2009, the ALJ issued the following findings:

> 1. The claimant was born on May 14, 1993. Therefore, he was an adolescent on September 15, 2006, the date application was filed, and is currently an adolescent. (20 CFR 416.926a(g)(2)).
>
> 2. The claimant has not engaged in substantial gainful activity since September 15, 2006, the application date. (20 CFR 416.924(b) and 416.971 *et seq.*).
>
> 3. The claimant has the following severe impairments: ADHD (attention deficit hyperactivity disorder), mood disorder, and adjustment disorder (20 CFR 416.924(c)).
>
> 4. The claimant does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1 (20 CFR 419.924, 416.925 and 416.926).
>
> 5. The claimant does not have an impairment or combination of impairments that functionally equals the listings (20 CFR 416.924(d) and 416.926a).
>
> 6. The claimant has not been disabled, as defined in the Social Security Act, since September 15, 2006, the date the application was filed (20 CFR 416.924(a)).

(Tr. at 22-37)

II. LEGAL STANDARDS

A. Motion for Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 415 U.S. 574, 586 n. 10 (1986). Material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To be genuine, a factual dispute must be more than speculative; a genuine issue of material fact exists only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* 477 U.S. at 248. When considering a motion for summary judgment, the Court must "draw all reasonable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

B. Review of the ALJ's Findings

The Court must uphold the Commissioner's factual decisions if they are supported by "substantial evidence." *See* 42 U.S.C. §§ 405(g), 1383(c)(3); *see also Monsour Med. Ctr. v. Heckler,* 806 F.2d 1185, 1190 (3d Cir. 1986). "Substantial evidence" means less than a preponderance of the evidence but more than a mere scintilla of evidence. *See Rutherford v. Barnhart*, 399 F.3d 546, 552 (3d Cir. 2005). As the United States Supreme Court has noted, substantial evidence "does not mean a large or significant amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Pierce v. Underwood, 487 U.S. 552, 565 (1988).

In determining whether substantial evidence supports the Commissioner's findings, the Court may not undertake a *de novo* review of the Commissioner's decision and may not re-weigh the evidence of record. *See Monsour*, 806 F.2d at 1190–91. The Court's review is limited to the evidence that was actually presented to the ALJ. *See Matthews v. Apfel*, 239 F.3d 589, 593–95 (3d Cir. 2001). However, evidence that was not submitted to the ALJ can be considered by the appeals council or the District Court as a basis for remanding the matter to the Commissioner for further proceedings, pursuant to the sixth sentence of 42 U.S.C. § 405(g). *See Matthews*, 239 F.3d at 592.

"Credibility determinations are the province of the ALJ and only should be disturbed on review if not supported by substantial evidence." *Gonzalez v. Astrue*, 537 F.Supp.2d 644, 657 (D. Del. 2008) (internal quotation marks omitted). However, the ALJ must include in the decision "specific reasons for the finding on credibility, supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual's statements and the reasons for that weight." *Titles II & XVI: Evaluation of Symptoms in Disability Claims: Assessing the Credibility of an Individual's Statements*, SSR 96-7P (S.S.A July 2, 1996).

The Third Circuit has explained that a "single piece of evidence will not satisfy the substantiality test if the [Commissioner] ignores, or fails to resolve, a conflict created by countervailing evidence. Nor is evidence substantial if it is overwhelmed by other evidence, particularly certain types of evidence (e.g., that offered by treating physicians) – or if it really constitutes not evidence but mere conclusion." *Kent v. Schweiker*, 710 F.2d 110, 114 (3d Cir.

1983). Where the ALJ considers the credibility of the evidence, "he must give some indication of the evidence which he rejects and his reason(s) for discounting such evidence." *Burnett v. Comm'r of Soc. Sec. Admin.*, 220 F.3d 112, 121 (3d Cir. 2000). "In the absence of such an indication, the reviewing court cannot tell if significant probative evidence was not credited or simply ignored." *Cotter v. Harris*, 642 F.2d 700, 705 (3d Cir. 1981).

