IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DION L. FERGUSON, Plaintiff, v. Larry G. Massanari; Acting Commissioner of Social Security,[1] Defendant.	)	C.A. No. 99-839-GMS

MEMORANDUM OPINION

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Dated: July 31, 2001
Wilmington, Delaware.

[1]Larry G. Massanari became the Acting Commissioner of Social Security on March 29, 2001. Under Fed. R. Civ. P. 25(d)(1), Massanari is automatically substituted as the defendant in this action. Nevertheless, the court can rule on the merits of the case. *See* 42 U.S.C. § 405(g) (stating "[a]ny action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office."). Although Massanari is the "Acting Commissioner," the court will refer to him as the "Commissioner" throughout its memorandum opinion.

SLEET, District Judge

I. INTRODUCTION

On October 21, 1993, the plaintiff, Dion Ferguson ("Ferguson"), by his mother, Brenda Ferguson, applied for Supplemental Security Income (SSI) on the basis of mental retardation. The claim was denied by the Social Security Administration on April 21, 1994, with no record of appeal. A second claim for benefits was filed on February 20, 1996 and was denied on April 15, 1996. After a request for reconsideration, the second claim was denied on June 13, 1996. Ferguson then timely filed a request for a hearing before an Administrative Law Judge (ALJ). In a decision dated December 15, 1997, ALJ Owen B. Katzman found that Ferguson was not eligible for SSI under Title XVI or for child disability benefits under Title II of the Social Security Act. *See* 20 C.F.R. §§ 404.1569, 416.969, R. 204, App. 2, Subpt. P, Reg. No. 4. A request for a review of the ALJ's decision was filed but was denied on October 21, 1999. Ferguson filed the present complaint with the court on December 6, 1999. Following the defendant's answer, Ferguson filed a motion for summary judgment on June 18, 2000 (D.I. 9, 13). The Commissioner submitted an answer brief containing a cross motion for summary judgment on August 29, 2000.[2] For the following reasons, the court will deny the Commissioner's motion and grant Ferguson's motion in part.

II. STANDARD OF REVIEW

The court must uphold the ALJ's factual decisions if they are supported by "substantial evidence". *See* 42 U.S.C. §§ 405(g) and 1383(c)(3); *see also Fargnoli v. Massanari*, 247 F.3d 34, 38 (3d Cir. 2001) (stating "[w]here the ALJ's findings of fact are supported by substantial evidence, . . . [the court is]

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[2]Both parties submitted letters to the court waiving their reply briefs (D.I. 18,19).

bound by those findings, even if . . . [it] would have decided the factual issue differently") (citing cases). This standard applies to motions for summary judgment filed pursuant to Fed. R. Civ. P. 56(c) in social security cases. *See Woody v. Sec. of the Dep't of Health and Human Serv.*, 859 F.2d 1156, 1159 (3d Cir. 1988).

"Substantial evidence" has been said to amount to more than "a mere scintilla." *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951). It is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See id*. Thus, "substantial evidence" may be slightly less than a preponderance. *See Jesurum v. Sec'y. of the United States Dept. of Health and Human Servs.*, 48 F.3d 114, 117 (3d Cir. 1995). The ALJ's determinations of credibility cannot be disturbed if they are supported by substantial evidence. *See Van Horn v. Schweiker*, 717 F.2d 871, 871 (3d. Cir. 1983).

III. BACKGROUND

At the time relevant to this action, Ferguson was a twenty-six year old male who resided with his mother, Brenda Ferguson. Beginning in September, 1978, Ferguson received "Level III" services as a learning disabled student from the Red Clay Consolidated School District. With the assistance of these services, he completed the eleventh grade. Ferguson was incarcerated for six months in 1995 for drug possession.[3]

Ferguson alleges that he is precluded from working because of adverse behavioral effects which

[3]There is no evidence in the record that Ferguson has ever used drugs. Though the record is somewhat unclear, Ferguson admits to having been arrested and convicted for drug possession. Ferguson claims that another individual gave him the drugs when a patrolling officer was nearby in order to not get caught.

are caused by mental retardation and compounded by Fetal Alcohol Syndrome (F.A.S.). Ferguson has worked as a kitchen helper at TLC Yogurt Company and as a general laborer for Action Multi-Crafts Inc., however, he only held both jobs briefly. As of the date of the filing of the present complaint, Ferguson was employed as a kitchen helper at Red Lobster and was scheduled for two four-hour shifts per week.[4]

A. Ferguson's Educational Testing Record

A school psychological evaluation was conducted on May 17, 1993. At that time Ferguson was eighteen years old and in the tenth grade. The evaluation consisted of a series of tests. Ferguson scored between the sixth and tenth percentile on the Kaufman Adolescent and Adult Intelligence Test (KAIT). His scores on the Kaufman Test of Educational Achievement (K-TEA) indicated a third percentile math composite, twenty-first percentile reading composite, and a battery composite in the twelfth percentile. On the school's Social Skills Rating System (SSRS), Ferguson was given a second percentile rating in social skills and a fifth percentile rating in academic competence. He scored in the top 5% for problem behaviors.

