

20-3297

*Colgan v. Kijakazi*

IN THE

**United States Court of Appeals  
For the Second Circuit**

\_\_\_\_\_  
AUGUST TERM 2021

ARGUED: SEPTEMBER 1, 2021

DECIDED: JANUARY 3, 2022

No. 20-3297

**RACHEL COLGAN,**

*Plaintiff-Appellant,*

*v.*

**KILOLO KIJAKAZI,**

**ACTING COMMISSIONER OF SOCIAL SECURITY,**

*Defendant-Appellee.\**

\_\_\_\_\_  
Appeal from the United States District Court  
for the Northern District of New York.  
19-cv-954 – David E. Peebles, *Magistrate Judge*.

\_\_\_\_\_  
\* The Clerk of Court is directed to amend the caption as set forth above.

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Before: WALKER, CALABRESI, and MENASHI, *Circuit Judges*.

Plaintiff-Appellant Rachel Colgan appeals from a judgment entered in the United States District Court for the Northern District of New York (Peebles, *M.J.*) affirming an administrative law judge's denial of her application for disability insurance benefits under the Social Security Act, 42 U.S.C. §§ 401–434. Following an evidentiary hearing on her claim for disability benefits, the administrative law judge determined that Colgan possessed the residual functional capacity to perform sedentary work, 20 C.F.R. § 404.1567(a), and was therefore not disabled within the meaning of the Social Security Act, 42 U.S.C. § 423(d)(1)(A). The Social Security Administration's Appeals Council denied review, and the District Court affirmed.

Upon consideration of the administrative record, we conclude that the administrative law judge's factual determination with respect to Colgan's residual functional capacity was not supported by substantial evidence. We therefore **VACATE** the District Court's judgment and **REMAND** the case to

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the District Court with instructions to remand to the Social Security Administration for further action consistent with this opinion.

Judge Menashi dissents in a separate opinion.

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*Defendant-Appellee.*

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CALABRESI, *Circuit Judge*:

Plaintiff-Appellant Rachel Colgan appeals from a judgment entered in the United States District Court for the Northern District of New York (Peebles, M.J.) affirming an administrative law judge's ("ALJ") denial of her application for

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1 disability insurance benefits under the Social Security Act (“the Act”), 42 U.S.C.  
2 §§ 401–434. Following an evidentiary hearing on her claim for disability benefits,  
3 the ALJ determined that Colgan possessed the residual functional capacity  
4 (“RFC”) to perform sedentary work, 20 C.F.R. § 404.1567(a), and hence was not  
5 disabled within the meaning of the Act, *see* 42 U.S.C. § 423(d)(1)(A). The Social  
6 Security Administration’s (“the Administration”) Appeals Council denied review  
7 of this decision and the District Court affirmed.

8 On appeal, Colgan contends that the ALJ’s determination was not  
9 supported by substantial evidence and, in particular, that the ALJ misapplied the  
10 treating physician rule, which, under certain circumstances, requires the agency  
11 to assign “controlling weight” to the medical opinion of a claimant’s treating  
12 physician when evaluating disability status, *see* 20 C.F.R. § 404.1527(c)(2).

13 Upon consideration of the administrative record, we hold that the ALJ’s  
14 decision was not supported by substantial evidence. We therefore **VACATE** the  
15 District Court’s judgment and **REMAND** the case to the District Court with  
16 instructions to remand to the Social Security Administration for further action  
17 consistent with this opinion.

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*Colgan v. Kijakazi***BACKGROUND****I.**

Colgan was employed as a teacher at a special education high school in the Binghamton City School District when, in February 2015, she came across two sixteen-year-old students fighting on school grounds. Colgan attempted to break up the fight but, in the course of doing so, either fell or was pushed into a wall, leading to serious injuries. Specifically, the administrative record reflects that Colgan was “hit in the head” with enough force for her head to penetrate “part of a wall.” App’x at 12. As a result of the incident, Colgan went to the emergency room with a closed head injury; there she also reported pain in her head, neck, and upper back, as well as “nausea and tingling in her right fingers.” *Id.* at 77.

