

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

PATRICIA WALLS,	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	NO. 01-2361
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security,	:	
Defendant.	:	

MEMORANDUM AND ORDER

YOHN, J. MARCH , 2002

Pursuant to 42 U.S.C. § 405(g), Patricia Walls appeals the final decision of the Commissioner of Social Security (“the Commissioner”) denying her claim for social security income (SSI) under Title XVI of the Social Security Act (“the Act”), 42 U.S.C. §§ 1381 - 83(f). Walls and the Commissioner both move for summary judgment; Walls also moves in the alternative to remand. These cross motions for summary judgment and motion for remand were referred to a magistrate judge who submitted a Report and Recommendation that I grant the Commissioner’s motion for summary judgment, and deny both of Walls’s motions.

Walls filed objections to the Magistrate Judge’s Report and Recommendation that separate into six points. Def’s Objections to the Magistrate Judge’s Report and Recommendation [hereinafter Objections]. She objects that:

- (1) The Magistrate Judge’s Report and Recommendation failed to “refute or reject [Walls’s] argument that her failure to appear for several appointments for a limited time [neither]

negated her diagnosis of bipolar disorder, nor . . . lessen[ed] the impact of the limitations . . . her treating psychiatrist” described. Objections at 1 - 2.

- (2) The Magistrate Judge’s Report and Recommendation failed to discuss whether the ALJ presented substantial evidence to support his credibility findings regarding Walls’s reasons for not taking her medication. *Id.* at 2.
- (3) The Magistrate Judge erred in not evaluating whether the ALJ presented substantial evidence to support his conclusion that Walls’s activities of daily living undermined her testimony about the extent to which her symptoms limited her ability to function. *Id.* at 4.
- (4) The Magistrate Judge erred as a matter of law in not reversing the ALJ’s finding that Walls could perform jobs existing in significant numbers within the national and regional economies because substantial medical evidence did not support such a conclusion. *Id.* at 5 - 8.
- (5) The Magistrate Judge erred by failing to address the implications or impact of Social Security Ruling 85-15 concerning Walls’s individual ability to handle stress in the work positions identified by the vocational expert. *Id.* at 9.
- (6) The Magistrate Judge erred in finding that the case did not need to be remanded for further hearing because of the large number of “inaudibles” in the transcript at key junctures. *Id.* at 10.

For the following reasons, I decline to accept the conclusion of the Magistrate Judge’s Report and Recommendation and will remand the case to the Commissioner for further proceedings consistent with this opinion.

Background

On December 15, 1999, Walls protectively filed for Social Security Income (SSI), claiming inability to work due to bipolar disorder. R.11. She was initially denied and timely filed a request for a hearing. *Id.* A hearing on her claim was held in Philadelphia on November 16, 2000. *Id.*

At the hearing, Walls testified that she was a 36-year-old woman with a seventh grade education. R.127. When asked about her prior work experience, Walls volunteered that she had worked as a prostitute “on and off” since she was a child. R.128. In her work history report for the agency, she also mentioned short stints as a clerk in a WaWa convenience store and as a food stand cashier for Aramark. R.60 - 62. The ALJ concluded that she had no “vocationally relevant past work experience.” R.11.

Walls’s medical records document that the onset of her bipolar disorder appeared at the age of nine when she was raped by her uncle. R.97. Her father later abused her physically and verbally. *Id.* Her personality changed dramatically and she often ran away from home. *Id.* She dropped out of school in eighth grade. R.98. By the age of seventeen, Walls was taking drugs and working as a prostitute. R.97. She married once and has three children in the care of the state. R.81, 98, 130.

At her hearing, Walls testified that she was attempting to turn her life around. *See, e.g.*, R. 128. She has been off of drugs for two years, with only one relapse eight months before. R.129. She had a one-year-old child whom it appeared from the transcript that she was still breast feeding. *Id.* (“[R]ight now I’ve even nervous taking medicine that I’m taking for my breathing beings [sic] I’m breast feeding.”). Walls had an on-again-off-again relationship with

her new boyfriend, the son's father, permitting him to live in the house with her despite a restraining order as long as he accompanied her to therapy sessions.¹ R.135. She used to be close to her boyfriend's mother before her relationship with the boyfriend deteriorated.² R.134 - 35. She was still embarrassed about the cuts from self-mutilation on her arms and uncomfortable about people (R.130), but was able to remember to feed the baby, to take the baby to doctor's appointments, and to go grocery shopping. R.132 - 33. She could also feed her pets. R.136. Walls does not drive, but could take public transportation. R.133. Her boyfriend paid the bills in the household.³ R.136.