The school evaluation report also noted teacher concern over Ferguson's organization, drive, behavior, ability to work independently and inappropriate behavior.[5] These concerns are echoed in a teacher questionnaire in the record. Minutes from a "Special Education Programs and Services" meeting during Ferguson's twelfth grade year indicate behavioral problems on several occasions, tardiness, several failing grades, failure to complete work and poor social skills. Ferguson did not complete the twelfth grade

[4]It is unclear whether Ferguson presently remains employed at Red Lobster. No post-hearing evidence has been submitted to the court. The court, therefore, does not address whether Ferguson is currently engaged in substantial gainful activity.

[5]Following this examination, the school psychologist suggested consideration of continued placement in special education, short-term counseling, the careful selection of elective courses and involvement in organized sports.

year.

B. Results Of Other Psychological Testing

1. 1994 Consultative Examination

A consultation examination was completed on March 8, 1994, by Frederick W. Kurz, Ph.D. ("Dr. Kurz") of the Delaware Disability Determination Service. On this date, Dr. Kurz administered the "WAIS-R" examination, on which Ferguson obtained a verbal I.Q. score of 79, a performance I.Q. of 71, and a full-scale I.Q. of 74.[6] Dr. Kurz noted that Ferguson had several impairments which he classified as "mild" and several "moderate" impairments.[7] Dr. Kurz concluded from his evaluation that Ferguson functions within the borderline ranges of intelligence and presents no signs of thought disorder.[8]

2. 1995 Consultation Examination

A second evaluation was completed on December 18, 1995 by Jeff Funk, M.Ed. ("Funk"). This evaluation was reviewed and signed by Dr. Kurz. On this date a second "WAIS-R" test was administered, on which Ferguson obtained a verbal I.Q. of 77, performance I.Q. of 72, and a full-scale I.Q. of 74. Funk

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[6]Ferguson placed below the fifth percentile in all sub-test areas except "similarities" and "picture arrangement," in which he placed in the ninth percentile. In "digit symbol" and "digit span," he placed in the seventy-fifth percentile. According to Dr. Kurz's assessment, digit span measures an individual's short-term auditory memory for number sequences. Digit symbol measures visual motor speed.

[7]Dr. Kurz identified "moderate" impairments in the following: the ability to carry out instructions under ordinary supervision, to sustain work performance and attendance in a normal work setting, to cope with pressures of ordinary work and to perform routine and repetitive tasks under ordinary supervision

[8] Dr. Kurz went on to state that based on Ferguson's reliance on his mother and current level of functioning, Ferguson could not likely handle his own funds.

noted that at the 95% confidence level, Ferguson's scores would range from an I.Q. of 68-80. Funk also used the "Vineland Adaptive Behavior" (VAB) test and utilized information about Ferguson's behavioral patterns provided by both Ferguson and his mother, Brenda Ferguson. Funk's report includes a competency profile which states that Ferguson independently performed self-care tasks with periodic reminders, performed select home management tasks, selected and initiated most required daily activities, utilized public transportation and socialized with neighborhood friends.[9] Funk also noted a deficit in the areas of self-direction and work. After reviewing the available information, Funk concluded that Ferguson's deficits were present during the developmental period and that "a diagnosis of mental retardation is supported."

3. Psychiatric Review and Residual Functional Capacity Assessments

The record contains four Psychiatric Review Technique Forms (P.R.T.F.) which were completed by separate medical consultants.[10] The first report was completed on April 13, 1994, and the others were completed on April 20, June 11, and July 26, 1996. All four reviewers checked a box stating "RFC [Residual Functional Capacity] Assessment Necessary, (i.e., a severe impairment is present which does not meet or equal a listed impairment)". In the 1994 report, Ferguson was given a "Moderate" functional limitation rating in daily living and social functioning, an "Often" rating in concentration difficulty, and a

[9]It is unclear whether the findings contained in the competency profile were the product of the VAB test, the results of the administrator's conversations with Brenda Ferguson, or the conclusions of the administrator.

[10]These forms are a "check-box" style that allows the consultant to check-off the level or limitation as "None," "Slight," "Moderate," "Marked" or "Extreme." In other categories, the reviewer has the option to check "Never," "Once or Twice," "Repeated" or "Often" or "Continual". In all categories, reviewers could mark "Insufficient evidence."