Colgan’s injuries and their symptoms persisted in the years that followed. During this time, she sought clinical treatment from a number of medical sources. According to her treating physician, Dr. Claudine Ward—a concussion specialist who regularly treated Colgan from September 2015 to April 2018—Colgan satisfied the medical criteria for mild traumatic brain injury and post-concussion syndrome with, *inter alia*, persistent cognitive defects and fatigue, chronic post-traumatic headaches, sleep disturbance, and dizziness. Of particular relevance to

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1 this appeal, Dr. Ward's medical notes from treatment sessions with Colgan  
2 indicate that she suffered from debilitating headaches which, in turn, severely  
3 hampered her ability to carry out activities of daily living and basic job-related  
4 functions. Due to these serious symptoms, Colgan did not take up any gainful  
5 employment following the incident and instead, successfully applied for workers'  
6 compensation benefits.

7 On June 29, 2016, Colgan filed for social security disability insurance  
8 benefits, but her claim was denied. In August 2018, Colgan appeared before an  
9 ALJ for an evidentiary hearing on her application. The following month, the ALJ  
10 issued a written denial of Colgan's claim, concluding that she had the RFC to  
11 perform sedentary work, subject to certain physical and cognitive limitations, and  
12 was therefore not disabled within the definition of the Act.

## 13 II.

14 According to the Act, a "claimant is disabled . . . if she is unable to 'engage  
15 in any substantial gainful activity by reason of any medically determinable  
16 physical or mental impairment [that] can be expected to result in death or which  
17 has lasted or can be expected to last for a continuous period of not less than 12  
18 months.'" *Estrella v. Berryhill*, 925 F.3d 90, 94 (2d Cir. 2019) (quoting 42 U.S.C.

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§ 423(d)(1)(A)) (alteration in original). In interpreting this statutory definition, the Administration has set forth by regulation a “five-step, sequential evaluation process” to determine disability status:

(1) whether the claimant is currently engaged in substantial gainful activity; (2) whether the claimant has a severe impairment or combination of impairments; (3) whether the impairment meets or equals the severity of the specified impairments in the Listing of Impairments; (4) based on a “residual functional capacity” assessment, whether the claimant can perform any of his or her past relevant work despite the impairment; and (5) whether there are significant numbers of jobs in the national economy that the claimant can perform given the claimant’s residual functional capacity, age, education, and work experience.

*Id.* (internal citations and quotation marks omitted); see 20 C.F.R. §§ 404.1520(a)(4)(i)–(v). At steps one through four of this analysis, the claimant bears the burden of proof; but at step five, the burden shifts to the Commissioner. See *Estrella*, 925 F.3d at 94.

In this case, the ALJ applied the five-step evaluation process and found that Colgan had satisfied steps one through four of the disability status analysis.

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1 Specifically, the ALJ determined: (1) that Colgan had not engaged in substantial  
2 gainful activity since February 12, 2015; (2) that she suffered from severe  
3 impairments including degenerative disease of the cervical and lumbar spine,  
4 post-concussion syndrome, depression, anxiety, and post-traumatic stress  
5 disorder; (3) that these impairments did not satisfy or equal the severity of the  
6 specified impairments in the Listing of Impairments that would automatically  
7 result in a finding that she is disabled; and (4) that given her severe impairments,  
8 Colgan would be unable to perform any of her past relevant work.

9       The disqualifying factor, however, that the ALJ ultimately rested his adverse  
10 decision on was at step five of the disability analysis: that is, whether “there are  
11 significant numbers of jobs in the national economy that the claimant can perform  
12 given the claimant’s residual functional capacity, age, education, and work  
13 experience.” *Estrella*, 925 F.3d at 94. In assessing this factor, the ALJ first  
14 determined that, despite her impairments, Colgan had the RFC to perform  
15 sedentary work, as defined in 20 C.F.R. § 404.1567(a), subject to certain physical

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1 and cognitive limitations.<sup>1</sup> Relying on the testimony of a vocational expert, the  
2 ALJ then found that, given Colgan's RFC, age, education, and work experience,  
3 there were significant numbers of sedentary jobs in the national economy that  
4 Colgan could perform. And, in light of those findings, the ALJ concluded that  
5 Colgan was not disabled within the meaning of the Act from February 12, 2015  
6 through the date of decision. *See* 42 U.S.C. § 423(d)(1)(A); 20 C.F.R.  
7 § 404.1520(g)(1).