Thus, the inquiry is not whether the Court would have made the same determination as the ALJ but, rather, whether the Commissioner's conclusion was reasonable. *See Brown v. Bowen*, 845 F.2d 1211, 1213 (3d Cir. 1983). Even if the reviewing Court would have decided the case differently, it must give deference to the ALJ and affirm the Commissioner's decision if it is supported by substantial evidence. *See Monsour*, 239 F.3d at 1190–91.

III. DISCUSSION

A. Disability Determination Process

Title XVI of the Social Security Act provides for the payment of disability benefits to indigent persons under the SSI program. *See* 42 U.S.C. § 1382(a). A "disability" is defined for purposes of SSI as the inability "to do 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. § 1382c(a)(3). A claimant is disabled "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 1382c(a)(l)(B); *see also Barnhart v. Thomas*, 540 U.S. 20, 21–22 (2003).

In determining whether a child is disabled, the Commissioner is required to perform a three-step sequential analysis. *See* 20 C.F.R. § 416.924. In step one, the Commissioner must determine whether the claimant is engaged in any substantial gainful activity. *See* 20 C.F.R. § 416.924(b) (mandating finding of non-disability where claimant is engaged in work, and the work is substantial gainful activity). If the claimant is not engaged in substantial gainful activity, step two requires the Commissioner to determine whether the claimant has a medically determinable impairment that is severe. *See* 20 C.F.R. § 416.924(c) (mandating a finding of non-disability where claimant does not have a medically determinable impairment, or where said impairment causes no more than minimal functional limitations). If the claimant has a severe medically determinable impairment, step three requires the Commissioner to determine if the impairment(s) meet, functionally equal, or medically equal the listings. *See* 20 C.F.R. § 416.924(d) (mandating a finding of non-disability where the impairment(s) do not meet, medically equal, or functionally equal the listed requirements).

Functional equivalence of severe impairment in children is based on an analysis of six different domains of functional activity. *See* 20 C.F.R. § 416.926a(a) & (b)(1). A finding of either "extreme" limitation in one domain, or "marked" limitations in two domains, is sufficient to support a finding of functional equivalence of severe impairment. *See* 20 C.F.R. § 416.926a(d). The six functional domains are: (1) acquiring and using information, (2) attending and completing tasks, (3) interacting and relating with others, (4) moving about and manipulating objects, (5) caring for yourself, and (6) health and physical well-being. *See* 20 C.F.R. § 416.926a(b)(1).

B. Serpe's Argument on Appeal

Serpe raises two principal arguments in his appeal: (1) the ALJ failed to weigh the evidence in the record properly, and (2) the ALJ failed to evaluate Serpe and T.S.'s credibility properly.

1. "Treating Physician" Doctrine

Serpe argues that the ALJ failed to give greater weight to the opinions of T.S.'s treating physician, Dr. Tonogbanua, as well as T.S.'s other doctors or counselors, in contradiction to the "treating physician" doctrine. (D.I. 14 at 12-13) Defendant responds that Serpe fails to identify any particular opinion on which the ALJ should have relied, instead pointing only to particular pieces of evidence. (D.I. 18 at 9-10) Furthermore, Defendant contends that the only opinion evidence supporting Serpe's position is from Ms. Doty and Ms. Harrington, sources who cannot establish an impairment under the Agency's guidelines. (D.I. 18 at 10) Finally, Defendant states that Dr. Tonogbanua failed to provide a specific opinion and that the ALJ is not required to discuss each piece of evidence specifically. (D.I. 18 at 11)