"Never" rating in "deterioration or decompensation" in work settings. The 1996 reports indicate a "Slight" limitation in daily living activities, "Slight" or "Slight to Moderate" limitation in social functioning, and a "Never" or "Once or Twice" limitation rating in "deterioration or decompensation."

Four Mental Residual Functional Capacity Assessments (M.R.F.C.A.) were completed by the same medical consultants on the same dates as the P.R.T.F.s.[11] The 1994 M.R.F.C.A. showed that Ferguson was "Moderately limited" in three categories relating to "sustained concentration and persistence," two categories relating to "social interaction," and three categories relating to "adaptation."[12] The April, 1996 M.R.F.C.A. showed a "Marked" limitation in one "understanding and memory" category and one concentration category, and "Moderate" limitations in three concentration and social areas.[13] The June, 1996 M.R.F.C.A. revealed a "Moderate" limitation in one understanding and memory, five concentration, and three social areas.[14] Finally, the July, 1996 M.R.F.C.A. showed a "Moderate" to "Marked" limitation in one understanding and memory, one concentration, and one social area.[15]

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[11]The record contains two "Medical Consultant's Review of Mental Residual Functional Capacity Assessment" forms for the 1994 date, on which two other consultants both marked "Agree" with respect to all of the 1994 M.R.F.C.A. findings.

[12]In the one paragraph summary included under the "functional capacity assessment" part of the form, the reviewer, Milton R. Canfield, Ed.D., stated that "Simple, 1-2 step operations at least are within [Ferguson's] functional capacity."

[13]In a subsequent written paragraph, the reviewer noted that Ferguson is a "somewhat dependant individual lacking self-direction in some areas" and that he "could be trained for simple work."

[14]This consultant's "functional capacity assessment" notes are mostly illegible, but do state that Ferguson "can do simple repetitive work."

[15]This consultant noted that Ferguson "functions in the borderline range of intelligence," "appears to lack motivation and is dependant on his mother for prompting and reminders," and "is able

C. Reports Involving Fetal Alcohol Syndrome

Ferguson was evaluated twice by Louis E. Bartoshesky, M.D., M.P.H. ("Dr. Bartoshesky") of the Division of Clinical Genetics at the Medical Center of Delaware. The first evaluation was on June 6, 1995 and the second was on September 28, 1995.

In his June 6, 1995 report, Dr. Bartoshesky stated that he had reviewed Ferguson's medical records and noted that the question of F.A.S. was raised in 1986. Dr. Bartoshesky stated that Ferguson's physical symptoms of "short stature, distal digital hypoplastia, nail dysplasia, and mild facial dymorphisms" are supportive of an F.A.S. diagnosis. He concluded that these symptoms are also relevant when considering "special education placements, developmental delay, hyperactivity, and behavioral problems." Dr. Bartoshesky specifically noted however that "this review does not confirm the hypothesized diagnosis" of F.A.S.

In his September 28, 1995 report, Dr. Bartoshesky again stated that Ferguson had some of the clinical features of F.A.S.[16] Notably however, Dr. Bartoshesky stated that "there is no specific diagnostic test that confirms [F.A.S.]. This diagnosis is made on the basis of clinical findings and history of exposure to alcohol in . . . gestation." Further, Dr. Bartoshesky stated that "[i]ndividuals with [F.A.S.] frequently have attention deficits [and] behavior problems characterized by impulsive behavior and poor judgment."

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to take public transportation independently . . . and perform all self skills." Further, she noted that "He should, with training, be able to perform low skilled tasks."

[16]It appears that on this date, Dr. Bartoshesky simply reviewed Ferguson's past medical records and did not reevaluate him personally. At that time, however, Dr. Bartoshesky again noted Ferguson's clinical F.A.S. features including "developmental delay, short stature, digital hypoplastia, nail dysplasia, and certain facial dysmorphic features."

Finally, he stated that "[F.A.S.] seems a likely diagnosis".[17]

D. Ferguson's Vocational Reports

The record contains several assessments from vocational counselors with regards to Ferguson's job behavior and performance.[18]

Ferguson's TLC Yogurt job was arranged through the Association for Retarded Citizens in Delaware (ARC) and commenced in March, 1996. By May, it was noted that Ferguson's work was sloppy and that he argued with others. In a letter dated May 24, 1996, ARC Coordinator Megan Duff noted that she and ARC Counselor Michael Haley ("Haley") concurred that Ferguson did his job well, but was given one-on-one attention.[19] A later report detailed that Ferguson lost this job because he "copped an attitude" with a female at work, and that his mother "confirms [his] problems with attitude."[20]

Ferguson was then placed with Goodwill Industries for remedial job training. Several Goodwill

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[17]Funk's 1995 report stated that "[F.A.S.] was diagnosed after birth." As no further FAS discussion appears in the record, it is unclear what, if any, diagnosis he referred to in his report.