8       Significantly, however, the national employment numbers of available jobs  
9 identified by the vocational expert at step five were based on the ALJ's assessment  
10 that Colgan would *not* have to be off-task for more than 15 percent of the day or  
11 be absent more than one day per month.

12       This RFC assessment is what lies at the heart of this appeal. In the  
13 evidentiary hearing before the ALJ, Colgan submitted an expert opinion by  
14 Dr. Ward stating that Colgan's impairments would require her to be off-task for  
15 more than 33 percent of the day and absent more than four days each month.

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<sup>1</sup> The ALJ found that, given her impairments, Colgan could not perform work involving reaching or lifting with either upper extremity; climbing; frequently using both upper extremities; more than occasional exposure to bright lights; or more than simple cognitive functions or a low level of work pressure.

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1 According to the administrative record, Dr. Ward's opinion was based on her  
2 clinical notes from treatment sessions with Colgan, which, taken collectively,  
3 described a pattern of chronic, debilitating headaches that would last for several  
4 hours each day. Specifically, in her October 10, 2017 treatment note, Dr. Ward  
5 wrote that Colgan "ha[d] reached maximal medical improvement in regards to  
6 concussion" but that she had "permanent impairments related to the injury."  
7 App'x at 276. This treatment note subsequently concluded that "[c]hronic fatigue  
8 and headaches . . . [would] interfere with her ability to perform [activities of daily  
9 living] and perform job-related duties." *Id.*

10 The ALJ asserted that there were several problems with Dr. Ward's expert  
11 opinion and, accordingly, assigned it "little weight" in assessing Colgan's RFC. *Id.*  
12 at 43–44. Then, looking at the rest of the record, the ALJ concluded that Colgan's  
13 claim for insurance benefits failed at step five of the disability analysis because she  
14 had the RFC to perform sedentary work sufficiently available in the national  
15 economy. *See* 20 C.F.R. § 404.1567(a). The Appeals Council denied review of this  
16 decision and the District Court affirmed.

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*Colgan v. Kijakazi***DISCUSSION****I.**

In reviewing “an appeal from the denial of disability benefits, we focus on the administrative ruling rather than the district court’s opinion,” *Estrella*, 925 F.3d at 95 (internal citation and quotation marks omitted), to determine whether the ALJ’s decision was supported by “substantial evidence,” *Selian v. Astrue*, 708 F.3d 409, 417 (2d Cir. 2013) (per curiam). Whether substantial evidence lies in support of the ALJ’s determination requires us to “conduct a plenary review of the administrative record[.]” *McIntyre v. Colvin*, 758 F.3d 146, 149 (2d Cir. 2014) (quoting *Kohler v. Astrue*, 546 F.3d 260, 265 (2d Cir. 2008)). Although, as the Supreme Court has said, the evidentiary threshold for the substantial evidence standard “is not high,” *Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019), the substantial evidence standard is also not merely hortatory: It requires relevant evidence which would lead a “reasonable mind” to concur in the ALJ’s factual determinations. *McIntyre*, 758 F.3d at 149 (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)); see *Burgess v. Astrue*, 537 F.3d 117, 127–28 (2d Cir. 2008).

In the context of disability adjudications, the Administration’s discretion in making factual determinations is also constrained by self-imposed regulations—

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1 one of which sets forth the treating physician rule, *see* 20 C.F.R. § 404.1527(c)(2); *see*  
 2 *also Burgess*, 537 F.3d at 128–29.<sup>2</sup> The treating physician rule, as its name connotes,  
 3 states that the medical opinion of a claimant’s treating physician must be given  
 4 “controlling weight” if it “is well-supported by medically acceptable clinical and  
 5 laboratory diagnostic techniques and is not inconsistent with the other substantial  
 6 evidence in the case record.”<sup>3</sup> *Estrella*, 925 F.3d at 95 (internal citations and  
 7 quotation marks omitted); *see* 20 C.F.R. § 404.1527(c)(2). Put another way, the rule  
 8 requires the ALJ to defer to the treating physician’s opinion when making  
 9 disability determinations if the opinion is supported by reliable medical

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<sup>2</sup> For claims filed after March 27, 2017, however, ALJs “will not defer or give any specific evidentiary weight, *including controlling weight*, to any medical opinion(s) or prior administrative medical finding(s), including those from your medical sources.” 20 C.F.R. §§ 404.1520c(a) (emphasis added), 416.920(c). Pursuant to the new regulation, the ALJ will consider a series of factors, including, *inter alia*, supportability, consistency, relationship to the claimant, and specialization when evaluating a medical opinion. The new regulatory regime is clear that claims filed before March 27, 2017—such as *Colgan*’s—are still governed by the framework and evidentiary standards set out in 20 C.F.R. § 404.1527. For that reason, although we are certainly aware of the new regulatory scheme, we need not speculate here as to its potential effects on a case that is not before us.

