

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

<b>JOAN PYSHER</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	
<b>KENNETH F. APFEL, COMMISSIONER OF SOCIAL SECURITY</b>	:	<b>NO. 00-1309</b>

**MEMORANDUM AND ORDER**

**Norma L. Shapiro, S.J.**

**July 11, 2001**

Plaintiff Joan Pysher (“Pysher”) seeks review under 42 U.S.C. §405(g) of the final decision of the Commissioner of Social Security (“Commissioner”) denying her claims for Disability Insurance Benefits (“DIB”) under the Social Security Act (“Act”). See 42 U.S.C. §401 et seq. The parties’ cross-motions for summary judgment were referred to United States Magistrate Judge Thomas J. Reuter (Magistrate Judge) for a Report and Recommendation (“R&R”). The Magistrate Judge recommended that Pysher’s motion for summary judgment be granted, the Commissioner’s motion for summary judgment be denied, but the case should be remanded for further proceedings to determine Pysher’s functional capacity and a new hearing should be held within 60 days. After receiving the R&R, Pysher filed an objection to Paragraphs 4 and 5, requesting that the matter be reversed, and not remanded. The defendant filed a response in support of the remand recommended by the Magistrate Judge.

After de novo consideration, the objection will be sustained and the case remanded for calculation of benefits only.

## Factual and Procedural History

Pysher is a 63-year-old woman with a history of back and kidney problems. On October 16, 1996, she filed a DIB application, alleging disability since July 18, 1996.<sup>1</sup> Her claim was denied, both initially and on reconsideration. Pysher then requested and was granted a hearing before an ALJ. At that hearing, Pysher claimed for the first time that she had a mental disorder which contributed to her disability. The ALJ remanded the case to the state agency for evaluation of a mental disorder. The state agency denied the claim again, and Pysher requested another administrative hearing. A hearing before another ALJ was convened on May 6, 1998. Pysher appeared and testified, as did a vocational expert.

The ALJ found that Pysher was not “disabled,” as defined by the Act, and therefore not entitled to receive DIB.<sup>2</sup> The ALJ found that Pysher’s physical restrictions included the inability to stand for prolonged amounts of time or lift more than 15-20 lbs., and the need to consume water at the work site and be in close proximity to bathroom facilities. The ALJ found Pysher’s physical restrictions would not preclude her from performing her past work as a cashier II.

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<sup>1</sup> Pysher had filed a previous application for DIB. Initially, her claim was denied. However, the matter was later remanded by the Appeals Council, and she was awarded disability benefits. The agency found her disabled for a period from November 14, 1984 to August 28, 1988. She received a closed period of disability because she returned to work. See Pl.’s Br. Supp. Summ. J, Mot. at 5.

<sup>2</sup> The ALJ made the following findings:

- 1) Plaintiff has not engaged in substantial gainful activity since July 18, 1996
- 2) Plaintiff has disc disease and kidney disease which are severe within the meaning of the ACT; Plaintiff does not have an impairment listed in or equal to one listed in Appendix 1, subpart P, regulations number 4.
- 3) Plaintiff’s anxiety/depression is not a severe impairment
- 4) Plaintiff’s complaints exceed what could be reasonably expected from the objective medical evidence.
- 5) Plaintiff can perform light exertional work, with no prolonged standing, no lifting more than 15-20 lbs, ability to consume water at the work site, close proximity to bathroom facilities.
- 6) These restrictions do not preclude her from performing her past work as a cashier II.
- 7) Plaintiff has no “disability” as defined in the Act.

Pysher requested review of the ALJ's decision. The Appeals Council denied the request, and the ALJ's decision became final.

Pysher filed this action against the Commissioner to challenge the denial of benefits. The Commissioner filed a motion to remand for further administrative action and a new hearing because the original audiotape of the administrative hearing could not be located, so the administrative record was incomplete. The Pysher opposed the motion for remand.

In June, 2000, this court granted the motion for 60 days, and remanded to allow the Commissioner to find the tape. The order stated that the matter should proceed after that time on whatever information was available. This court also ordered Pysher to provide the Commissioner with her copy of the hearing audiotape as well as any other relevant documents in her possession, which she did.

In August, 2000, the Commissioner filed a motion for enlargement of time to transcribe the copy of the audiotape. The court ordered the Commissioner to submit a transcript of the tape on or before September 20, 2000. On September 20, 2000, the Commissioner filed an answer to the Plaintiff's complaint, and an administrative record that did not include a transcription of the audiotape. On November 2, 2000, the Commissioner filed a copy of the certified record to replace the previously filed record. This included a partial transcription, because portions of the tape were inaudible. Shortly after the amended record was filed, this court ordered both parties to file motions for summary judgment.

