

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

ROCHELLE JONES,	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	NO. 01-2232
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security,	:	
Defendant.	:	

MEMORANDUM AND ORDER

YOHN, J. MARCH , 2002

Pursuant to 42 U.S.C. § 405(g), Rochelle Jones appeals the final decision of the Commissioner of Social Security (“the Commissioner”) denying her claim for social security disability benefits under Title II of the Social Security Act (“the Act”), 42 U.S.C. §§ 401 - 33. Jones and the Commissioner both move for summary judgment. These cross motions for summary judgment were referred to Magistrate Judge Peter B. Scuderi. Magistrate Judge Scuderi has submitted a Report and Recommendation that I grant Jones’s motion for summary judgment, and deny the Commissioner’s motion.

The Commissioner files four objections to the Magistrate Judge’s Report and Recommendation. Def’s Objections to the Magistrate Judge’s Report and Recommendation [hereinafter Objections]. She objects that:

- (1) The Magistrate Judge erred as a matter of law in recommending that benefits be awarded without further administrative proceedings. Objections at 2. Because the ALJ found that

- Jones failed to meet her burden at step two, the district court should remand for the ALJ to continue his sequential evaluation of Jones's claim under the remaining steps. *Id.*
- (2) The Magistrate Judge erred in asserting that the plaintiff could have established a prima facie case under step two without supporting clinical findings to substantiate her testimony. *Id.* at 3 - 4. The Commissioner objects that the chiropractor's opinion cannot be an "acceptable medical source" under the regulations, and that he did not offer a medical opinion that Jones was "disabled" within the meaning of the Act. *Id.* at 3.
 - (3) Medical-Vocational Rule 201.21 would direct a finding that Jones was "not disabled" even if she were incapable of performing her past work. *Id.* at 4 - 5.
 - (4) In the alternative, the Commissioner asserted that there are material facts in dispute so summary judgment for Jones would be inappropriate. *Id.* at 5.

For the following reasons, I accept Magistrate Judge Scuderi's Report and Recommendation and grant Jones's motion for summary judgment.

Background

In 1982, Rochelle Jones was stricken with back pain so severe that she was thrown to the street and has never been fully functional since. *See, e.g.*, R.89. On August 30, 1984, Jones originally petitioned the Social Security Administration for disability benefits for her back impairment. *Id.* at 1. That petition was denied on September 26, 1984 on the ground that she did not have a "severe" medically determined impairment. *Id.* at 1 - 2. She filed a second application for benefits in November 1987 on the same claim. *Id.* at n1; *see also* Pl's Motion for Summary

Judgement at 15. This time the Commissioner found her eligible for benefits in a decision dated March 25, 1991 and retroactive to the November 1987 petition. *Id.*

In 1990, the Third Circuit held that portions of the Commissioner's policy in evaluating the severity of impairments between August 7, 1983 and November 30, 1984 had not conformed with the Social Security Act. *Bailey v. Sullivan*, 885 F.2d 52 (3d Cir. 1990). Jones was a qualified member of the *Bailey* class, and the Middle District ordered the Commissioner to re-adjudicate her 1984 claim accordingly. *Bailey v. Sullivan*, Civ. A. No. 83-1797 (M.D.Pa. July 29, 1991). At issue were Jones's disability payments for the 27 days between her August 30, 1984 application and the Commissioner's decision on September 26, 1984.¹ Rep. and Rec. at 2; R.16.

During the *Bailey*-mandated rehearing, however, there were certain irregularities. The Commissioner could not produce vital medical records in her possession. Rep. and Rec. at n.14. Jones's separate affective disorders made it difficult for her to testify — indeed the Magistrate Judge was concerned that she was not able to provide reasoned answers to the ALJ's questions. *Id.* at n.13. Finally, by the time of the rehearing, 14 years had passed since the events in question and both parties were having difficulty pinpointing what Jones's exact condition had been in 1984. *See, e.g., id.* at 11 (noting the toll that 14 years had taken on the plaintiff's recollection); Pl's Motion for Summary Judgment (arguing that the Commissioner improperly used events from 1982 and 1983 to evaluate the plaintiff's condition in 1984); *see also* Pl's Motion for

¹ Jones appears to be pursuing this case for 27 days of benefits because she is unemployed and supports herself on \$ 557 a month. Pl's Motion to Proceed in Forma Pauperis at 1. She has no checking or savings accounts. *Id.* at 2. Her rent is \$ 350 a month and food expenses for her family total \$ 140 a month. *Id.* at 1. This leaves her \$ 67 a month for transportation and all other necessities.