The "treating physician" doctrine provides that when a "a court consider[s] a claim for disability benefits, [the Court] must give greater weight to the findings of a treating physician than to the findings of a physician who has examined the claimant only once or not at all." *Mason v. Shalala*, 994 F.2d 1058, 1067 (3d Cir. 1993) (citing *Gililand v. Heckler*, 786 F.2d 178, 183 (3d Cir. 1986)). When a treating physician's opinion is "well-supported by medically acceptable clinical and laboratory diagnostic techniques and it is not inconsistent with the other substantial evidence in the record," it should be accorded "controlling weight." *Fargnoli v. Massanari*, 247 F.3d 34, 43 (3d Cir. 2001). An ALJ may reject a treating physician's opinion

"only on the basis of contradictory medical evidence, but may afford a treating physician's opinion more or less weight depending upon the extent to which supporting explanations are provided." *Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999). But, "a finding that a treating source medical opinion is not well-supported by medically acceptable clinical and laboratory diagnostic techniques or is inconsistent with the other substantial evidence in the case record means only that the opinion is not entitled to controlling weight, not that the opinion should be rejected;" "[i]n many cases, a treating source's medical opinion will be entitled to the greatest weight and should be adopted, even if it does not meet the test for controlling weight." S.S.R. 96–2p, 1996 WL 374188, at *4 (July 2, 1996).

Serpe asserts that the opinion of one of T.S.'s treating physicians, Dr. Tonogbanua, was ignored in the ALJ's decision. (D.I. 14 at 14-15) Defendant responds that the decision does refer to general records from the time period in which T.S. was being treated by Dr. Tonogbanua, indicating that the ALJ considered and rejected the treating physician's opinions. (D.I. 18 at 11, 12 n.5) The Court is not persuaded that the ALJ complied with the "treating physician" doctrine.

First, Dr. Tonogbanua's diagnosis of T.S. as having multiple disorders, including ADHD, occurred on December 19, 2007, while the ALJ's decision only discusses T.S. receiving treatment with Jewish Family Services in February 2008. (Tr. at 23, 472-73) Even if the ALJ's mentioning of T.S.'s treatment with Jewish Family Services is viewed as a consideration of all documents in T.S.'s record from this period, it remains the case that the ALJ's decision fails to mention Dr. Tonogbanua or the diagnoses made of T.S. during the pertinent time period. (Tr. at 23) Second, Defendant's suggestion that the ALJ implicitly rejected Dr. Tonogbanua's opinion is inconsistent with the treating physician doctrine, which disallows rejection of a treating

physician's opinion in the absence of directly contradictory medical evidence, which seems to be lacking in this case.

The Court reaches its conclusions even recognizing that Defendant appears to be correct that Ms. Harrington and Ms. Doty – a certified counselor and nurse practitioner, respectively (Tr. at 514-15) – cannot themselves establish an impairment. *See* 20 C.F.R. § 416.913(a); *Strunk v. Barnhart*, 112 Fed. Appx. 675 (10th Cir. 2004) (holding that counselor was not acceptable medical source); *Gomez v. Chater*, 74 F.3d 967, 971 (9th Cir. 1996) ("Acceptable medical sources specifically include licensed physicians and licensed psychologists, but not nurse practitioners."). Though Ms. Harrington and Ms. Doty cannot be relied upon to establish an impairment, their opinions, especially as treating medical sources, should be accorded some weight in determining the extent of potential disability caused by a disorder that has been diagnosed through an acceptable medical source. *See* 20 C.F.R. §416.913(d); *Crysler v. Astrue*, 563 F. Supp. 2d 418, 434 (N.D.N.Y. 2008) (holding that nurse practitioner's opinion on condition which had been diagnosed by acceptable medical sources is evidence which can inform ALJ on severity of plaintiff's impairment).