In her motion for summary judgment, Pysher argued that substantial evidence does not support the conclusion of the ALJ as to Pysher's functional capacity. Pysher also said that the ALJ relied on documents not presently in the record, and the ALJ applied an improper standard to evaluate the Plaintiff's subjective complaints. The Commissioner argued in response that

substantial evidence supports the ALJ's decision that Pysher was not disabled. Alternatively, the Commissioner recommended that the case be remanded for further evaluation of Pysher's medical record. The court referred the matter to Judge Reuter for an R&R. Pysher's objections are now before the court for de novo review.

## **Discussion**

### **I. STANDARD OF REVIEW**

The court conducts de novo review of the portions of an R&R to which specific objections have been filed. See 28 U.S.C. §636(b)(1)(C); Fed. R. Civ. P. 72(b). To be eligible for social security benefits, the claimant must demonstrate an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. 42 U.S.C. § 423(d)(1)(A). The impairment must be such that the claimant "is not only unable to do his previous work but cannot, considering [her] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. § 423(d)(2)(A).

The plaintiff has the burden of proving the existence of a disability and must furnish medical evidence indicating the severity of the impairment. 42 U.S.C. § 423(d)(5). A claimant satisfies this burden by showing an inability to return to former work. Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979). The burden of proof then shifts to the Commissioner to show that, given the claimant's age, education, and work experience, the claimant has the ability to perform specific jobs that exist in the national economy. 42 U.S.C. § 423(d)(2)(A); 20 C.F.R. § 404.1520(f).

The Commissioner decided this matter by utilizing the five steps sequential evaluation process established by the Department of Health and Human Services to determine whether a person is “disabled.” This process required the Commissioner to consider, in sequence, whether a claimant: 1) is currently employed; 2) has severe impairment; 3) has an impairment which meets or equals the requirements of a listed impairment; 4) can perform past relevant work; and 5) if not, whether the claimant can perform other work, in view of age, education, and work experience. 20 C.F.R. § 404.1520

## **II REVIEW AND ANALYSIS**

On June 22, 2000, this court granted a remand for 60 days because the Secretary was unable to locate the administrative file, and granted permission at that time to conduct a de novo hearing before an ALJ. Defendant’s Motion to Remand, ¶ 3. The order of remand stated: “The motion for remand is GRANTED. The action is hereby remanded to the Commissioner for further administrative action to be taken within 60 days. After 60 days, the action will proceed on whatever information is available.” This is a “Sentence six” remand under 42 U.S.C. sec.405(g).<sup>3</sup>

In reviewing the decision of the Commissioner, the Commissioner’s determination must be upheld if supported by substantial evidence. 42 U.S.C. §405(g); Richardson v. Perales, 402 U.S. 389, 390, 91 S.Ct. 1420, 28 L. Ed. 2d 842 (1971); Doak v. Heckler, 790 F.2d 26, 28 (3d cir. 1986). “Substantial evidence is defined as the relevant evidence which a reasonable mind might accept as adequate to support a conclusion.” Maduro v. Shalala, No. 94-6932, 1995 WL 542451,

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<sup>3</sup> This sentence reads, in pertinent part: “The court may on motion of the Secretary made for good cause shown before he files his answer, remand the case to the Secretary for further action by the Secretary ....” 42 U.S.C. § 405(g).

at \*1 (E.D. Pa. Sept. 9, 1995) (Shapiro, J.); See Richardson, 402 U.S. at 401; Dombrosky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). Substantial evidence is “more than a scintilla of evidence but may be somewhat less than a preponderance of the evidence.” Maduro, 1995 WL 542451, at \*1; see Ginsburg v. Richardson, 436 F.2d 1146, 1148 (3d Cir.), cert denied, 402 U.S. 976, 91 S.Ct. 1680, 29 L.Ed.2d 142 (1971). The court cannot conduct a de novo review of the Commissioner’s decision or re-weigh the evidence of record. See Monsour Med. Ctr. V. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986), cert. denied, 482 U.S. 905, 107 S.Ct. 2481, 96 L. Ed. 2d 373 (1987).

The ALJ may disregard subjective complaints when contrary evidence exists in the record. Mason v. Shalala, 994 F.2d 1058, 1067-68 (3d Cir. 1993). The ALJ must, however, provide reasons for doing so. Serody v. Chater, 901 F. Supp. 925, 930 (E.D. Pa. 1995). Credibility determinations are the province of the ALJ and only should be disturbed on review if not supported by substantial evidence. Van Horn v. Schweiker, 717 F.2d 871, 973 (3d Cir. 1983); 20 C.F.R. § 404.1527(e).

The record, incomplete though it is,<sup>4</sup> contains substantial evidence that is incompatible with the ALJ’s finding that Pysher is able to return to her former employment as cashier II. The ALJ found that “the claimant’s subjective complaints are not accepted to the extent that they exceed what is demonstrated by or could reasonably be expected from the objective medical evidence.” R. 18.