[18]Because the record contains numerous training notes and job coaching notes taken by counselors during Ferguson's various periods of employment, the court examined the reports as a whole as they pertain to Ferguson's brief periods of employment.

[19]This report was addressed to Counselor Nancy Hawkinson ("Hawkinson") of the Delaware Division of Vocational Rehabilitation. It appears as though Hawkinson supervised Ferguson's vocational progress with the ARC. In her log notes, Hawkinson first described Ferguson's "Impediment to Employment" as an "immature pattern of social behaviors that [is] displayed as disorganization, lack of motivation, difficulty working independently and inappropriate social interaction."

[20]This report was also submitted to Hawkinson, but did not contain the name of its author, nor the date of its submission.

Behavior Assessment forms by counselor Betty Lord ("Lord") appear in the record, dating from July 13, 1996 through August 7, 1996.[21] On these forms, Lord indicated several "needs improvement" ratings in hygiene, punctuality, seeking assistance, confidence and cooperativeness. Lord's assessments include comments indicating "angeribility," complaining, and threatening others. Lord subsequently noted that Ferguson was once required to sign a training agreement because he "struck down another trainee for accidentally bumping" into him. Ferguson was eventually placed in a general laborer position for Action Multi-Crafts Inc., but was unable to maintain that position.

E. Testimony At Ferguson's Hearing Before the ALJ

1. Witness Testimony

Ferguson, his mother, and Halley all testified at the ALJ hearing. Halley first testified that Ferguson worked well at TLC Yogurt with job coaching but could not perform the job independently. He specifically noted that this was because he "does not retain what he was taught the day before." Halley then testified that an intermittent construction job did not work out because of lack of support.[22] He also testified that Ferguson was working at that time part-time at Red Lobster, but that he "[does not] see Dion from [his] experience having a full-time job Monday through Friday with benefits."

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[21]Hawkinson's log includes one report of a meeting with Lord and Ferguson which apparently took place during Ferguson's employment with Goodwill Industries. It, therefore, appears that Hawkinson continued to supervise Ferguson's employment progress. On this report, it was noted that Ferguson was "performing poorly in adjustment training," "[repeating] similar problems . . . with no change," and that his "chances for improving [were] slim" because he "[acknowledged his] problem behaviors and will not change."

[22]Halley also noted that Ferguson's mother subsequently called him frantically because he "hadn't left the house in weeks and hadn't left his room basically," though the cause of this episode is unclear.

Ferguson himself then testified that he regularly completes several self-help tasks.[23] He was then briefly questioned about his incarceration.[24] Brenda Ferguson subsequently testified that her son stays upstairs in his room most of the time, eats junk food, and rarely interacts with his family. She also testified that Ferguson completes household chores after being told four or five times, or when she "gets the bat," but does not do his own laundry and needs reminders to complete tasks of daily hygiene. Further, Brenda Ferguson stated that she used to drink when she was younger. She testified that the amount did not exceed three beers per night, or a shot and two mixed drinks in an occasion. The record is silent as to whether this consumption occurred during the course of her pregnancy.

2. Vocational Expert Testimony

In testimony before the ALJ, vocational expert Nancy Halter ("Halter") stated that she had never previously come across an F.A.S. diagnosis within the context of an adult placement. The ALJ presented Halter with the following hypothetical:

> Let's assume we have a young man in his 20's. Same age, same education as Mr. Ferguson. Borderline intellectual functioning. Moderate impairments in the ability to understand, remember, and carry out detailed job instructions, in the ability to maintain attention and concentration, in the ability to perform . . . within a schedule, maintain regular attendance and be punctual within customary tolerances. The ability to sustain an ordinary routine without special supervision. The ability to complete a normal work day and work week without interruptions from psychologically based symptoms. The ability to maintain socially appropriate behavior and adhere to basic standards of neatness and cleanliness. The ability to be aware of normal hazards and take appropriate precautions. [He would have] to set realistic goals and make plans independently of others. And as I said, he would be moderately impaired in all of these.

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[23]These tasks include cleaning up, sweeping, and going across the street to the store to buy food or candy for himself.

[24]Though it seems clear that Ferguson did not deny his incarceration, the ALJ subsequently discounted Ferguson's credibility due to his testimony on this matter.