Summary Judgment at 10 (noting that the ALJ misidentified a date on one of the chiropractor's records from the period); Def's Motion for Summary Judgment at 6 (noting that the chiropractor's notes from this period were poor).

The ALJ decided against Jones on June 26, 1998 on the same ground as the original September 26, 1984 opinion, announcing that her back impairment was not "severe" enough to pass step two of the five-step evaluation process.² R.16, 18; Rep. and Rec. at 2 - 3. The ALJ claimed that "[o]bjective laboratory records show[ed] only minor findings." R.17. He acknowledged that the record contained x-rays taken in April 1982, November 1982, and one in September 1984 that the ALJ misidentified as having been taken in September of 1994. *Id.*; Exhibit 8. Those x-rays revealed discogenic and secondary change at C6-7, as well as minimal disc space narrowing at L3-4, L5-S1 and degenerative joint disease at the inferior aspect of the left sacroiliac joint. *Id.*; Exhibit 8. According to the ALJ though, the chiropractic records contained "no clinical findings" and there was "no evidence concerning the critical period at issue, September 1984." R.17. He found Jones's reports of pain to be "contradictory and not credible" because, although she said she was "paralyzed" in 1982, she was able to attend school, graduate, and make regular visits to her chiropractor's office. *Id.* In closing, the ALJ faulted Jones's recollection of events from 1984 and again highlighted what he believed to be a lack of evidence about her condition at the time. *Id.* at 18.

The Magistrate Judge found that the substantial evidence did not support the ALJ's conclusion "because [his conclusion was] based upon the . . . apparent misinterpretation or minimization of [Jones's] medical record." Rep. and Rec. at 9. Although Jones had the burden

² For the full five-step process, see 20 C.F.R. § 416.920(b) - (f); Rep. and Rec. at n.2.

to show she had a medically determinable impairment (*Bowen v. Yuckert*, 482 U.S. 137, 149 - 51 (1987); Rep. and Rec. at 8), the Magistrate Judge found that she had established her prima facie case for disability because her “subjective complaints of pain, reasonably supported by medical testing . . . render her incapable of performing her past relevant secretarial and clerical work.” Rep. and Rec. at 13; R.93, 97 - 100. He also found that the “ALJ failed to properly credit [Jones’s] subjective complaints,” disregarding the fourteen-year time lag and the corroborating medical evidence she was able to present. *Id.* at 10 - 12. He concluded that “substantial evidence in the record” supported an award of benefits to Jones, because Jones’s case had been in the administrative system for the seventeen years since 1984 and a remand “for additional evidence or analysis would serve no purpose since there is no apparent means of further analyzing [Jones’s] medical condition in 1984 or its impact on her ability to work.” *Id.* at 12 - 13.

Standards of Review

I review *de novo* the parts of the magistrate judge’s report and recommendation to which the Commissioner objects. 28 U.S.C. § 636(b)(1)(C) (2001). I have the option to accept, reject or modify, in whole or in part, the magistrate judge’s findings or recommendations. *Id.*

The standard by which I review the ALJ’s underlying determinations of disability is one of whether there is substantial evidence to support his decision.³ *Plummer v. Apfel*, 186 F.3d 422, 427 (3d Cir. 1999) (citing *Adorno v. Shalala* 40 F.3d 43, 46 (3d Cir. 1994)). Substantial

³ This is not a *de novo* review of the ALJ’s decision, but rather consideration of whether the evidence from the record as a whole supports his decision, not just the evidence that is consistent with his findings. *Monsour Medical Center v. Heckler*, 806 F.2d 1185, 1190 - 91 (3d Cir. 1986).

evidence to support the ALJ's decision means "more than a mere scintilla" but somewhat less than a preponderance of the evidence. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Brown v. Bowen*, 845 F.2d 1211, 1213 (3d Cir. 1988). The ALJ's decision must present "such relevant evidence as a reasonable mind might accept as adequate" to reach his conclusion. *Richardson*, 402 U.S. at 401; *Plummer*, 186 F.3d at 427 (citing *Ventura v. Shalala*, 55 F.3d 900, 901 (3d Cir. 1995)); *Morales v. Apfel*, 225 F.3d 310, 316 (3d Cir. 2000).

