

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

Albert D. Green,
Plaintiff,

v.

Kenneth S. Apfel, Commissioner of Social Security
Administration,
Defendant

:
: CIVIL ACTION
:
:
:
: NO. 00-CV-487
:
:

Memorandum and Order

YOHN, J.

February , 2001

Pursuant to 42 U.S.C. § 405(g), Albert D. Green seeks judicial review of the Commissioner of Social Security’s [“Commissioner’s”] denial of his claim for disability benefits under Title II of the Social Security Act. The parties’ cross-motions for summary judgment were referred to Magistrate Judge Charles B. Smith for a report and recommendation. Magistrate Judge Smith recommended that Green’s motion for summary judgment be denied and the Commissioner’s motion for summary judgment be granted. *See* Rep’t & Rec. (Doc. No. 11). Green has filed his objections to the report and recommendation. *See* Pl. Albert D. Green’s Objections (Doc. No. 12). Because the Commissioner’s decision is supported by substantial evidence in the administrative record, and for the reasons set forth below, I will approve and adopt Magistrate Judge Smith’s report and recommendation.

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. 11), at 1-3.

LEGAL STANDARD

Title 28 U.S.C. § 636(b)(1)(C) 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. *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

DISCUSSION

Green makes five objections to Magistrate Judge Smith's report and recommendation. In considering these objections, I have independently reviewed the administrative record, the report and recommendation, and the parties' submissions. I will address Green's objections seriatim.

A. Objection 1

First, Green objects to the magistrate judge's conclusion that "there is no evidence that plaintiff is illiterate." *See* Rep't & Rec. (Doc. No. 11), at 14 n.6. Green contends that, at the hearing before the Administrative Law Judge ["ALJ"], he testified that he cannot read. *See* Social Security Administrative Record ["Tr."] at 41-42 (Green Test., Hr'g of Jan. 28, 1998, 5-6).¹

Under the Social Security regulations, an individual's education is one of the vocational factors that is evaluated in order to determine whether that individual can obtain substantially gainful employment. *See* 20 C.F.R. § 404.1520(f)(1) ("If you cannot do any work you have done

¹The relevant testimony reads as follows:

By Administrative Law Judge:

Q: Do you have— can you read?

A: No, not real well.

Q: Not real well.

A: No.

Q: But, you can read— can you read the newspaper?

A. No.

...

Q: Now, you worked for many years as a grocer, is that correct?

A. Yes.

...

Q: Okay, did you have any difficulty reading bills—

A: Oh, no —

Q: — and stuff like that coming in?

A: — I could handle all that.

Q: You could handle all that?

A: Oh, yeah.

Q: What about when a bill would come in or something?

A: I give it — it was all by memory, I [memorized] everything.

...

Q: Yeah, but I'm sure there's paperwork involved in running a store.

A: Oh, yeah, I could do the paper[work]. All it was was figures, numbers, arithmetic. I was good at arithmetic.

Q: Uh-huh.

A: I could run the store. And my mother helped me. It was no problem at the store.

in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work.”). In evaluating an individual’s education, the following mutually exclusive categories are used: 1) illiteracy, 2) marginal education, 3) limited education, and 4) high school education and above. *See* 20 C.F.R. § 404.1564(b). The Social Security regulations define “illiteracy” as follows: “the inability to read or write. We consider someone illiterate if the person cannot read or write a simple message such as instructions or inventory lists even though the person can sign his or her name. Generally, an illiterate person has had little or no formal schooling.” 20 C.F.R. § 404.1564(b)(1).

After reviewing the administrative record, I conclude that there is some evidence that Green is illiterate. As a result, I decline to adopt the final two sentences of footnote six on page 14 of the report and recommendation.² However, I also conclude that the question of whether there is *any* evidence that Green is illiterate is wholly irrelevant because the ALJ’s decision is not based on a finding that there is *no* evidence that Green is illiterate. Instead, the ALJ found that Green has “a ‘marginal’ sixth grade education.” *See* Tr. at 19 (Hearing Decision, May 21, 1998 [“ALJ Decision”], at 9). Therefore, the appropriate question for this court is whether the ALJ’s finding that Green had a “‘marginal’ sixth grade education,” is supported by substantial evidence in the record.

² Those two sentences read as follows:

Additionally, there is no evidence that plaintiff is illiterate. He testified at the administrative hearing that although he only has a sixth grade education and is unable to read “real well”, he was able to run a grocery business for many years and was able to handle all bills and paperwork associated with running a business (Tr. 41-42).”

According to the Social Security regulations, a person has a “marginal education” if she has “ability in reasoning, arithmetic, and language skills which are needed to do simple, unskilled types of jobs.” 20 C.F.R. § 404.1564(b)(2). Generally, a person who has had a formal education “at a 6th grade level or less” is presumed to have a marginal education. *Id.* The record clearly contains substantial evidence from which a reasonable mind could conclude that Green has a “‘marginal’ sixth grade education.” For example, Green testified that he left school during the seventh grade and that he has trouble with basic reading skills. *See* Tr. at 41 (Green Test., Hr’g of Jan. 28, 1998, at 5). The record also indicates that Green has basic mathematical skills and that, with minimal assistance, he was able to operate a business. *See id.*

B. Objection 2

Green also claims that the ALJ failed to apply a different standard to him, an individual who was between 45 and 49 years old, than the ALJ would have applied to an individual who was under the age of 45. Pl. Albert D. Green’s Objections (Doc. No. 12), at 1.