Addressing the fact that Ferguson has no physical limitations, Halter then identified two jobs that Ferguson could successfully perform: a vehicle washer (equipment cleaner) at a car wash and a landscaper. She stated that 7,000 vehicle washer positions and 4,000 landscaper positions exist in the region. When questioned if a negative attitude or the inability to interact with the public would preclude work at either of these positions, Halter stated that "a bad attitude isn't going to preclude any employment" and that these two jobs do not require public contact. Halter further stated that if Ferguson is "continually getting into verbal or physical altercations, then he's not going to be able to sustain any employment." Further, Halter stated that only a moderate ability to carry out instructions under ordinary supervision, sustain performance and attendance, cope with work pressure, and perform routine and repetitive tasks, "if something middle of the road . . . isn't going to be an issue". However, "if it gets further away from that and closer to severe, certainly routine and repetitive tasks are going to preclude that [work]."

IV. DISCUSSION

A. Applicable Statute and Law

The Commissioner has promulgated regulations for determining disability by application of a five-step sequential analysis. *See* 20 C.F.R. § 404.1520. The ALJ, reviewing Appeals Council, and the Commissioner evaluate each case according to this five-step process until a finding of "disabled" or "not disabled" is obtained. *See id*. at § 404.1520(a). The process is summarized as follows:[25]

1. If the claimant currently is engaged in substantial gainful employment, he will be found "not disabled."
2. If the claimant does not suffer from a "severe impairment," he will be found "not

[25]The following five-step process is summarized and numbered for convenience and corresponds to 20 C.F.R. § 404.1520 (b)-(f).

disabled."

3. If the severe impairment meets or equals a listed impairment in 20 C.F.R. Part 404, Subpart P, Appendix 1 and has lasted or is expected to last for a continuous period of at least twelve months, the claimant will be found "disabled."
4. If the claimant can still perform work he has done in the past ("past relevant work") despite the severe impairment, he will be found "not disabled."
5. Finally, the Commissioner will consider the claimant's ability to perform work ("residual functional capacity"), age, education and past work experience to determine whether or not he or she is capable of performing other work in the national economy. If he or she is incapable, a finding of disability will be entered. Conversely if the claimant can perform other work, he will be found "not disabled."

20 C.F.R. § 404.1520 (b)-(f).

This analysis involves a shifting burden of proof. *See Wallace v. Secretary of Health & Human Servs.*, 722 F.2d 1150, 1153 (3d Cir. 1983). In the first four steps of the analysis, the burden is on the claimant to prove every element of his or her claim by a preponderance of the evidence. At step five, however, the burden shifts to the Commissioner to prove that there is some other kind of substantial gainful employment the claimant is able to perform. *See Sykes v. Apfel,* 228 F.3d 259, 263 (3d Cir. 2000); *see also Kangas v. Bowen,* 823 F.2d 775, 777 (3d Cir. 1987); *Olsen v. Schweiker*, 703 F.2d 751, 753 (3d Cir. 1983).

A claimant must demonstrate that his impairments either meet or equal a listed impairment in order to support a finding of "disabled" at step three. *See* 20 C.F.R. § 416.926 (a). Under either analysis, impairments must be considered in combination. *See Burnam v. Schweiker,* 682 F.2d 456, 458 (3d Cir. 1982); *see also Washington v. Heckler,* 756 F.2d 959, 967 (3d Cir.1985), *Bazemore v. Heckler,* 595 F. Supp. 682, 689 (D. Del. 1980). In the present case, the ALJ determined that Ferguson's impairments do not meet or equal the qualifications for "Mental Retardation" under 20 C.F.R. 404, Subpt. P, Reg. No.

4, § 12.05. In making this determination, however, the ALJ relied solely on Ferguson's I.Q. score. He did not determine to what extent, in any, Ferguson's mental impairments were the result of F.A.S.[26] In proceeding through the remaining steps, the ALJ also determined that Ferguson retains the residual functional capacity to perform two jobs in the national economy and found him "not disabled" at step five. Both analyses are devoid of any indication that the effects of F.A.S. were considered. The court, therefore, concludes that the ALJ's determination that Ferguson is "not disabled" is not supported by substantial evidence.

B. The ALJ's Finding Of "Not Disabled" At Step Three Is Not Supported By Substantial Evidence

The required level of severity for mental retardation may be met when a claimant possesses an I.Q. rating below seventy. The applicable sections of 20 C.F.R. 404, Subpart P, Reg. No. 4, § 12.05 (c) and (d), state that either of the following suffice as requisite evidence of mental retardation and a finding of disability:[27]

> (c) A valid verbal, performance, or full scale I.Q. of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function.
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> (d) A valid verbal, performance, or full scale I.Q. of 60 through 70, resulting in at least two of the following:

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[26]The statute classifies F.A.S. along with "other chromosomal abnormalities" and provides that "the effects of [F.A.S.] should be considered under the affected body system." *See* 20 C.F.R., Subpt. P, Reg. No. 4, § 10.00(c).

