



Report and Recommendation). I will, however, review the medical opinions proffered in this case as they are relevant to the Plaintiff's timely filed objections.

The record in this case consists of the medical opinions of Albert Weiss, M.D., the Plaintiff's treating orthopedic surgeon, Pushpa Thakara, M.D., a consulting physician for the state agency, and B. Kushner, M.D., a reviewing physician from Maine Disability Determination Services. Dr. Weiss began treating the Plaintiff immediately following his accident and the record contains his treatment notes and diagnostic test results.<sup>1</sup> The record also contains an undated form that Dr. Weiss completed for the State Department of Welfare, wherein he opined that the Plaintiff was permanently disabled. He did not, however, complete a formal disability determination form or assessment in support of the Plaintiff's SSI and DIB applications.

In November 1995, Dr. Thakara conducted a consultative examination for the Pennsylvania Bureau of Disability. In connection with the examination, Dr. Thakara completed a functional capacity assessment form, wherein he stated that the Plaintiff could lift ten (10) pounds, stand or walk less than two (2) hours and sit less than six (6) hours. He further determined that the Plaintiff could not climb, balance, stoop, kneel, crouch, or crawl. Dr. Thakara also found that the Plaintiff's functional capacity for reaching was limited in the left upper extremity, but he could operate hand and/or foot controls without limit.

Approximately one month after Dr. Thakara completed his assessment of the Plaintiff's functional capacity, Dr. Kushner conducted an independent review of the Plaintiff's medical records and completed another residual functional capacity assessment. In his assessment, Dr. Kushner found that the plaintiff could occasionally lift and/or carry twenty pounds, frequently lift and/or carry ten (10) pounds, stand and/or walk for a total of about six (6) hours in an 8-hour workday, and occasionally climb, balance, stoop, kneel, crouch and crawl. Dr. Kushner further

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<sup>1</sup> Diagnostic tests performed in 1996 and 1997 revealed satisfactory anatomical alignment of the bones of the left arm, a healed fracture of the right femur, a negative MRI, and some noted myositis ossificans.

determined that the Plaintiff had an unlimited ability to push and/or pull including operation of hand and/or foot controls.<sup>2</sup>

**C. Evidence Presented at the Administrative Hearing**

On October 29, 1997, an Administrative Law Judge (“ALJ”) held a hearing, wherein she received testimony from the Plaintiff and a vocational expert. At the hearing, the Plaintiff testified that on “good days” he could lift forty (40) to fifty (50) pounds using both arms, carry a seven (7) to ten (10) pound grocery bag in his left arm, walk slowly for nine (9) to ten (10) blocks, sit for forty-five (45) minutes at a time, stand for one(1) to one and one-half (1½) hours, and climb four (4) flights of steps before experiencing pain or discomfort. He further testified that he performed certain household chores, including vacuuming, cooking, and washing dishes. On rainy days, however, the Plaintiff reported that he could not engage in any activities and needed to take pain medications all day to relieve his discomfort. Plaintiff also reported that he experienced right leg numbness, pain in his left wrist and elbow, difficulty sleeping, and his right hip locked.

After receiving the Plaintiff’s testimony, the ALJ posed several hypotheticals to the vocational expert.<sup>3</sup> The first hypothetical required the VE to give an opinion as to whether a person with the Plaintiff’s limitations and past work experience could return to any of his prior jobs. The VE opined that the person could return to work as a meter reader. The second hypothetical required the VE to determine whether the same person could return to one of his

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<sup>2</sup> Since Dr. Kushner’s findings were significantly different from the treating/examining physicians’ assessments in the plaintiff’s file, the functional capacity assessment form required him to explain why the other physicians’ opinions were unsupported by the evidence in the file. In response to the question, Dr. Kushner stated that the treating/examining sources did not give an explanation for their conclusions regarding the plaintiff’s limitations.

<sup>3</sup> All of the hypotheticals involved a right-handed person, with limited mobility of the left arm, between the ages of twenty-six (26) and twenty-nine (29), who possessed a high school education. The person could occasionally climb, balance, stoop, kneel, crouch, and crawl, regularly lift twenty (20) pounds, and lift ten (10) pounds occasionally.

previous occupations if he could only stand and/or walk for two to six hours. The VE opined that these limitations would preclude the person from returning to past work. However, the person could perform sedentary unskilled or semiskilled jobs which exist in significant numbers in the local, regional and national economies. The ALJ's final hypothetical required the VE to determine whether the person could return to past work if he could only stand and/or walk for less than two hours. Again, the VE determined that such a person could not return to past relevant work, but could perform employment duties associated with a sedentary job, like cashiering.