<sup>3</sup> If an ALJ reasonably finds that the treating physician’s medical opinion is not entitled to “controlling weight” under the treating physician rule, then the ALJ must determine how much weight to assign the treating physician’s opinion. The ALJ does so by “explicitly” applying the *Burgess* factors: “(1) the frequen[cy], length, nature, and extent of treatment; (2) the amount of medical evidence supporting the opinion; (3) the consistency of the opinion with the remaining medical evidence; and (4) whether the physician is a specialist.” *Estrella*, 925 F.3d at 95-96 (quoting *Selian*, 708 F.3d at 419–20). Failure to do so, we have said, constitutes a procedural error subject to a harmless error analysis. *Id.* Here, the ALJ failed explicitly to apply the *Burgess* factors in his written denial of *Colgan*’s disability claim. But because we hold that Dr. Ward’s opinion was entitled to “controlling weight” at step one of the treating physician rule, we need not reach the question of whether this procedural error was harmless.

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1 techniques and is not contradicted by other reasonable evidence in the  
2 administrative record. *See* 20 C.F.R. § 404.1527(c)(2). Moreover, the ALJ must  
3 articulate “good reasons” to rebut the presumption of controlling deference  
4 conferred on the treating physician’s opinion. *See, e.g., Estrella*, 925 F.3d at 96;  
5 *Burgess*, 537 F.3d at 129–30.

## 6 II.

7 Colgan’s principal argument on appeal is that the ALJ misapplied the  
8 treating physician rule by assigning “little weight” to the medical opinion of  
9 Dr. Ward—a concussion specialist who, as previously noted, had regularly treated  
10 Colgan from September 2015 to April 2018. During the evidentiary hearing before  
11 the ALJ, Dr. Ward produced a medical opinion on a standard check-box form  
12 stating that, given her impairments, Colgan would have to be off-task for more  
13 than 33 percent of the day and absent more than four days each month. *See supra*  
14 7–9. Colgan first contends that the treating physician rule required the ALJ to  
15 assign controlling weight to Dr. Ward’s opinion in determining her RFC to  
16 perform sedentary work. She then asserts that the ALJ erred in not providing good  
17 reasons for assigning little weight to Dr. Ward’s expert opinion.

**A.**

As a preliminary matter, the ALJ partly rested his decision to discount Dr. Ward's medical opinion on the fact that it was presented in a check-box form. The Commissioner argued in her appellate brief before us as well as at oral argument that the ALJ's reasoning in this respect was appropriate given our

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1 statements in *Halloran v. Barnhart*, 362 F.3d 28, 32 (2d Cir. 2004) (per curiam), and  
2 *Heaman v. Berryhill*, 765 F. App'x 498, 501 (2d Cir. 2019). The Commissioner reads  
3 those cases to hold that an ALJ may discount a treating physician's medical  
4 opinion in the determination of disability benefits if the opinion is provided in a  
5 check-box form.

6 We are, however, unable to discern any such rule, either in our case law or  
7 in relevant federal regulations. In *Halloran*, we set forth the modest proposition  
8 that a treating physician's medical opinion is not entitled to controlling weight  
9 where it is provided in a check-box form and is unaccompanied by meaningful  
10 medical evidence in the administrative record. 362 F.3d at 31–32. There, the  
11 disability claimant had relied on a check-box opinion completed by her treating  
12 physician which simply noted that the claimant was unable to take up sedentary  
13 work because she “could sit for less than 6 hours per day[.]” *Id.* at 31 (internal  
14 quotation marks omitted). Because the treating physician's check-box opinion was  
15 unsupported by substantial medical evidence, including the opinions of other  
16 medical experts, and “not particularly informative,” we agreed with the ALJ's  
17 decision not to grant controlling weight to the physician. *Id.* at 32; *see also Heaman*,  
18 765 F. App'x at 501 (relying on *Halloran* and affirming ALJ's discounting of treating

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1 physicians' opinions where they were provided in stand-alone "checkbox forms"  
 2 that "offer[ed] little or nothing with regard to clinical findings and diagnostic  
 3 results" and "were inconsistent with . . . findings reflected in the doctors' notes").