[27]The statute first provides that mental retardation must have initially manifested during the developmental period, that is having onset prior to age twenty-two. As it appears uncontested that Ferguson's impairments were manifest prior to this age, and as F.A.S. is a condition the onset of which occurs in utero, the court will not address this requirement.

1. Marked restriction of activities of daily living;[28] or
2. Marked difficulties in maintaining social functioning; or
3. Marked difficulties in maintaining concentration, persistence, or pace; or
4. Repeated episodes of decompensation, each of extended duration.[29]

Id. Further, the statute provides that when more than one I.Q. is customarily derived from an administered test,[30] "we use the lowest of these in conjunction with 12.05." *See id.* at § 12.00 (d)(6)(c). According to the record, Ferguson's lowest reported I.Q. was a score of 71.[31] Ferguson's second lowest score was a performance I.Q. of 72, whereas it was noted that his scores would range from an I.Q. of 68-80 at the 95% confidence level.[32]

Some courts have held that the range of error for reported I.Q. scores may be used in place of the lowest reported score in determining whether a claimant is disabled. *See Hampton v. Apfel*, Civ.A.No.

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[28]According to the statute, a "marked" restriction is defined as "more than moderate, but less than extreme," and is measured by the overall degree of interference with function in an area. *See id.* at § 12.00 (c)(1-3).

[29]Episodes of decompensation are defined as "exacerbations or temporary increases in symptoms or signs accompanied by a loss of adaptive functioning, as manifested by difficulties in performing activities of daily living, maintaining relationships, or maintaining concentration, persistence, or pace." *See id*. at § 12.00 (c)(4).

Further, the term repeated episodes of decompensation, each of extended duration in these listings means three episodes within one year, or an average of once every four months, each lasting for about two weeks." *See id.* Episodes differing in duration or frequency will also be examined for equivalence.

[30]Separate verbal, performance, and full scale I.Q.'s provided in the Wechsler series are given as example by the statute.

[31]Ferguson scored a performance I.Q. of 71 on the WAIS-R exam administered on March 8, 1994 by Dr. Kurz. No range of deviation was reported for this exam. The court notes that the ALJ failed to use the lowest score available as per the statute and instead cited Ferguson's lowest I.Q. score as 74. (R. 16.)

[32]Funk administered this second WAIS-R test on December 18, 1995.

97-6651, 1999 WL 46614, at *2 (E.D. Pa. Jan. 6, 1999) (holding that lowest score of range of error should be utilized and incorporating five point margin of error); *Halsted v. Shalala*, 862 F. Supp. 86, 90 (W.D. Pa. 1994) (holding I.Q. of 71 within range of § 12.05 (c)); *Soto v. Sullivan*, Civ.A.No. 91-47-CMW, 1991 WL 226776, at *3 (D. Del. Oct. 31, 1991) (stating that "the court is aware that an I.Q. measurement is fallible and an error of measurement of approximately five points is considered to represent the applicable zone.").[33] *But see Williams v. Apfel*, Civ.A.No. 99-39-SLR, 2000 WL 376390, at *11 (D. Del. Mar. 30, 2001) (holding that the margin or error should not be taken into account), *Colavito v. Apfel*, 75 F. Supp.2d 385, 403 (E.D. Pa. 1999); *Lawson v. Apfel*, 46 F. Supp.2d 941, 948 (W.D. Mo. 1998) (citing *Bendt v. Chater*, 940 F. Supp. 1427, 1431 (S.D. Iowa 1996) (holding that "incorporating a five point measurement error into a claimant's I.Q. would effectively expand the requisite I.Q. under listing 12.05 (c) from test scores of 60 to 70 to test scores of 60 to 75."); *Peterson v. Callahan*, Civ.A.No. 96-2825, 1997 WL 642981, at *4 n.6 (E.D. La. Oct. 15, 1997) (stating that court is without duty to assign appropriate I.Q. level); *Brainard v. Secretary of Health and Human Svcs.*, (Table and Unpublished), Civ.A.No. 93-5173, 1994 WL 170783, at *1 (May 5, 1994) (holding that court is without authority to take standard of deviation into account); *Bennett v. Bowen*, (Table and Unpublished), Civ.A.No. 88-3166, 1989 WL 100665, at *3-*4 (Aug. 28, 1989) (same).

Absent controlling authority on the subject, the court may elect to adopt Ferguson's lowest reported deviated score of 68 or apply the five point margin of error to find that Ferguson's performance

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[33]The *Soto* court did not specifically adopt the lowest score within the five point standard deviation of the claimant's I.Q. score of 73; the court found that the issue was precluded as no opinions in the record supported a finding of mental retardation, and that all experts in that case agreed that the claimant could perform clerical work. *See id.* at *4.