Plaintiff's attorney then posed two additional hypotheticals. He first asked the VE to consider whether the hypothetical person described by the ALJ could return to relevant past work if he could only sit for less than six hours. The VE concluded that the person could perform sedentary cashiering jobs. Plaintiff's attorney then asked whether jobs existed in the economy for the hypothetical person who had limited reaching ability in the non-dominant upper extremity, could never climb, crouch, stoop, balance or crawl, was restricted from certain environmental factors, and could only sit less than six hours. Given these factors, the VE concluded that no work existed in the economy.

After considering the evidence, the ALJ applied the five step, sequential process set forth in the regulations governing the evaluation of claims for Social Security and Disability Insurance Benefits. See 20 C.F.R. §§ 404.1520, 416.920 (2000). Pursuant to the five-step process, the ALJ must determine: (a) whether the person is presently engaged in a substantial gainful activity; (b) if not, whether the claimant has a severe impairment; (c) if the claimant does have a severe impairment, whether it meets or equals the criteria listed in 20 C.F.R. § 404, Subpt. P, App. 1; (d) if the impairment does not satisfy one of the criteria, whether the claimant's impairments prevent him from performing his past relevant work; and (e) if the claimant is incapable of performing past relevant work, whether he can perform any other work

which exists in the national economy in light of his residual functional capacity, age, education, and past work experience. 20 C.F.R. §§ 404.152, 416.920 (2000). After applying the above-described five-step sequential analysis, the ALJ determined that:

The claimant lacks the residual functional capacity to lift and carry more than 20 pounds or more than ten pounds on a regular basis, or perform tasks requiring reaching or fine manipulation with the left upper extremity or more than occasional climbing, balancing, stooping, kneeling, crouching, or crawling;

In his past work as a meter reader, the claimant was not required to lift more than 20 pounds or perform tasks requiring reaching or fine manipulation with the left upper extremity, rotation of the left wrist, or more than occasional climbing, balancing, stooping, kneeling, crouching, or crawling;

The claimant's past relevant work as a meter reader did not require the performance of work functions precluded by his medically determinable impairments ; and

The claimant's impairments do not prevent him from performing his past relevant work.

(R. at 21-22).<sup>4</sup> Based on the above-described findings, the ALJ denied the Plaintiff's claim for SSI and DIB benefits.

After exhausting his administrative remedies, Plaintiff brought this action in the District Court, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3). In the present action, Plaintiff seeks review of the decision of the Commissioner of the Social Security Administration ("Commissioner") denying his Disability Insurance Benefit ("DIB") and Supplemental Security Income ("SSI") applications. The parties filed cross-motions for summary judgment and I referred the matter to Chief United States Magistrate Judge Melinson to determine if the Commissioner's decision was supported by substantial evidence. Upon consideration of the parties' cross-motions, Chief Judge Melinson issued a Report and Recommendation, wherein he recommended that Plaintiff's motion for summary judgment be denied and Defendant's

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<sup>4</sup> Because the ALJ determined that the Plaintiff could return to relevant past work, she found it unnecessary to consider the remaining step in the sequential evaluation process. She did note, however, that the vocational expert found other jobs in the national economy that the claimant could perform even if he were unable to be on his feet less than six hours but more than two hours per work day.

motion for summary judgment be granted. Pursuant to Local Rule of Civil Procedure 72.1 IV (b) and 28 U.S.C. § 636 (b)(1)(C), Plaintiff timely filed written objections to the Magistrate's Report and Recommendation. Upon consideration of the Report and Recommendation and Plaintiff's objections thereto, I will approve and adopt the Report and Recommendation.

## **II LEGAL STANDARD**

A district court judge may refer an appeal of a decision of the Commissioner to a magistrate judge, pursuant to 28 U.S.C. § 636(b)(1). Once the magistrate issues a report and recommendation, a party may file timely and specific objections thereto. 28 U.S.C. § 636(b)(1)(C). The district court judge will then make a *de novo* determination of those portions of the report and recommendation to which objection is made. Id. The judge may accept, reject, modify, in whole or in part, the findings or recommendations made by the magistrate, receive further evidence or recommit the matter to the magistrate with instructions. Id.