4       Needless to say, *Halloran* did not then and does not now stand for the rule  
 5 that the evidentiary weight of a treating physician's medical opinion can be  
 6 discounted by an ALJ based on the naked fact that it was provided in a check-box  
 7 form.<sup>5</sup> To endorse such a peculiar rule would, moreover, contravene our general  
 8 approach to agency factfinding which, though deferential, as relevant federal  
 9 regulations also make clear, is a functional and not a formalist one. *See, e.g.*, 20  
 10 C.F.R. § 404.1527(c) (setting forth various factors in the ALJ's consideration of  
 11 medical evidence with respect to disability determinations); *cf. Biestek*, 139 S. Ct. at  
 12 1157 (rejecting disability applicant's argument calling for a "categorical rule" in  
 13 assessing the substantial evidence standard and explaining that the relevant

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<sup>5</sup> The Commissioner also relies on 20 C.F.R. § 404.1527(c)(3) to argue that check-box form opinions may be discounted by an ALJ in making disability determinations. But the regulatory provision cited by the Commissioner makes no mention of check-box opinions and instead states the obvious principle that a better explained medical opinion will, as a general matter, be given more weight by the ALJ. *See* 20 C.F.R. § 404.1527(c)(3) ("The more a medical source presents relevant evidence to support a medical opinion, particularly medical signs and laboratory findings, the more weight we will give that medical opinion. The better an explanation a source provides for a medical opinion, the more weight we will give that medical opinion.").

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1 “inquiry, as is usually true in determining the substantiality of evidence, is case-  
2 by-case”); *id.* at 1162 (Gorsuch, J., dissenting) (discussing capacious categories of  
3 evidence that would not satisfy the substantial evidence standard). Accordingly,  
4 we take this occasion to reassert and clarify that the nature of an ALJ’s inquiry in  
5 disability factfinding turns on the substance of the medical opinion at issue—not  
6 its form—and ultimately whether there is reasonable evidence in the record that  
7 supports the conclusions drawn by the medical expert, *see McIntyre*, 758 F.3d at  
8 149.

9 Applying those principles here, we conclude that the ALJ’s reasoning for  
10 discounting Dr. Ward’s expert opinion was, like his reliance on *Halloran*, flawed.  
11 In contrast to the medical report at issue in *Halloran*—which completely lacked any  
12 supporting evidence in the medical record—Dr. Ward’s check-box form opinion  
13 was supported by voluminous treatment notes gathered over the course of nearly  
14 three years of clinical treatment. In light of these circumstances, then, the ALJ’s  
15 first reason for assigning little weight to Dr. Ward’s opinion was erroneous.<sup>6</sup>

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<sup>6</sup> Troublingly, the ALJ did not seem to mind that a state agency psychologist’s adverse opinion had been provided on a check-box form when assigning it “significant weight.” *See infra* 20–22. Although we have no reason to doubt the impartiality of the ALJ in this case, we find it appropriate to reiterate at this juncture

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The ALJ also determined that Dr. Ward's opinion was not entitled to controlling weight because: (1) it was internally inconsistent and (2) it was unsupported by other substantial evidence in the administrative record. Additionally, the ALJ asserted that Dr. Ward's opinion was entitled to little weight based on other expert opinions. For the following reasons, we disagree.

***1. Internal Inconsistencies***

The ALJ found that Dr. Ward's medical opinion was internally inconsistent because, on the check-box form, Dr. Ward listed "a side effect of fatigue" while, in several of her treatment notes, she had written that Colgan's fatigue rose and fell depending on the dosage levels of prescribed medications. App'x at 43–44. Additionally, the ALJ found that Dr. Ward's diagnosis of "anxious mood, emotional lability, perseverative speech, and impaired concentration" was

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that, "the Commissioner is not a litigant and has no representative at the agency level . . . . Thus, it is the ALJ's duty to investigate and develop the facts and develop the arguments both for and against the granting of benefits." *Butts v. Barnhart*, 388 F.3d 377, 386 (2d Cir. 2004) (internal citations and quotation marks omitted).

