

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DIANE SHERRER	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 99-2930
KENNETH APFEL, Commissioner of Social Security	:	
Defendant	:	

MEMORANDUM AND ORDER

YOHN, J. March , 2000

Pursuant to 42 U.S.C. § 405(g), plaintiff Diane Sherrer seeks judicial review of the final decision of the Commissioner of Social Security [“Commissioner”] denying Sherrer’s claim for disability insurance benefits under Title II of the Social Security Act. Because the Commissioner’s final decision is supported by substantial evidence in the administrative record, and for the reasons set forth below, I will approve and adopt in part Magistrate Judge Smith’s report and recommendation, deny the plaintiff’s motion for summary judgment, and grant the defendant’s motion for summary judgment.

I. Background

The factual background and procedural history of this case are set forth in Magistrate Judge Smith’s report and recommendation. *See* Rep’t & Rec. (Doc. No. 12) at 1-2.

II. Legal Standard

Title 28 U.S.C. § 636(b)(1) requires a district court to “make a de novo determination of those portions of the [magistrate judge’s] recommendations to which objection is made.” It further allows the court to “accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.” *Id.*; see *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 91 (3d Cir. 1992). It is not, however, the court’s province to review the decisions of the Commissioner de novo. On appeal from a denial of benefits, the issue to be addressed is whether the Commissioner’s decisions are “supported by substantial evidence in the record.” *Adorno v. Shalala*, 40 F.3d 43, 46 (3d Cir. 1994). “Substantial evidence” is evidence that “a reasonable mind might accept as adequate to support a conclusion” after reviewing the entire record, but it may be less than a preponderance. *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

III. Discussion

Sherrer makes four objections to Magistrate Judge Smith’s report and recommendation. In considering her objections, I have independently reviewed the administrative record, the report and recommendation, and the parties’ submissions. I will address Sherrer’s objections seriatim.¹

¹Because Magistrate Judge Smith’s report and recommendation correctly and completely analyzes the nature of the hypothetical posed by the Administrative Law Judge [“ALJ”] to the vocational expert at the oral hearing, the court will not address Sherrer’s fourth objection, which concerns this hypothetical. See Rep’t & Rec. at 17-18.

A. Objection 1

First, Sherrer objects to the magistrate judge's support of the ALJ's finding that Sherrer's impairment is not the equivalent of that listed in 20 C.F.R. Part 404, Subpart P, app. 1, § 12.05(C), which requires both an IQ of 60-70 and some other "physical or other impairment imposing additional and significant work-related limitation of function." *See* Pl.'s Objections to the Rep't & Rec. of the Mag. J. (Doc. No. 13) ["Pl.'s Objections"] at 3. This objection is ill-founded.

The record contains substantial evidence from which a reasonable mind could conclude that Sherrer's current mental condition does not equal that required by § 12.05(C). For example, the psychologist performing Sherrer's most recent psychological evaluation stated that data from her IQ tests "suggest[] the possibility of an erraticness [sic], and an unpredictability within her overall performance. I.e., the claimant often failed easy items but would respond correctly to items of increased difficulty." Admin. R. at 309. Moreover, this psychologist concluded that Sherrer's psychosocial and cultural deprivation may have had a negative impact on recent IQ test results. *See* Admin. R. at 309. As Magistrate Judge Smith states, "Wermuth was of the opinion that these results did not 'appear to be a valid estimate of the claimant's true potential which at one time may have been within the low average range (80-89) of cognitive function.'" Rep't & Rec. at 10 (quoting Admin. R. at 309). The unreliable nature of the results from Sherrer's recent IQ tests suggests that Sherrer's IQ test from high school, which measured her IQ at 84, is the most accurate. *See* Admin. R. at 153 (reporting her IQ as 84 at age 17). From this, the court concludes that the record sufficiently supports the ALJ's finding that Sherrer's condition does not

“meet or equal the criteria of any of the impairments listed in [§ 12.05],” as well as the magistrate judge’s support of that finding. Admin. R. at 24; *see* Rep’t & Rec. at 11-12.

B. Objection 2

Sherrer’s second objection concerns the magistrate judge’s decision not to examine the ALJ’s methodology in rejecting Sherrer’s subjective complaints of pain based solely on the objective medical evidence in the record. *See* Pl.’s Objections at 4-5. Although the Social Security regulations disallow an ALJ’s complete rejection of “statements about the intensity and persistence of your pain or other symptoms or the effect your symptoms have on your ability to work solely because the available objective medical evidence does not substantiate your statements,” an ALJ will consider only such “statements about the intensity and persistence of your pain or other symptoms *which may reasonably be accepted as consistent with the medical signs and laboratory findings.*” 20 C.F.R. § 404.1529(c)(2), (a) (emphasis added).

There is sufficient evidence in the record from which a reasonable mind could conclude that the objective medical evidence is not reasonably consistent with Sherrer’s statements concerning the intensity and persistence of her pain. *See, e.g.,* Admin. R. at 18-19 (discussing the lack of support both in Sherrer’s own testimony and in the objective medical evidence for Sherrer’s statements about the extent of her pain). Thus, it was proper for the ALJ to decide not to accept these statements “to the extent those statements allege a level of disabling symptoms which exceed what the objective medical evidence and clinical findings could reasonably be expected to produce.” Admin. R. at 25. The magistrate judge’s decision not to address the ALJ’s methodology in his report and recommendation was similarly proper.