To establish a disability under the Act, a claimant must prove that she is unable to "engage in 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) (2001). To determine whether the claimant can satisfy this standard, the Commissioner applies a five-step process of evaluation under 20 C.F.R. § 404.1520. The first two steps of the analysis involve threshold determinations whether the claimant is working, 20 C.F.R. § 404.1520(a) (2001), and whether the claimant's impairment is of required duration and severity to significantly limit her ability to perform basic work activities, 20 C.F.R. § 404.1520(c) (2001). The third step is comparing the evidence of medical impairment against a list of impairments that would permit the claimant to qualify for disability without further inquiry. 20 C.F.R. § 404.1520(d) (2001). If the claimant does not qualify for benefits automatically according to this list, the Commissioner proceeds to the fourth and fifth steps of her analysis. In the fourth step she determines whether the claimant retains the residual functional capacity to perform work similar to that she has performed in the past. 20 C.F.R. § 404.1520(e) (2001). In the fifth and final step, if the Commissioner finds that the claimant is unable to perform any other work that

exists in the national or regional economies, she must find the claimant to be disabled. 20 C.F.R. § 404.1520(f) (2001). *See also Sullivan v. Zebley*, 493 U.S. 521, 525 (1990) (expounding on the application of this five-step process).

It must be noted that the burden shifts from the claimant to the Commissioner during the five-step process. At steps one and two, the claimant bears the burden of establishing a prima facie case that she has a “medically determinable basis” for an impairment that prevents her from engaging in any basic work activities for the statutory twelve-month period. *Burnett v. Commissioner of Social Security*, 220 F.3d 112, 118 (3d Cir. 2000) (citing *Plummer*, 186 F.3d at 427 and quoting *Stunkard v. Secretary of Health and Human Services*, 841 F.2d 57, 59 (3d Cir. 1988)). The claimant retains the burden through step four, at which she must demonstrate “an inability to return to her past relevant work.” *Id.* (citing *Adorno*, 40 F.3d at 46). Then, as the Third Circuit has held, at step five, “*the burden of production shifts to the Commissioner*, who must demonstrate [that] the claimant is capable of performing other available work in order to deny a claim of disability.” *Id.* (citing 20 C.F.R. § 404.1520(f)) (emphasis added). It is the responsibility of the Commissioner to show that there are other jobs existing in significant numbers in the national and regional economies that the claimant can perform “consistent with her medical impairments, age, education, past work experience, and residual functional capacity.” *Id.* (quoting *Plummer*, 186 F.3d at 428).

Discussion

Examining the Commissioner’s four objections individually, I find them to be without merit. The first three objections fail adequately to analyze the caselaw, the Magistrate Judge’s

Report and Recommendation, and the governing regulations. The final objection is not well enough developed to be answerable as a legal argument.

The Commissioner's First Objection

The Commissioner's first objection is that the Magistrate Judge erred as a matter of law in recommending that benefits be awarded without further administrative proceedings. I do not agree. I review the Magistrate Judge's Report and Recommendation *de novo*, 28 U.S.C. § 636(b)(1)(C) (2001), and find that under Third Circuit precedent, this court may "affirm, modify, or reverse the [Commissioner's] decision with or without a remand to the [Commissioner] for a rehearing." *Podedworny v. Harris*, 745 F.2d 210, 221 (3d Cir. 1984); *see also* 42 U.S.C. § 405(g) (2001) ("The court shall have the power to enter . . . a judgment affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.").

The Commissioner specifically contends that remand would not be appropriate in this case because the ALJ dismissed Jones's claim at step two of the five-step process. Objections at 2. The fact that the Jones's case was dismissed by the ALJ at step two rather than at some other point in the process is not, however, determinative of a result: the Third Circuit has itself reversed lower courts in order to award benefits directly to a plaintiff dismissed at step two. *See, e.g., Ferguson v. Schweiker*, 765 F.2d 31 (3d Cir. 1985). In *Ferguson v. Schweiker*, the Third Circuit remanded for the payment of benefits at step two when Ferguson produced "sufficient supporting medical documentation to prove a prima facie case of disability and that the burden of proof shifted to the [Commissioner]." *Id.* at 36. As in Jones's case, the ALJ in Ferguson's case

had determined at step two that Ferguson’s “impairments [were] not severe[, and so] did not reach the question of whether her impairments prevent[ed] her from returning to her customary employment.” *Id.* at 37. In response to these facts, the Third Circuit held that “[u]nless a medical opinion to the contrary is obtained, the evidence of record [from the claimant’s prima facie case] appears to establish that Ferguson cannot return to her past work.” *Id.* The Circuit then remanded directly for an award of benefits.