In the present case, T.S.'s ADHD, impulse control disorder, and depression were all independently diagnosed by his treating physician, Dr. Tonogbanua. (Tr. at 472-73) Thus, Ms. Harrington's and Ms. Doty's views regarding T.S.'s disability in four out of the six functional domains should be considered. (Tr. at 517-19) In addition, their recorded GAFs of 50 are consistent with Dr. Tonogbanua's GAF measurement of 45-50 as well as Dr. Simon's measurement of 44. (Tr. at 309, 472, 495, 512)

The apparently controlling weight the ALJ accorded to the opinions of two non-

treating/consulting sources, Drs. Simon and Fugate, who collectively opined that T.S.'s ADHD symptoms were mostly under control and he showed no or less than marked limitations in four of the six functional domains (Tr. at 22-37, 304-14), was inconsistent with the "treating physician" doctrine. *See Foster v. Astrue*, 826 F. Supp. 2d 884, 886-87 (E.D.N.C. 2011) ("Affording the greatest weight to the opinion of two non-treating physician sources cannot be supported by substantial evidence when a treating source, albeit a non-acceptable treating source, has provided substantial evidence to the contrary."). This is particularly so as the ALJ recognized that Dr. Simon's report was internally inconsistent. (Tr. at 26) ("Though the claimant presented with a history of significant interpersonal problems, a GAF of 44 was not consistent with the narrative and test results reported above.")

Accordingly, the Court concludes that it must remand this matter to Defendant to allow for additional proceedings.

2. Credibility Findings

Serpe also contends that the ALJ erred by failing to make credibility findings regarding T.S. and his father, Serpe. (D.I. 14 at 17) An ALJ is required to make credibility findings related to statements made by claimants or related parties. *See Dixon v. Comm'r of Soc. Sec.*, 183 F. App'x 248, 252 (3d Cir. 2006) ("Once an ALJ determines that a medical impairment exists, the ALJ must determine the extent to which a claimant is accurately stating . . . the extent to which he or she is disabled by it."); *see also* 20 C.F.R. § 416.929. Defendant argues that the ALJ did make a credibility finding, and even if she did not, this failure is just a harmless error. (D.I. 18 at 14) Defendant's arguments are unpersuasive.

In claiming the ALJ made credibility findings, Defendant points to nothing more than the

ALJ's cursory reference to 20 C.F.R. § 416.929 and applicable social security rulings. (D.I. 18 at 14) While these references may have been allusions to the issue of credibility, they do not constitute the "specific reasons for the finding on credibility" required. Further, while it is true that the ALJ discusses at length T.S. and Serpe's hearing testimony, she does so without indicating whether she found this testimony credible or what weight, if any, she is giving it. (*See* Tr. 30-37) Given that the ALJ rejected the application for benefits, and cited some of the hearing testimony in support of her decision, it is possible that the ALJ intended to convey that she found T.S. and/or Serpe somewhat non-credible. This possibility demonstrates that the failure to make express credibility findings, in this case, cannot be dismissed on the present record as mere harmless error.

Because the Court has already determined it must remand the matter to the Commissioner, the Commissioner on remand should also make an express credibility finding regarding T.S. and Serpe.

CONCLUSION

For the reasons stated above, the Court will remand this matter to the Commissioner for proceedings not inconsistent with this Opinion. An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

THOMAS D. SERPE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. NO.: 12-570-LPS
	)	
MICHAEL J. ASTRUE, Commissioner of Social Security,	)	
	)	
Defendant.	)	

ORDER

At Wilmington this 24th day of March, 2014, consistent with the Memorandum Opinion issued this same date, IT IS HEREBY ORDERED that:

1. Plaintiff's motion for summary judgment (D.I. 13) is GRANTED IN PART and DENIED IN PART, such that this matter is REMANDED to the Commissioner of Social Security for proceedings not inconsistent with the Memorandum Opinion.

2. Defendant's cross-motion for summary judgment (D.I. 17) is DENIED.

3. The Clerk of the Court is directed to CLOSE this case.

4. Because the Memorandum Opinion has been filed under seal, the parties are directed to submit a proposed redacted version, for public filing, no later than March 28, 2014.

UNITED STATES DISTRICT JUDGE