I.Q. is as low as 66. Since, however, it finds that the ALJ failed to properly consider the weight of a possible F.A.S. diagnosis on the remaining requirements of 20 C.F.R. 404, Subpt. P., Reg. No. 4, § 12.05 (c) and (d), the court declines to decide the issue.

F.A.S. is a legitimate "brain disorder of children impaired in utero by maternal alcohol consumption. The court has previously noted some of the symptoms of F.A.S., some additional characteristics of which are 'inappropriate social behavior, memory deficits . . . lack of judgment, lack of remorse for misbehavior, lying . . . unusual aggressiveness, and wide variations in learning abilities at different times'." *See Roelandt v. Apfel*, 125 F. Supp.2d 1138, 1146 (S.D. Iowa 2001) (citing *Devereaux v. Perez*, 218 F.3d 1045, 1057 (9th Cir. 2000)). It is unclear whether a diagnosis of F.A.S. would create evidence of a "physical or other mental impairment imposing an additional and significant work-related limitation of function" as per § 12.05 (c) or effect the determination of "marked"difficulties outlined in § 12.05 (d).[34]

In the present case, Dr. Bartoshesky's report states that Ferguson has many of the clinical and behavioral features of F.A.S., stating that "[F.A.S.] seems a likely diagnosis." However, he then specifically states that "there is no specific diagnostic test that confirms [F.A.S.]." The statute explicitly states that "medical equivalence must be supported by medically acceptable clinical and laboratory techniques." *See* 20 C.F.R. § 416.926 (a)(2) (citing §§ 404.1512 and 416.912). The ALJ, therefore, failed to develop the record by investigating the nature of F.A.S. diagnoses and providing evidence as to whether Ferguson can be accurately diagnosed with the condition.

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[34]Although Ferguson's case proceeded under an analysis under § 12.05, "Mental Retardation," it is also unclear whether an analysis under § 12.10, "Autistic disorder and other pervasive development disorders," could be appropriate in considering the in utero onset of F.A.S.

Although Dr. Bartoshesky's report is the only evidence in the record which alludes to the presence of F.A.S., the ALJ only briefly noted it in his opinion. Further, the ALJ offered no reasoning for discounting a possible F.A.S. diagnosis, and did not discuss the effects of Dr. Bartoshesky's report on his decision. The ALJ has the duty to "develop the record when there is a suggestion of mental impairment by inquiring into the present status of impairment and its possible effects on the claimant's ability to work." *See Plummer v. Apfel*, 186 F.3d 422, 434 (3d Cir. 1999). *See e.g. Ferguson v. Schweiker*, 765 F.2d 31, 36 n.4 (3d Cir. 1985) (stating that the Commissioner must secure sufficient information to make a "sound determination"); *cf. Thompson v. Sullivan*, 878 F.2d 1108, 1110 (8th Cir. 1989) (holding that the ALJ has a duty to "develop the record fully and fairly"). The ALJ is required to employ this standard when conducting his own investigation into the claimed mental impairments.[35] *See Plummer*, 186 F.3d at 434.

Though the claimant has the burden of producing evidence of disability, the ALJ must analyze all of the evidence in the record and provide an adequate explanation for disregarding evidence. *See generally Adorno v. Shalala*, 40 F.3d 43, (3d Cir. 1994). Further, the ALJ must set out a specific factual basis for each finding. *See Baerga v. Richardson*, 500 F.2d 309, 312 (3d Cir. 1974); *Root v. Heckler*, 618 F. Supp. 76, 79 (D. Del. 1985). With regard to Ferguson's possible F.A.S. diagnosis, there appears to be "simply no difference in the probative value of the evidence supporting the findings made and of that supporting the findings [the ALJ] declined to make."[36] *See Woody v. Secretary of Health and Human*

[35]The regulations provide for the purchase of consultative examinations and tests when evidence is not contained in the claimant's medical records, or to resolve a conflict or ambiguity in the evidence, or to obtain highly technical testing or other specialized evidence. *See* 20 C.F.R. § 404.1519a (b), § 416.916a (b).

[36]Consequently, there does not appear to be any reasoning in the ALJ's opinion as to why testimony by Ferguson's mother was discounted except to the extent that the testimony concerned

Services, 859 F.2d 1156, 1161 (3d Cir. 1988). Without additional evidence, or any indication of the ALJ's reasoning in discounting Ferguson's possible F.A.S. diagnosis, the court cannot complete a comprehensive review of the ALJ's third step finding of "not disabled."