As other cases have reiterated, such a remand for benefits is also appropriate where “the claimant established a prima facie case of entitlement, the record was fully developed, and there is no good cause for the [Commissioner’s] failure to adduce all the relevant evidence at the prior proceeding.” *Allen v. Bowen*, 881 F.2d 37, 44 (3d Cir. 1989). Here the Magistrate Judge carefully noted that Jones had established a prima facie case, and if the record was not fully developed, it was because the Commissioner had misplaced medical documents and delayed the conclusion of litigation for seventeen years. Rep. and Rec. at 12 - 13. In these circumstances, the Third Circuit has written that it “see[s] no reason to remand for further fact finding.” *Allen*, 881 F.2d at 44. Furthermore, it is clear that after seventeen years, the loss of critical records by the Commissioner, and with the faulty health of the claimant affecting her ability to recall, remand would be pointless. There is no other evidence to present.

The Commissioner’s Second Objection

The Commissioner’s second objection is that the Magistrate Judge erred in asserting that the plaintiff could have established a prima facie case under step two without supporting clinical findings to substantiate her testimony. Objections at 3 - 4. This objection, however, misreads

the Magistrate Judge's Report. The Magistrate Judge noted that Jones's prima facie case was supported by clinical evidence to substantiate her testimony. Rep. and Rec. at 11 ("[Jones's] testimony regarding persistent back pain is substantiated by x-rays and continuing chiropractic care."). For example, an x-ray of Jones's lumbar spine taken during the critical period at issue in September 1984 revealed the narrowing of the space between her discs, degenerative joint disease and chronic discogenic disease. *Id.* at 10; R.70. The ALJ apparently thought that the x-ray had been taken in September of 1994. *See* R.17.

In her objections, the Commissioner cites 20 C.F.R. § 416.913 for the proposition that this evidence should not be considered because the record came from Jones's treating chiropractor, rather than a medical doctor. The very section of the regulations that the Commissioner cites, however, lists additional acceptable medical sources, including "for example, . . . chiropractors." 20 C.F.R. § 416.913(d)(1)(2001). Furthermore, the plain language of 20 C.F.R. § 416.913 notes that acceptable medical reports from these sources include "(1) [m]edical history . . . [and] (3) [l]aboratory findings (such as blood pressure, *X-rays*)" *Id.* at § 416.913(b). (emphasis added). The x-rays and other documentation that Jones produced to support her testimony are specifically enumerated as acceptable by the regulations.

The Commissioner continues to protest that the medical evidence Jones produced to support her testimony cannot make her eligible for benefits because her chiropractor never explicitly applied the criteria of the Act to pronounce her "disabled." Objections at 3. But 20 C.F.R. § 416.913 holds that a final medical assessment is not ultimately necessarily for the agency to determine disability. In the words of the regulation, "[a]lthough we will request a medical source statement about what you can still do despite your impairment(s), the lack of the

medical source statement will not make the report incomplete.” 20 C.F.R. § 416.913(b) (2001). In its own regulations, the agency has acknowledged that it does not require a pronouncement in the medical record that the plaintiff be disabled to properly determine disability.

The Commissioner’s Third Objection

The Commissioner’s third objection is that Medical-Vocational Rule 201.21 would direct a finding that Jones was “not disabled” even if she were incapable of performing her past work. Objections at 4 - 5. Medical-Vocational Rule 201.21 can be found in 20 C.F.R. Part 404, Subpt. P, App. 2, T.1. (2001). It is an entry in a table under “Residual Functional Capacity: Maximum Sustained Work Capability Limited to Sedentary Work as a Result of Severe Medically Determinable Impairment(s).” *Id.* The one-line rule reads in full: “Age: younger individual age 45-49; Education: high school graduate or more; Previous Work Experience: skilled or semiskilled—skills not transferable; Decision: not disabled.” *Id.*

There are two major problems with this approach in Jones’s case. First, the Commissioner carries the burden of proving that Jones is capable of working in a job existing in substantial numbers within the national and regional economies. *Burnett* 220 F.3d at 118. Second, the evidence that the Commissioner relies upon in her brief to attempt to establish that Jones would be capable of working is badly flawed for this purpose.

