

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

LORRAINE M. STOLZ : CIVIL ACTION
 :
 v. :
 :
 LARRY G. MASSANARI, Acting :
 Commissioner of Social Security : NO. 00-4053

MEMORANDUM AND ORDER

HUTTON, J.

July 18, 2001

Presently before this Court are Magistrate M. Faith Angell's Report and Recommendation (Docket No. 13) and Defendant's Objections to the Magistrate Judge's Report and Recommendation (Docket No. 14) Defendant's Motion for Summary Judgment and Plaintiff's Motion for Summary Judgment. For the following reasons, Defendant's Motion is for Summary Judgment is **GRANTED**.

I. BACKGROUND

On January 13, 1997, Lorraine M. Stolz ("Plaintiff") filed an initial application for disability insurance benefits ("DIB") alleging that beginning May 24, 1996, she became totally disabled due to environmental illness, chronic fatigue syndrome and fibromyalgia.

The application was denied initially and upon reconsideration. Plaintiff requested a hearing before an Administrative Law Judge ("ALJ"). A hearing was held on October 6, 1998. Plaintiff was present and testified on her own behalf.

In a decision dated November 3, 1998, the ALJ found that the Plaintiff was not totally disabled and was not entitled to receive DIB payments. Plaintiff's counsel appealed to the Appeals Counsel to review the decision of the ALJ and submitted a letter brief. On June 19, 2000, the Appeals Counsel denied Plaintiff's request for review and upheld the decision as the final decision of the Commissioner.

Plaintiff appealed from this decision. Both parties then filed cross-motions for summary judgment.

II. STANDARD OF REVIEW

The Court conducts de novo review of the portions of a magistrate judge's Report and Recommendation on a dispositive motion to which specific objections have been filed. See 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72(b). In reviewing the decision of the Commissioner, this court must uphold the findings of the Commissioner of Social Security as to any fact as long as the Commissioner's determination is supported by substantial evidence. 42 U.S.C. § 405(g); *Richardson v. Perales*, 402 U.S. 389, 390 (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, at *1 (E.D. Pa. Sept. 9, 1995). 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. The court cannot conduct 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).

The search for substantial evidence "is not merely a quantitative exercise." *Kent v. Schweiker*, 710 F.2d 110, 114 (3d Cir. 1983). Rather, "[t]he administrative decision 'should be accompanied by a clear and satisfactory [explication] of the basis on which it rests.'" *Phillips v. Chater*, 1996 WL 457183 at *4 (D. N.J. June 27, 1996). "A single piece of evidence will not satisfy the substantiality test if the [Commissioner] ignores, or fails to resolve, a conflict created by countervailing evidence." *Kent*, 710 F.2d at 114. "[A]ll evidence" should be "explicitly weigh[ed]." *Cotter v. Harris*, 642 F.2d 700, 706, n. 8. As the Third Circuit has stated, we need from the ALJ not only an expression of the evidence he considered which supports the result, but also some indication of the evidence which was rejected. See *id.* at 705. In the absence of such an indication, the reviewing court cannot tell if significant probative evidence was not credited or simply ignored. See *id.* As the Third Circuit stated in *Dobrowolsky v. Califano*, 606 F.2d 403 (3d Cir. 1979), unless the Secretary has analyzed all evidence and has sufficiently explained the weight he has given to obviously probative exhibits, to say that his decision is supported by substantial evidence approaches an abdication of

the court's "duty to scrutinize the record as a whole to determine whether the conclusions reached are rational." Id. at 407. The Court's review of the Magistrate Judge's ruling is de novo. See 28 U.S.C. § 636(b). Therefore, the Court "may accept, reject, or modify, in whole or in part," the Magistrate Judge's findings and recommendations. Id.

In considering the Commissioner's objections to the Magistrate Judge's ruling, the Court has independently reviewed the entire record, the motions of the parties, the Report and Recommendation itself, the ALJ's written decision, the transcript of the hearing, the hearing exhibits and relevant correspondence.

III. DISCUSSION

Defendant's first objection to the Magistrate Judge's Report and Recommendation asserts that the Magistrate is essentially recommending that this Court re-weigh the evidence of record and decide this case according to the Magistrate's own findings. See Def.[']s] Objections, at 2. The Magistrate Judge's Report and Recommendation notes that the ALJ determined that Plaintiff's long term care physician's testimony was of "little significance." The Magistrate Judge relied on this statement to conclude that the ALJ's decision fails to be supported by substantial evidence.

Here, while the Magistrate Judge correctly noted that the ALJ determined that Dr. Shippen's testimony was of "little significance", the ALJ also stated his rationale for this

determination. See T. at 27-28. The ALJ declined to attribute great weight to Dr. Shippen's testimony because Shippen's conclusion that Plaintiff is disabled was discredited by two specialists, Drs. Reed and Minehart. See id. These two doctors determined that Dr. Shippen's conclusions were inconsequential and, as a result, the ALJ found that Dr. Shippen's opinion was not supported by objective medical evidence. See id.

In fact, the ALJ's decision discusses at length his reasons for concluding that Dr. Shippen's testimony is inconsequential.

The decision states:

As Dr. Shippen's opinion is not supported by the objective tests as interpreted by the specialists or any other objective evidence and also rest upon an assumption that he is not qualified to make (eg. that the [Plaintiff] lacks the cognitive capacity for sedentary work), the undersigned assigns little weight to Dr. Shippen's conclusion that [Plaintiff] is disabled (20 CFR 404.1527 and Social Security Rulings 96-2p and 96-5p).