C. The ALJ's Finding Of "Not Disabled" At Step Five Is Not Supported By Substantial Evidence

The ALJ concluded that Ferguson has no significant "past relevant work [history]" by which to make a step four assessment. Proceeding to step five, the ALJ made a determination that Ferguson's residual functional capacity enables him to perform two jobs in the national economy. In making his capacity assessment, the ALJ made no statements regarding the four M.R.F.C.A. forms in the record.[37] Two of the 1996 M.R.F.C.A. reports yield "marked" restriction results in two categories relating to Ferguson's ability to understand, remember, and carry out detailed instructions. One of the 1996 M.R.F.C.A. reports shows one "marked" restriction in Ferguson's ability to interact appropriately with the

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Ferguson's ability to do complex work. *See* 20 C.F.R. § 404, Subpt. P, Reg. No. 4, § 12.00 (D)(1)(c), (providing that "if necessary, information should also be obtained from nonmedical sources, such as family members . . . to supplement the record of your functioning.")

[37]The court notes that the Third Circuit has held that "form reports in which a physician's obligation is only to check a box or fill in a blank are weak evidence at best", and that "as we pointed out in discussing [RFC reports], where these so-called 'reports are unaccompanied by written reports, their reliability is suspect. . .'." *See Mason v. Shalala,* 994 F.2d 1058, 1065 (3d Cir. 1993) (citing *O'Leary v. Schweiker,* 710 F.2d 1334, 1341 (8th Cir. 1983)); *See also Brewster v. Heckler,* 786 F.2d 581, 585 (3d Cir. 1986). There are few written reports evident in this record. The M.R.F.C.A. reports are "check-box" style, and so are the four PR.T.F. forms on which the ALJ relied. The ALJ did not provide his reasoning in discounting one set of applicable form reports, as required. The suspect reliability of "check-box" forms in general provides another basis for the court to find that the ALJ failed to fully develop the record.

general public.[38] The ALJ provided no indication of his rationale in discounting these functional capacity reports. Furthermore, the effects of a F.A.S. diagnosis were also not considered at step five.

It is well established that "the ALJ's finding of residual functional capacity must 'be accompanied by a clear and satisfactory explanation of the basis on which it rests.'" *See Fargnoli*, 247 F.3d at 41 (citing *Cotter v. Harris*, 642 F.2d 700, 704 (3d Cir. 1981)). It is obvious that no such clear explanation appears in the present record. The court simply "cannot tell if significant probative evidence was not credited or simply ignored." *See id.* at 42 (citing *Cotter*, 642 F.2d at 705)). As the Third Circuit has held, access to the Commissioner's reasoning is indeed essential to a meaningful court review:

> Unless the [Commissioner] has analyzed all the evidence and has successfully explained the weight he has given to obviously probative exhibits, to say that his decision is supported by substantial evidence approaches an abdication of the court's duty to scrutinize the record as a whole to determine whether the conclusions reached are rational.

Gober v. Matthews, 574 F.2d 772, 776 (3d Cir. 1978). The court finds that, at minimum, the looming possibility of the presence of F.A.S. in this case is sufficiently "probative" to warrant further hearings on this matter. Consequently, this case will be remanded to the ALJ for further proceedings.

V. CONCLUSION

The ALJ has presently failed to develop the record with regards to the presence and the impacts of an F.A.S. diagnosis. The ALJ also has not provided a clear or satisfactory explanation for his finding of "not disabled" at step three and subsequently at step five. Because the court cannot adequately review

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[38]Because the court is not "empowered to weigh the evidence or substitute its conclusions for those of the fact-finder," the court reserves judgment on what bearing the neglected reports would have on the potential step five Residual functional capacity analysis. *See Williams v. Sullivan*, 970 F.2d 1178, 1182 (3d Cir. 1992).

the ALJ's finding, the matter must be remanded for further proceedings consistent with this memorandum opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DION L. FERGUSON, Plaintiff, v. Larry G. Massanari; Acting Commissioner of Social Security,[1] Defendant.	)	C.A. No. 99-839-GMS

ORDER

For the reasons stated in the court's Memorandum Opinion of the same date, IT IS HEREBY ORDERED that:

1. The Commissioner's motion for summary judgment (D.I. 16) is DENIED.

2. Ferguson's motion for summary judgment (D.I. 13) is GRANTED in part.

3. This case is REMANDED to the Administrative Law Judge for further proceedings consistent with the aforementioned memorandum opinion.

Dated: July 31, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

[1]Larry G. Massanari became the Acting Commissioner of Social Security on March 29, 2001. Under Fed. R. Civ. P. 25(d)(1), Massanari is automatically substituted as the defendant in this action.