First, the Commissioner carries the burden of proving that Jones is capable of working in a job existing in substantial numbers within the national and regional economies and cannot assume she would prevail in this analysis. *Id.* (announcing that “*the burden of production shifts to the Commissioner*, who must demonstrate [that] the claimant is capable of performing other

available work in order to deny a claim of disability”) (emphasis added). As the Third Circuit emphasized in *Ferguson*, once the claimant has submitted enough evidence to prove a prima facie case, the burden shifts to the Commissioner, and if “the [Commissioner] has not met the burden of countering the claimant’s evidence of disability” the case may be remanded directly for benefits. *Ferguson*, 765 F.2d at 35, 38. The ALJ in Jones’s rehearing cut short his analysis of her case at step two, and misleadingly claimed that “[o]bjective laboratory records show[ed] only minor findings.” R.17. As the Magistrate Judge found, Jones’s ALJ either badly misinterpreted or deliberated minimized Jones’s medical records. Rep. and Rec. at 9. The ALJ then never analyzed the issue of whether Jones would be capable of work in jobs existing in significant numbers in the national and regional economies. 20 C.F.R. § 404.1520(f) (2001). Given such a history, the *Allen v. Bowen* case establishes in the Third Circuit that the Commissioner cannot expect the case to be remanded in order for her to supplement the record if she did not provide appropriate evidence in the original hearing. *Allen*, 881 F.2d at 44.

Second, the evidence that the Commissioner relies upon in her brief to attempt to establish that Jones would be capable of working is badly flawed for this purpose. According to the Commissioner, the record supports the proposition that, “[a]s of August 1984, [Jones] was a ‘younger individual,’ had a high school education and some college course, no transferrable skills, and was capable of sedentary work, according to the medical advisor who testified at her hearing.” Objections at 4 - 5 (citing R.26). But the Commissioner cites for support to a nearly illegible copy of the March 25, 1991 opinion that found Jones to be disabled based on her November 1987 claim. *Id.* (citing R.26). From what the court can discern of that part of the record, the ALJ came to conclusion that: “I find that the claimant retains the residual functional

capacity for sedentary work activity *at most*. Her painful feet limit her ability to walk or stand for prolonged periods. Furthermore, she can lift only approximately ten pounds. This finding is consistent with the testimony of the medical advisor at the supplemental hearing.” R.26 (emphasis added). This is not the definitive pronouncement that Jones would be able to perform work existing in the national and regional economies that the Commissioner portrays. Moreover, although much of the rest of the report is illegible, the ALJ then went on to declare her disabled as of November 1987.

Furthermore, the ALJ in the March 25, 1991 hearing examined different evidence than was available in Jones’s 1984 hearing. It was the responsibility of the ALJ at Jones’s *Bailey*-mandated rehearing to examine the records available to the agency in 1984 and provide substantial evidence from that record to support his conclusion that Jones could perform work as exists in substantial numbers in the national and regional economies. This he failed to do. The agency cannot now attempt to incorporate into the findings for the 1984 claim the 1991 analysis of a separate claim by a separate ALJ analyzing a different issue and coming to a conclusion on the basis of different data.

The Commissioner’s Fourth Objection

The Commissioner’s fourth and final objection is that there are material facts in dispute so summary judgment for Jones would be inappropriate. Objections at 5. This last objection is included in a single line at the close of her brief. The Commissioner makes no argument as to which material facts may be in dispute and what the dispute would be over those facts. Without more detail to the objection, I cannot evaluate it as a substantive legal argument.

Conclusion

In sum, the Magistrate Judge's Report and Recommendation properly reviewed the ALJ's underlying opinion for whether he presented substantial evidence to support his decision. Rep. and Rec. at 10, 12; *Fargnoli v. Massanari*, 247 F.3d 34, 38 (3d Cir. 2001); *Knepp v. Apfel*, 204 F.3d 78, 84 (3d Cir. 2001); *see also Morales*, 225 F.3d at 316 (defining substantial evidence as such relevant evidence a reasonable mind might accept as adequate to support a conclusion). His Report and Recommendation is well reasoned and properly addressed the merits of both parties' motions for summary judgment. I therefore uphold his conclusion, grant Jones's motion for summary judgment, and remand her case to the Commissioner for calculation of benefits.

**IN THE UNITED STATES DISTRICT COURT
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ROCHELLE JONES,	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	NO. 01-2232
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security,	:	
Defendant.	:	

ORDER

YOHN, J. MARCH , 2002

AND NOW, this day of March 2002, upon consideration of the parties' cross-motions for summary judgment, and after careful review of the Report and Recommendation of the United States Magistrate Judge Peter B. Scuderi and the defendant's objections thereto, IT IS HEREBY ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.
2. The motion of plaintiff Rochelle Jones for summary judgment is GRANTED.
3. The motion of defendant Jo Anne B. Barnhart, Commissioner of Social Security, for summary judgment is DENIED.
4. The decision of the Commissioner is REVERSED and the case is REMANDED for calculation of benefits.

BY THE COURT:

William H. Yohn, Jr.