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1 contradicted by her treatment records which showed that, on certain occasions,  
2 Colgan did not appear to present those infirmities. *Id.* at 44.

3 It was legal error for the ALJ to deem these to be internal inconsistencies.  
4 As this Court explained recently—and powerfully—in *Estrella v. Berryhill*, an ALJ  
5 commits legal error in resting his disability determination on “a one-time snapshot  
6 of a claimant’s status” because that episode “may not be indicative of her  
7 longitudinal mental health.” 925 F.3d at 98. “Cycles of improvement and  
8 debilitating symptoms [of mental illness],” we said, “are a common occurrence,  
9 and in such circumstances it is error for an ALJ to pick out a few isolated instances  
10 of improvement over a period of months or years and to treat them as a basis for  
11 concluding a claimant is capable of working.” *Id.* at 97 (quoting *Garrison v. Colvin*,  
12 759 F.3d 995, 1017 (9th Cir. 2014)) (alteration in original). What the ALJ here did,  
13 by cherry-picking particular instances of improvement from Dr. Ward’s treatment  
14 notes in order to create an inconsistency within her medical opinion, was precisely  
15 what we deemed erroneous in *Estrella*. *Id.* at 97–98; see *Selian*, 708 F.3d at 418–19.

## 16 2. *Unsupported by the Record*

17 The ALJ also determined that Dr. Ward’s opinion was unsupported by  
18 treatment records which the ALJ viewed as stating that Colgan’s debilitating

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1 headaches were “short-lived” when she could “remove herself from the trigger”  
2 (e.g., noise). App’x at 279. This finding, however, was based on a misconception  
3 of the record. *See Selian*, 708 F.3d at 418. In the very next sentence after the above  
4 quoted language, Dr. Ward noted that Colgan’s “headaches last all day if she is  
5 unable to rest” and that prescribed medications “did not improve [her]  
6 symptoms.” App’x at 279. Read in this proper context, these treatment notes  
7 support Dr. Ward’s medical opinion that Colgan needed to be off-task for more  
8 than 33 percent of the day and absent more than four days each month. Because  
9 the ALJ “ignored the context of the notation” and “made no effort to reconcile this  
10 apparent inconsistency,” *Selian*, 708 F.3d at 418–19, this reason also did not provide  
11 a sufficient basis to discount Dr. Ward’s opinion.

12 Finally, we disagree with the ALJ that Colgan’s ability to engage in certain  
13 activities of daily living—such as caring for her two children, preparing meals  
14 and washing dishes, and driving to her medical appointments—provided  
15 substantial record evidence to discount Dr. Ward’s medical opinion.

16 There is some evidence that Colgan, a single mother, could to some extent  
17 care for her two young children and engage in activities necessary to her own  
18 welfare. But we cannot say that these make a treating physician’s findings flawed

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1 and foreclose an applicant's entitlement to disability benefits. *See, e.g., Balsamo v.*  
2 *Chater*, 142 F.3d 75, 81 (2d Cir. 1998) ("We have stated on numerous occasions that  
3 a claimant need not be an invalid to be found disabled under the Social Security  
4 Act.") (internal citations and quotation marks omitted). Indeed, as we powerfully  
5 explained in *Balsamo*:

6 [W]hen a disabled person gamely chooses to endure pain in order to pursue  
7 important goals, such as attending church and helping his wife on occasion  
8 go shopping for their family, it would be a shame to hold this endurance  
9 against him in determining benefits unless his conduct truly showed that he  
10 is capable of working.

11 *Id.* at 81–82 (internal citation and quotation marks omitted). Because we find that  
12 reasoning to apply with equal force here, we conclude that the ALJ erred in  
13 discounting Dr. Ward's opinion on this basis.

### 14 3. Other Expert Opinions

15 In assigning little weight to Dr. Ward's medical opinion, the ALJ stated that  
16 he took into account other expert opinions provided by medical authorities. In  
17 particular, the ALJ assigned "significant weight" to the opinion of state agency

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1 psychologist, O. Fassler, Ph.D., who had conducted a consultative cognitive  
2 assessment of Colgan in connection with her disability claim. App'x at 46.  
3 According to the administrative record, Dr. Fassler provided on a check-box form  
4 his psychological view that, despite Colgan's cognitive defects, she was capable of  
5 "performing unskilled work." *Id.* at 69. The ALJ, in turn, assigned this opinion  
6 significant weight on the grounds that it was "from a relevant medical specialist  
7 who is familiar with Agency disability program rules, and is supported by the  
8 medical and other evidence of record." *Id.* at 46.