In reviewing the Commissioner's decision, the court is bound by the ALJ's findings of fact if they are supported by substantial evidence in the record. 42 U.S.C. § 405(g). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate." Plummer v. Apfel, 186 F.3d 422, 427 (3d. Cir. 1999).

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Plaintiff timely filed two specific objections. I will address each one in turn.

## **III. ANALYSIS**

### **A. PLAINTIFF'S FIRST OBJECTION**

In Magistrate Melinson's Report and Recommendation, he found that the ALJ was correct in affording greater weight to the opinion of Dr. Kushner, over the opinions of Drs. Weiss and Thakara. In his first objection, the Plaintiff contends that the Magistrate erred in upholding the ALJ's decision regarding the medical opinions, arguing that the ALJ failed to recognize that objective evidence in the record did, in fact, support the conclusions of Drs.

Weiss and Thakara.

### **1. The ALJ's Treatment of Dr. Weiss' Medical Opinion**

In his first objection, the Plaintiff asserts that Dr. Weiss' medical opinion should have been given controlling weight because the doctor's treatment notes provided sufficient evidence of his disability. In support of this argument, Plaintiff cites Dr. Weiss' treatment notes that describe his continued pain, osteoarthritis of the elbow, and calcification of the tissues in his left elbow and right leg.

While the Plaintiff is correct in his assertion that a treating physician's report should be accorded great weight when it is well-supported by medical evidence, Plummer v. Apfel, 186 F.3d 422, 429 (3rd Cir. 1999), he fails to acknowledge that an ALJ may choose to afford a treating physician's opinion more or less weight depending upon the extent to which supporting explanations are provided. Id. In essence, the proper weight to be given a treating physician's opinion is directly related to the degree to which his opinion is supported by clinically acceptable objective medical data and laboratory results. 20 C.F.R. §§ 404.1527, 416.927 (2000).

In the instant case, the ALJ listed specific reasons for affording little weight to Dr. Weiss' medical opinion. Significantly, the ALJ determined that Dr. Weiss certified that the plaintiff was permanently disabled on a form report and failed to provide a written explanation for the basis upon which he reached this medical conclusion. Moreover, the ALJ determined that the evidence of record, including Dr. Weiss' treatment notes and results of diagnostic tests, did not support such a conclusion.

Based upon my review of the evidence of record, I find that the ALJ could have determined that Dr. Weiss' opinion was not well supported by the medical evidence of record and, as such, it was not entitled to deferential weight.

### **2. Treatment of Dr. Thakara's Medical Opinion**

In evaluating the medical evidence of record, the ALJ determined that Dr. Thakara

based his opinion on the allegations of the claimant and not his objective findings. Therefore, she discounted the residual functional capacity assessment of Doctor Thakara, opting instead to rely upon the functional capacity assessment of Dr. Kushner. The Plaintiff now objects to the ALJ's decision to discount Dr. Thakara's opinion, arguing that Dr. Thakara's residual functional capacity assessment should have been fully credited because the record did, in fact, contain objective findings consistent with his assessment of the Plaintiff's residual functional capacity.

Generally, more weight is given to the opinion of a source who has examined a claimant than to one who has not. 20 C.F.R. § 404.1527(d)(1)(2000). However, the weight a non-examining source's opinion receives depends upon the degree to which he provides supporting explanations for his opinion. 20 C.F.R. § 404.1527(d)(3)(2000). Thus, the better an explanation a non-examining source provides for his opinion, the more weight that opinion will receive. Id. And, an opinion that is consistent with the record as a whole will receive more weight than one that is not. 20 C.F.R. § 404.1527(d)(4)(2000).