According to her testimony at the hearing though, Walls still lives with limitations. She does not feel comfortable associating with people, and fears leaving the apartment unless she

¹ Walls's description of the relationship at the hearing was that she had a restraining order against her boyfriend but that he was back living in the house with her on the condition that he accompany her to therapy sessions. R.135. This was the boyfriend who had helped Walls through her nervous breakdown three years ago and who had helped get her off of drugs. R.128. According to Walls, the boyfriend had originally accompanied her to therapy and been supportive, but some time ago, "he stopped going, and he became like calling me a whore and stuff, and you know, I, I, don't do anything wrong. And I'm a disgrace and I'm crazy." R.135.

² The ALJ implies in his opinion that Walls still lived with her boyfriend's mother, but this appears to be at odds with the testimony during Walls's hearing. In the ALJ's opinion, he argues that she cannot be badly agoraphobic because "[s]he has been able to live with her boyfriend and his mother and care for her baby." R.14. In Walls's testimony at trial she discusses speaking with her boyfriend's mother on the phone (R.134), and how her boyfriend's mother "won't speak to me" after Walls got a restraining order against her son. R.135.

³ There seems to be some confusion on this point in the ALJ's opinion and in the notes of the doctor that the agency hired to review Walls's medical records. (See discussion later in text.)

On the record at her hearing, however, the ALJ asked Walls "Do you, who pays the bills in the house?" R.136. Walls answered the ALJ: "He does [the boyfriend], and it gets thrown in my face all the time." *Id.* Walls did not write checks for her bills: her boyfriend "gives me money and I pay my landlord when she comes to the house to pick it up. I won't go to the office." *Id.*

absolutely has to. *Id.* Her landlord must come to the apartment to collect rent checks because Walls will not go to the office. R.136. The closest people Walls associates with outside her apartment appear to be the neighbors. Walls describes those neighbors as “really, really nice” but found it hard to associate with them or “sit outside with them.” R.133. She is particularly embarrassed around them because she believes that the neighbors hear the names that her boyfriend calls her. *Id.* She does not speak on the telephone except to make medical appointments for herself or her son. R.134. She does not watch television because it is difficult for her to “sit and watch something for an amount of time.” R.135. When Walls takes public transportation, she often has trouble getting off at her stop. R.137. In her words, “I get on the train, I get very nervous, and I just start, a lot of times I get into depressions and, and stress, whatever’s on my mind, and I’ll, when I sit down on the trolley or the subway, my mind just starts getting into some deep thinking and I miss my stop, or forget which stop I was getting off, or whatever.” *Id.* This problem had happened to Walls as recently as the morning of the hearing and the day before. *Id.*

When asked about whether she was taking medication at the hearing, Walls told the ALJ “No, right now I’m even nervous taking medicine that I’m taking for my breathing beings [sic] I’m breast feeding.” R.129. When asked about her past interaction with a psychiatrist, Walls described how she was wary of medication because a doctor in the past had wanted to give her a new medication which could have endangered her child. R.138. (“[O]ne psychiatrist [who] wanted to give me medication as a guinea pig, like it was a [sic] new stuff coming out, and then Dr. Harris told me that it was bad for your kidneys and your liver.”) Doctors had recommended that Walls not take medication while breast feeding and she had not filled a recent prescription

because she was having difficulty weaning her son. R.139 - 40 (“Dr. Harris and Dr. Laney, the two psychiatrists don’t recommend taking medication while breast feeding.”); R.138 (“Dr. Harris gave me a prescription for medicine one time, and I just, I got real, because of me breast feeding still too, I’m having a really hard time getting my son [weaned].”). In the hearing though Walls specifically expressed her willingness to take medication for her bipolar disorder once she thought it would be safe for her child. R.140 (“Yes I’m willing to take medication if it’s going to stop me from being so paranoid and stop my negative thinking.”).