According to the Social Security regulations, an individual under age 50 is considered to be a “younger person.” 20 C.F.R. § 404.1563(c). However, the regulations also state that, “in some circumstances, we consider that persons age 45-49 are more limited in their ability to adjust to other work than persons who have not attained age 45.” *Id.* (citing 20 C.F.R. Pt. 404, Subpt. P, App. 2, Tbl. 1, Rule 201.17). In particular, the Social Security regulations direct a finding of “disabled” for an individual who is between 45 and 49 years old, has no relevant past work or who can no longer perform vocationally relevant work, is illiterate or unable to communicate in English, is unskilled or has no transferrable skills, and is limited to sedentary work, but direct a

finding of “not disabled” for a similarly situated individual who is under the age of 45. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 201.00(h); 20 C.F.R. Pt. 404, Subpt. P, App. 2, Tbl. 1, Rule 201.17 & 201.23. However, this distinction is not made under other circumstances. *See* 20 C.F.R. Pt. 404, Subpt. P, App. 2; *see also* 20 C.F.R. Pt. 404, Subt. P, App. 2, § 200.00(a)(“Where any one of the findings of fact does not coincide with the corresponding criterion of a rule, the rule does not apply in that particular case and, accordingly, does not direct a conclusion of disabled or not disabled.”).

The ALJ found that Green was “a younger individual” because he “was 47 years old at the alleged onset of disability and 48 years old when his insured status expired” *See* Tr. at 19 (ALJ Decision, at 9). The ALJ did not apply a different standard to Green as a 47 or 48 year old “younger person” than he would have applied to an individual under the age of 45 because the limited circumstances under which this age-based distinction is made are not present in this case. In particular, as noted above, the ALJ found that Green had a “marginal education” and, therefore, he was not “illiterate” under the Social Security regulations. As a result, the ALJ determined that Rule 201.17 was inapplicable. *See id.* at 17 (ALJ Decision, at 7). As discussed above, the ALJ’s finding that Green had a “marginal education” is supported by substantial evidence in the record. Therefore, there is evidence that a reasonable mind might accept as adequate to support the ALJ’s conclusion that Rule 201.17 is inapplicable.

C. Objections 3 & 4

Green’s third and fourth objections are premised on his argument that the ALJ should have found that Green was “illiterate.” Because I have concluded that there was substantial

support for the ALJ's finding that Green had a "marginal education," and, therefore, that he was not "illiterate" under the Social Security regulations, I will not directly address these objections.

D. Objection 5

Finally, Green objects to the magistrate judge's failure to address the precedent of *McGrew v. Bowen*, 652 F. Supp. 1348 (W.D. Pa. 1987).

In *McGrew*, the district court found that the medical evidence did not support a finding that the claimant was able to do a full range of sedentary work. *See McGrew*, 652 F. Supp. at 1349-50. Therefore, the court reversed the Commissioner's decision that the claimant had the residual functional capacity to perform a full range of sedentary work. *See id.* In particular, the court noted that a doctor had found that the claimant was unable to climb a staircase or to perform any work that involved "even a minimal amount of lifting or ambulation." *See id.*

The Social Security regulations define "sedentary work" as follows:

Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 404.1567(a). In this case, there is substantial medical evidence that Green is able to do sedentary work. For example, as the magistrate judge pointed out in his report and recommendation, the office of John Shapiro, M.D., found that Green was able to frequently lift and carry up to ten pounds, frequently climb staircases, stand and walk for less than two hours, sit for less than six hours, and push or pull unlimitedly. *See Tr.* at 174-75. Similarly, B.

Kushner, M.D., found that Green was able to occasionally lift up to twenty pounds, frequently lift ten pounds, stand, sit, and/or walk for approximately six hours in an eight-hour work day, occasionally climb staircases, and push or pull unlimitedly. *See id.* at 183-89.

McGrew is also inapposite because, as noted above, on appeal from a denial of benefits, the issue to be addressed is whether the Commissioner's decision is "supported by substantial evidence in the record." *Adorno v. Shalala* 40 F.3d 43, 46 (3d Cir. 1994). "Substantial evidence" is evidence "a reasonable mind might accept as adequate to support a conclusion" after reviewing the entire record. *Id.* (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). As a result, even if *McGrew* were indistinguishable from this case, the fact that a similarly-situated individual may have been found to be disabled does not determine whether the ALJ's decision in this case is supported by substantial evidence in the administrative record. Although this or another reviewing court may have reached a different conclusion based on an initial evaluation of the same or similar facts, I cannot say that there is not substantial evidence to support the ALJ's conclusion.

CONCLUSION

The administrative record contains substantial support for the Commissioner's determination that Green is not entitled to disability insurance benefits. As a result, this court will approve and adopt Magistrate Judge Smith's report and recommendation, with the exception of two sentences on which the court's decision does not rely. Therefore, this court will deny Green's motion for summary judgment, grant the Commissioner's motion for summary judgment, and enter judgment in favor of the Commissioner.

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

Albert D. Green,
Plaintiff,

v.

Kenneth S. Apfel, Commissioner of Social Security
Administration,
Defendant

:
: CIVIL ACTION
:
:
:
: NO. 00-CV-487
:
:

ORDER

AND NOW, this day of February, 20001, upon consideration of the parties' cross-motions for summary judgment (Docs. Nos. 5 & 7), and after review of the administrative record, the magistrate judge's report and recommendation (Doc. No. 11), and the plaintiff's objections thereto (Doc. No. 12), IT IS HEREBY ORDERED that:

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

William H. Yohn, Jr., J.

³ The court declines to adopt the final two sentences of footnote six on page 14 of the report and recommendation. The remainder of the report and recommendation is approved and adopted.