Dr. Thakara examined the plaintiff, but Dr. Kushner did not. Therefore, Dr. Thakara's opinion could be given controlling weight. However, the ALJ determined that the Plaintiff's statements concerning his impairments and their impact on his ability to work were not credible in light of his own description of his activities, lifestyle, and required medical treatment.<sup>5</sup> Since the ALJ determined that Dr. Thakara based his opinion, in part, on the unreliable statements of the claimant, not on his objective findings, which were almost entirely negative, she decided to

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<sup>5</sup>The record in this case shows that the plaintiff underwent physical therapy, wherein he engaged in various exercises that required pushing, pulling, lifting and carrying. Moreover, during the Administrative Hearing, the plaintiff reported that he could lift forty (40) to (50) pounds with both arms, carry a seven to ten pound grocery bag in the left arm, and walk nine(9) to ten(10) blocks on a good day. He further reported that he could sit for forty-five minutes at a time and stand one (1) to one and one-half(1½) hours before he experienced pain.

afford Dr. Thakara's functional capacity assessment less weight .<sup>6</sup> Since Dr. Kushner's medical opinion is consistent with the Plaintiff's testimony, physical therapy records, and results of diagnostic testing found in the medical records, the ALJ could reasonably afford Dr. Kushner's opinion greater weight. Therefore, the Plaintiff's first objection will be overruled.

## **B. PLAINTIFF'S SECOND OBJECTION**

In his second objection, Plaintiff asserts that the ALJ erred in finding that he could return to his past relevant work as a meter reader. In support of this argument, Plaintiff's counsel proffers the Occupational Profile for Meter Readers found in O\*NET. According to the O\*NET excerpt, a utility meter reader performs duties that require, climbing, lifting, balancing, walking, and stooping.<sup>7</sup> Relying on this information, the Plaintiff asserts that he is incapable of performing the duties of a meter reader. Therefore the Plaintiff concludes that it is impossible for him to return to work as a utility meter reader and the ALJ erred in making such a determination.

In reaching her decision, the ALJ found that:

The claimant was not required to lift more than 20 pounds or perform tasks requiring reaching or fine manipulation with the left upper extremity, rotation of

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<sup>6</sup> The ALJ also discounted the residual functional capacity assessment of Dr. Thakara because Dr. Thakara:

provided no reason that the claimant's sitting, standing, and walking would be limited when the only pertinent, positive, objective findings of impairment was myositis ossificans in relation to the greater trochanter characterized as 'some' by the radiologist on September 25, 1997.

Decision of the ALJ at p. 8. (March 1998).

<sup>7</sup> Exhibit A of the Plaintiff's Memorandum in Support of his Motion for Summary Judgment contains what appears to be an excerpt from O\*NET. According to the Occupational Profile for Meter Readers found in O\*NET, some of the important work activities performed by a meter reader include: Performing General Physical Activities – Performing physical activities that require moving one's whole body, such climbing, lifting balancing, walking, stooping, where the activities often also require considerable use of the arms and legs, such as in the physical handling of materials.

(Pl.'s Mem. Supp. Summ. J. at Ex. A).

the left wrist, or more than occasional climbing, balancing, stooping, kneeling, crouching, or crawling [ in his former job as a meter reader]. The impartial vocational expert offered testimony indicating that given his particular residual functional capacity, the claimant can return to the type of work he performed in the past. Because Mr. Williams' past work did not require the performance of work activities precluded by his medically determinable impairments, he is able to return to the type of work he performed in the past.

(R. at 20). Based on these findings of fact, the ALJ concluded that Mr. Williams retained the functional capacity to return to his past work as a meter reader. Upon reviewing these findings, I conclude that the ALJ's findings of fact are supported by substantial evidence of record. Therefore, the Plaintiff's second objection will be overruled.

#### **IV CONCLUSION**

For the foregoing reasons, I find that substantial evidence exists to support the Commissioner's decision. Therefore, the Plaintiff's objections to the Report and Recommendation of Chief Judge Melinson will be overruled and the Report and Recommendation will be approved and adopted.

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

DORSEY WILLIAMS,

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	Plaintiff,	:	CIVIL ACTION
v.		:	
		:	NO: 99-3670
		:	
KENNETH S. APFEL,		:	
SECRETARY OF HEALTH AND HUMAN		:	
SERVICES,		:	
	Defendant.	:	

**ORDER**

**AND NOW**, this \_\_\_\_day of August 2000, upon consideration of the parties' cross-motions for summary judgment, and careful and independent review of the Report and Recommendation of Chief United States Magistrate Judge James R. Melinson, and the Plaintiff's timely objections thereto, **IT IS HEREBY ORDERED** that:

1. The Plaintiff's Objections are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED**;
3. The Plaintiff's Motion for Summary Judgment is **DENIED**; and
4. The Defendant's Motion for Summary Judgment is **GRANTED**.

BY THE COURT,

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CLIFFORD SCOTT GREEN, S.J.