Although the ALJ referenced reports by Dr. Scharle from 1994 stating that Pysher could work, those reports are not in the record before the court. R&R n.7. If Dr. Scharle ever reported that Pysher was able to work, his opinion has changed; Dr. Scharle’s reports of June, 1998 and

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<sup>4</sup> Medical reports of Drs. Makhdomi, Turner, and Scharle are missing. Magistrate’s Report, p. 8. The court was unable to locate report the report of Dr. Scharle, which the ALJ relied upon, indicating that the claimant could work for five hours a day. R&R n.7.

January, 2000, state that he does not believe that Pysher is able to work. R&R n.7. Dr. Scharle stated that Pysher “cannot perform any work of any kind” because of back pain and because Pysher’s symptoms require her to urinate every 20-30 minutes. She also cannot stand for more than a few minutes at a time. R. 91. These conditions would prevent Pysher from working as a cashier II, a job which requires the ability to stand or walk for six hours out of an eight-hour day, and the ability to lift up to 20 pounds. R. 49.

The ALJ, when determining that Pysher could work, stated that Pysher’s claims of physical disability were unwarranted because Pysher could cook, go grocery shopping, feed her pets, read the paper, pay bills, and dust. R. 17. Here, the ALJ relied, at least in part, on Pysher’s testimony regarding her daily activities to discount Pysher’s subjective complaints. However, the record shows that although Pysher did say that she is able to perform the listed tasks, she can perform each of them only occasionally, depending on her physical state on a given day.<sup>5</sup> R. 31-43. Pysher’s admission that she is, on occasion, able to dust or feed her dog does not contradict her complaints that her back pain makes working as a cashier II impossible for her. See Smith v. Califano, 673 F.2d 968, 972 (3d Cir. 1981) (“Disability does not mean that a claimant must vegetate in a dark room excluded from all forms of human and social activity.”).

By showing that she is unable to stand for more than a few minutes, and therefore unable to return to her former work as a cashier, Pysher met the initial burden of proof under the Social Security Act. Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979). Then, the burden of proof shifted to the Commissioner to show that there are specific jobs in the economy that the Plaintiff can perform, given her age, education, and work experience. 42 U.S.C. § 423(d)(2)(A); 20

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<sup>5</sup> Pysher testified that she rarely leaves the house, that she shops for groceries only once or twice a month, and that she often spends most of her morning in the bathroom because of chronic diarrhea. R. 36.

C.F.R. § 404.1520(f). The Commissioner cannot meet this burden of proof since there is no substantial evidence of record to support this conclusion.

If an additional administrative hearing were appropriate and necessary, it would have been ordered in the June 22, 2000 remand order. Now, after a delay of another year, to order a remand for an additional hearing would unnecessarily and unreasonably prolong these proceedings. Even if a hearing were held within 60 days, another three to four months might pass before a decision is issued. At that time, if the decision were unfavorable, plaintiff would again be required to seek Appeals Council review (which took one and one-half years after the last ALJ decision) before again coming to this court for meaningful judicial review.

The delays in this case have all been due to the conduct of the defendant, who misplaced portions of the record. While the record does not contain all of the documents in the original administrative file, it nevertheless contains substantial, competent, and uncontradicted evidence of Pysher's disability. Another remand would penalize Pysher by requiring that she recreate an administrative record lost by the defendant, in order to prove her disability. There is no reason to delay the matter further by remanding for another administrative hearing.

### **CONCLUSION**

Summary judgment will be granted in favor of the plaintiff; the case is remanded for calculation of benefits only.

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<b>JOAN PYSHER</b>	:	<b>CIVIL ACTION</b>
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<b>v.</b>	:	
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<b>KENNETH F. APFEL,</b>	:	
<b>COMMISSIONER OF SOCIAL</b>	:	
<b>SECURITY</b>	:	<b>NO. 00-1309</b>

**ORDER**

AND NOW, this 11th day of July, 2001, upon consideration of the parties' cross-motions for summary judgment, de novo review of the Report and Recommendation of United States Magistrate Judge Thomas J. Reuter, the objection and response thereto, and in accordance with the attached Memorandum, it is hereby **ORDERED** that:

1. Plaintiff's objection to the Report and Recommendation, Paragraphs 4 and 5, is **SUSTAINED**.
2. The Report and Recommendation is **APPROVED AND ADOPTED** except for Paragraphs 4 and 5.
3. Plaintiff's motion for summary judgment is **GRANTED**. Judgment is **ENTERED** in favor of plaintiff.
4. Defendant's motion for summary judgment is **DENIED**.
5. The case is **REMANDED** to the Social Security Commissioner for calculation of benefits only.

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Norma L. Shapiro, S.J.