C. Objection 3

In the third objection, Sherrer faults the magistrate judge's support of the ALJ's explanation, or the lack thereof, of the reasons for rejecting lay testimony and other submissions supporting Sherrer's claim. Specifically, Sherrer complains that the ALJ gave illegitimate reasons for rejecting, to the same extent as Sherrer's testimony, the testimony of Sherrer's mother. *See* Pl.'s Objections at 5-6. She also objects to the ALJ's failure to discuss letters submitted by Sherrer's husband and Sherrer's friend in support of Sherrer's disability claim. *See* Pl.'s Objections at 5-6 (citing *Cotter v. Harris*, 642 F.2d 700, 707 (3d Cir. 1981), which requires an ALJ to explain the reasons for rejecting probative evidence that suggests a contrary disposition).

As discussed hereinbefore, *see supra* Part III.B, the ALJ is adequately supported by the record in her rejection of lay statements concerning Sherrer's pain to the extent that such statements were not reasonably consistent with the objective medical evidence. Additionally, Sherrer's mother's testimony can be legitimately interpreted as contradicting Sherrer's testimony with respect to the longest period of time between doctor's visits for treatment of Sherrer's abscesses. *See* Admin. R. at 19 (noting the inconsistency, which is reflected on pages 47 and 64 of the administrative record). Therefore, the court concludes that the ALJ made a legitimate decision to reject, to the extent that she did, Sherrer's mother's testimony.

Although the ALJ makes no mention of the letters from Sherrer's husband and friend, this absence of discussion does not warrant either a reversal of the ALJ's decision or a remand for further consideration of Sherrer's claim. The Third Circuit only requires an explanation for the rejection of probative evidence, and the letters from Sherrer's husband and friend are not

particularly probative. *See Cotter*, 642 F.2d at 707. For the most part, the letters contain information that is cumulative of other evidence in the record. *See, e.g.*, Admin. R. at 285-86 (remarking that Sherrer stopped going bowling and going for walks, information also reflected on pages 301 and 53-54, respectively, of the administrative record), 289-92 (taking notice of the difficulty Sherrer has in doing household chores when her abscesses are bad, information also reflected on pages 47-48). To the extent that the letters contain non-cumulative evidence, they concern the intensity and persistence of Sherrer's pain. Thus, the letters suffer from the same lack of reasonable consistency with the objective medical evidence as do similar statements made by Sherrer and her mother. Therefore, although some mention of these letters by the ALJ—either finding that they have no probative value whatsoever or rejecting what little probative value they may have had for the reasons discussed—would have been helpful, the absence of any discussion thereof in the administrative record neither calls into question the validity of the ALJ's denial of Sherrer's claim to disability benefits nor prevents the court's review of that denial.²

²The situation with which the court is presented in this case stands in marked contrast to the situation confronting the Third Circuit in *Cotter*, which led to the matter being remanded for further consideration. In *Cotter*, an ALJ was presented with conflicting expert medical testimony and rejected the testimony of one expert without explanation, apparently based on a misunderstanding of that testimony. *See Cotter*, 642 F.2d at 707. Because the ALJ did not explain the rejection of that expert's testimony, the Third Circuit could not actually consider the propriety of the rejection. Thus, the *Cotter* court could not properly review the denial of benefits. In this case, considering the cumulative nature and generally negligible probative value of the letters, as well as the ALJ's well-reasoned rejection of similar evidence, the court is able to properly review the denial of benefits.

IV. Conclusion

Because the administrative record contains substantial support for the determination of the ALJ that the plaintiff is not entitled to disability insurance benefits, the court will approve and adopt Magistrate Judge Smith's report and recommendation, except for one sentence on which the court's decision does not rely. Consequently, the court will deny the plaintiff's motion for summary judgment, grant the defendant's motion for summary judgment, and enter judgment in favor of the defendant.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

DIANE SHERRER	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 99-2930
KENNETH APFEL, Commissioner of Social Security	:	
Defendant	:	

ORDER

YOHN, J.

AND NOW, this day of March, 2000, upon consideration of the parties' cross-motions for summary judgment (Doc. Nos. 8 & 9), and after careful review of the administrative record, the magistrate judge's report and recommendation (Doc. No. 12), and the petitioner's objections thereto (Doc. No. 13), IT IS HEREBY ORDERED that:

1. The report and recommendation is APPROVED and ADOPTED in part.¹
2. The plaintiff's motion for summary judgment is DENIED.
3. The defendant's motion for summary judgment is GRANTED.
4. Judgment is entered affirming the decision of the Commissioner of Social Security.

William H. Yohn, Jr.

¹The court declines to adopt the sentence on page 17 of the report and recommendation that begins with "However, because such subjective testimony." The remainder of the report and recommendation is approved and adopted.