See T. at 28.

If a treating source's opinion on the issue of the nature and severity of an impairment is well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in the case, it will receive controlling weight. See 20 C.F.R. §§ 404.1527(d)(2); 416.927. In addition, treating physicians' reports should be accorded great weight, especially "when their opinions reflect expert judgment based on a continuing observation of the patient's condition over a prolonged period of time." *Rocco v. Heckler*, 826

F.2d 1348, 1350 (3d Cir. 1987); 20 C.F.R. § 404.1527(d)(2); (providing for controlling weight where treating physician opinion is well-supported by medical evidence and not inconsistent with other substantial evidence in the record.) An ALJ may reject a treating physician's opinion outright only on the basis of contradictory medical evidence, but may afford a treating physician's opinion more or less weight depending upon the extent to which supporting explanations are provided. *Newhouse v. Heckler*, 753 F.2d 283, 286 (3d Cir.1985).

The ALJ determined that Dr. Shippen's opinion should not be given controlling weight because of the contradictory testimony of two other doctors. Because we find that the ALJ properly considered Dr. Shippen's testimony and detailed his reasons for rejecting his opinion, the ALJ's decision to discredit Dr. Shippen's testimony was based on substantial evidence.

Defendant next objects to the Report and Recommendation's conclusion that the ALJ made improper speculative inferences from Dr. Ziem's report. See Def.[']s Objections, at 4. Again, the Magistrate Judge determined that the ALJ did not attribute the proper weight to Dr. Ziem's testimony. To the contrary, the ALJ's decision discussed Ziem's testimony and determined that her failure to state the extent to which Plaintiff is disabled, leads to the inference that Plaintiff had at least some capacity for work.

The ALJ may rely not only on what the record says, but also on

what it does not say. See *Riggsbee v. Shalala*, NO. CIV. A. 93-5768, 1995 WL 847944, *6 (D. N.J. Jun 29, 1995), *aff'd sub nom.*, *Riggsbee v. Chater*, 82 F.3d 406 (3rd Cir. 1996). When a conflict in the evidence exists, the ALJ may choose whom to credit but "cannot reject evidence for no reason or for the wrong reason." *Mason v. Shalala*, 994 F.2d 1058, 1066 (3d Cir. 1993). The ALJ must consider all the evidence and give some reason for discounting the evidence she rejects. See *Stewart v. Secretary of H.E.W.*, 714 F.2d 287, 290 (3d Cir.1983).

Here, Dr. Zeim never expressly opined that Plaintiff was disabled, so the ALJ inferred that this indicated she retained some capacity to work. Other evidence in the record supports the ALJ's analysis of Dr. Ziem's report. See Reports of Drs. Chesnick, Feinberg, Reed, Perilstein, Minhart, Busko, McTamney and Prout (which support the Commissioner's finding that Plaintiff's impairments were not of disabling severity). Viewing the record as a whole, the ALJ's analysis was consistent with other objective medical testimony in the record, and his conclusion was thus based on substantial evidence.

Defendant lastly objects to the Magistrate Judge's Report and Recommendation because of factually inaccurate statements about the ALJ's decision. The Report and Recommendation states that the ALJ fails to reference the opinion of Dr. Perilstein. See Rep. and Recommendation, at 11. In addition, the decision states the ALJ

"ignores in his hypothetical to the VE, the [Plaintiff's] organic brain damage diagnosis which affects her memory and concentration." See *id.* The decision also claims that the ALJ failed to "give weight to the husband's testimony." See *id.* at 12. The Magistrate Judge uses these alleged oversights by the ALJ to support her conclusion that the ALJ's decision fails to be supported by substantial evidence.

As Defendant notes in his objections, the analysis in the Report and Recommendation fails to withstand scrutiny. First, contrary to the Report and Recommendation's assertion, the ALJ's decision makes explicit reference to the findings of Dr. Perilstein. See T. at 23. With respect to the ALJ's supposed ignorance of Plaintiff's organic brain disorder which affected her memory and concentration, the Report and Recommendation is again incorrect. The ALJ expressly considered and acknowledged Plaintiff's organic brain syndrome. See T. at 30. Further, consistent with the medical evidence of record, the ALJ accommodated Plaintiff's diminished memory and concentration by limiting her work activity to that which involved only simple job tasks. See T. at 25, 28, 29, 33. With respect the testimony of Plaintiff's husband, the ALJ again explicitly discussed his testimony. See T. at 29. In sum, the Report and Recommendation fails to account for explicit references to evidence in the record.

In light of the analysis above, the Court declines to approve

and adopt the Magistrate Judge's Report and Recommendation. After considering the record in this case, the Court finds that the ALJ's decision was supported by substantial evidence.

An appropriate Order follows.

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O R D E R

AND NOW, this 18th day of July, 2001, upon consideration of Magistrate M. Faith Angell's Report and Recommendation (Docket No. 13) and Defendant's Objections to the Magistrate Judge's Report and Recommendation (Docket No. 14), Defendant's Motion for Summary Judgment (Docket No. 10) and Plaintiff's Motion for Summary Judgment (Docket No. 11), IT IS HEREBY ORDERED that:

1. Defendant's Motion is for Summary Judgment is **GRANTED**;
and
2. Plaintiff's Motion for Summary Judgment is **DENIED**.

BY THE COURT:

HERBERT J. HUTTON, J.