At Walls’s hearing, her attorney asked the vocational expert whether there were any jobs that could be performed by someone with Walls’s limitations as described by her treating physician. R.144 - 45. He answered that there were none. *Id.*

Walls’s Medical Records

Walls’s medical records for this case begin in August of 1999. R.2. Treatment notes from the Philadelphia Mental Health Clinic dated August 17, 1999 note that Walls had a history of mood disorders and sexual abuse. R.81. She was seven months pregnant at the time of intake. *Id.* She had attended three individual therapy sessions in the past and wished to return to therapy but was breast feeding and therefore could not take medication. *Id.* The clinic recommended behavioral intervention for mood management; she was also to have her parenting skills assessed. *Id.* An undated interview sheet in checkmark form notes that Walls was tearful, agitated with labile emotions, anxious, irritable, depressed, delusional, hallucinating, had ideas of reference, and flights of ideas. R.82. It warned of a history of self-injury, denied that she would be aggressive to others, and noted she was a victim of abuse. *Id.* Her motivation for treatment

was rated as “strong.” R.83. Although the intake evaluator marked Walls as having “partial” insight into her condition, the doctor reviewing her diagnosis upgraded this to “full” insight. *Id.*

On December 11, 1999, brief treatment notes from the Philadelphia Mental Health Clinic reiterate Walls’s diagnosis of bipolar disorder. R.85. Listed under “needs” is to get help with “low self-esteem” and “to remain free of drugs and alcohol.” *Id.*

Philadelphia Mental Health Clinic’s appointment record for September 1999 through January 2000 shows that Walls kept over half of her scheduled weekly appointments. R.89. She missed two appointments in a row in the beginning of October of 1999, one at the end of October 1999, and one in the beginning of December 1999. *Id.* She had to cancel a second appointment in early December of 1999, and called to cancel two more in early January 2000. *Id.*

On January 17, 2000, Walls’s therapist noted that she had requested discussing pharmacological options with a doctor. R.84. At the time, Walls was breast feeding her three-month old infant and specifically wanted information on “safe” mood stabilizers. *Id.* She still had delusions, hallucinations, and was depressed and anxious. *Id.* The notes also record problems with insomnia. *Id.*

On January 22, 2000, Walls’s therapist, Doris Robinson, M.S.W., wrote a note to confirm that Walls had been attending weekly psychotherapy and monthly psychiatric sessions. Exhibit F (R.114). She noted Walls’s diagnosis of bipolar disorder and her acts of self-mutilation when Walls became depressed. *Id.* Her note concluded that Walls “is disabled due to her psychiatric condition and medication management.” *Id.*

In clinical notes from the same day, Robinson noted that Walls was experiencing “periods of anxiety and agitation.” R.115. She appeared “pressured” and “tearful,” fearing for her baby.

Id. Walls was undeniably “anxious and emotional,” but she “does fine with him [the baby].” *Id.* Walls was doing a “good job” as a mother and the baby was “developing well.” *Id.* A medical note at the bottom of the page documents that Walls was not on medication while nursing, and that she should be started on an antidepressant when finished. *Id.*

On February 24, 2000, Dr. Cecil Harris performed a psychiatric examination of Walls. Exhibit 3F (R.97 - 100). He reported that Walls had arrived with her infant son and boyfriend by subway; her appearance and dress were consistent with her age and the occasion. R.97. Walls though was garrulous and “often had to be interrupted in order to complete the examination.” *Id.* She described her personality when well as having friends and feeling secure; when ill, she stopped going out and seeing friends. *Id.* Walls was breast feeding at the time and so was not taking her medication. R.97.

Walls’s speech was pressured; her mood was “one of depression and/or anxiety.” R.98. Her symptomatology appeared deep and intense. *Id.* She had frequent fluctuation of mood. *Id.* Dr. Harris noted an “above average” amount and range of expression as Walls varied between hypomania and depression. *Id.* She had noted difficulty initiating, sustaining or terminating an emotional direction. *Id.* Although she had no difficulty initiating or sustaining an emotional response, she often had difficulty terminating that emotional response. *Id.* In her speech, there was an overabundance of ideas as she thought rapidly and spontaneously. *Id.* Dr. Harris noted that her replies were less answers to questions than loose associations: she was preoccupied by her illness, she had a compulsion to clean, she had a fear of closed spaces, spiders, snakes and rats. *Id.* She often felt that people “talked about her” and thought that she was ugly, or looked at her and made her think of “being a whore.” *Id.* She was pervasively suspicious. *Id.*

Walls had both visual and auditory hallucinations. *Id.* She often saw her cat being hit by a car; she heard a voice telling her to give up and quit. *Id.* She also had feelings of depersonalization and derealization. *Id.* She was unable to control either her hostile and aggressive impulses, or her sexual and amorous impulses. R.99.