9 We find that the ALJ erred in assigning significant weight to Dr. Fassler's  
10 opinion. Dr. Fassler's opinion was based on a single consultative cognitive  
11 assessment and "[w]e have frequently cautioned that ALJs should not rely heavily  
12 on the findings of consultative physicians after a single examination." *Estrella*, 925  
13 F.3d at 98 (internal citation and quotation marks omitted). Moreover, Dr. Fassler  
14 was not a physician, and his assessment that Colgan could perform unskilled work  
15 was unsupported by any substantial medical evidence. In his report, Dr. Fassler  
16 noted that, at times, Colgan appeared to be "appropriate," "not silly, not tearful  
17 and not emotional." App'x at 69. Based on these cursory observations, Dr. Fassler  
18 concluded that "on the whole," Colgan would be able to perform "unskilled

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1 work.” *Id.* It is hard to see how these conclusory remarks could constitute  
2 substantial medical evidence sufficient to undermine Dr. Ward’s medical opinion.  
3 *See Biestek*, 139 S. Ct. at 1159 (Gorsuch, J., dissenting) (explaining that “conclusory  
4 assertions” fail to satisfy the substantial evidence standard). In passing, but  
5 significantly, in *Burgess v. Astrue*, we stated that “an opinion couched in terms so  
6 vague as to render it useless in evaluating the claimant’s residual functional  
7 capacity” cannot “rise to the level of evidence that is sufficiently substantial to  
8 undermine the opinion of the treating physician.” 537 F.3d at 128–29 (internal  
9 citation and quotation marks omitted). Dr. Fassler’s opinion fits that description  
10 all too well.<sup>7</sup>

11 Nor do we find any other substantial evidence in the record, whether  
12 considered individually or together, that would raise a genuine conflict with

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<sup>7</sup> At some level of generality, in disability cases, there will often be medical opinions that are not entirely consistent with each other. A person suffering from an ailment may reasonably consult multiple physicians in order to get a comprehensive view of his illness and at times, some of those consultations may give rise to inconsistent medical opinions. Given this reality of medical practice, the treating physician rule should not be construed so narrowly as to set aside a treating physician’s opinion whenever there are some indicia of inconsistency in the medical record. *See Burgess*, 537 F.3d at 128–29 (recognizing that “not all expert opinions rise to the level of evidence that is sufficiently substantial to undermine the opinion of the treating physician”). This would preclude the treating physician rule from having any effect and frustrate its core rationale, which is that the treating physician is typically best situated to provide the most accurate representation of the disability claimant’s condition. *See* 20 C.F.R. § 1527(c)(2) (“Generally, we give more weight to medical opinions from your treating sources, since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairment(s)[.]”).

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1 Dr. Ward's medical opinion. Apart from his reliance on Dr. Fassler's opinion, the  
2 ALJ cited the opinions of several other authorities, most of whom were  
3 consultative physicians. These consulting sources diagnosed Colgan with  
4 moderate to marked limitations in her day-to-day activities and employment.  
5 Crucially, their reports did not address or dispute the crux of Dr. Ward's medical  
6 opinion: that Colgan suffered from debilitating headaches which would require  
7 her to be off-task more than 33 percent of the day and absent more than four days  
8 each month. The reports did make relevant comments as to Colgan's appearance  
9 and functionality on various occasions. But given the reality that one afflicted by  
10 cognitive pain can appear coherent on some occasions while still be suffering from  
11 debilitating headaches at other times, *see Estrella*, 925 F.3d at 98, we find it hard to  
12 read these reports as inconsistent with Dr. Ward's assessment.

13 \* \* \*

14 For all the above reasons, we conclude that, on this record, Dr. Ward's  
15 opinion was entitled to controlling weight under the treating physician rule. We  
16 therefore **VACATE** the judgment of the District Court and **REMAND** the case to  
17 the District Court with instructions to remand to the Social Security  
18 Administration for further action consistent with this opinion.