Dr. Harris found that it would “very difficult” for Walls to perform in a work environment. R.98. He wrote that Walls would have trouble adjusting to superiors or co-workers because she “refused to come out of the home or could not come out of the home, except for therapy or to take her child to a pediatrician.” *Id.* Her social judgement was generally poor. R.99. Dr. Harris found her prognosis to be “guarded,” warning that Walls had been “ill for many years” and needed psychopharmacotherapy intervention. *Id.* His ultimate conclusion was that Walls was “unable to perform work-related tasks.” *Id.*

In his summary Medical Assessment to do Work-Related Activities dated the same day, Dr. Harris reiterated that Walls had no ability to follow work rules, to relate to her co-workers, or to deal with the public. Exhibit 2F (R.90 - 96); R.95. She had fair use of judgment and fair ability to interact with supervisors, but no ability to deal with work stress, to function independently, or to maintain attention or concentration. R.95. In evaluating Walls’s ability to carry out instructions, Dr. Harris concluded that she had poor to no ability to understand, remember and carry out “complex job instructions” or “detailed, but not complex job instructions.” *Id.* She had a fair ability to understand, remember and carry out “simple” job instructions. *Id.* Under the category of “making personal-social adjustments,” he found that Walls had a fair ability to maintain her personal appearance, but poor to no ability to “behave in an emotionally stable manner,” “relate predictably in social situations,” or to “demonstrate

reliability.” R.96. His final notes in the report on work-related activities record that Walls is “[o]ften too depressed or too elated to perform most work-related activities — [in her words, she] freaks out on people.” R.96, 100.

Dr. John Ortiz reviewed Walls’s medical records for the Social Security Administration on March 3, 2000 , but never met with Walls. *See* R.101 - 03. The sum total of textual observations in his Medical Residual Functional Capacity Assessment were four conclusory sentences. Exhibit 4F (R.101 - 04). Dr. Ortiz wrote in full: “Claimant is a 35 year old female diagnosed with Bipolar disorder and a history of prostitution. According to reported ADLs and recent evaluations, she is capable of handling daily living activities such as cleaning, shopping, preparing meals, paying bills⁴ and other household activities. She is able of [sic] getting along with authority figures, follow [sic] simple, two-level type instructions, make simple decisions, concentrate on simple activities such as those involved in maintaining a residence, making simple, basic calculations and taking public transportation. She can handle changes if these are not overly stressful.” R.103.

In the Mental Residual Functional Capacity Assessment Dr. Ortiz completed at the same time, he checked a series of boxes to report his evaluation of Walls’s medical record. Exhibit 4F (R.101 - 03). Dr. Ortiz concluded that Walls was moderately limited in eight out of the twenty areas demarcated on the standardized form. R.101 - 02. The areas in which Dr. Ortiz recognized that Walls was moderately limited included “the ability to understand and remember detailed instructions;” “the ability to carry out detailed instructions;” “the ability to maintain attention and

⁴ See note 3 above noting that the doctor the agency hired to review Walls’s medical records may have been mistaken in his understanding of the financial procedures in Walls’s household.

concentration for extended periods;” “the ability to perform activities within a schedule, maintain regular attendance, and be punctual within customary tolerances;” “the ability to complete a normal workday and workweek without interruptions from psychologically based symptoms and to perform at a consistent pace without an unreasonable number and length of rest periods;” “the ability to accept instructions and respond appropriately to criticism from supervisors;” “the ability to get along with coworkers or peers without distracting them or exhibiting behavioral extremes;” and “the ability to respond appropriately to changes in the work setting.” R.101 - 02. “Moderately limited,” as a term in a medical source statement or residual functional capacity form, means that the claimant has some loss of ability in the activity listed for up to one-third of an eight-hour workday. *Morales v. Apfel*, 225 F.3d 310, 314 n.4 (3d Cir. 2000) (noting that the definition of “moderately limited” in the context of a hearing before the Social Security Administration means that the claimant is “unable to perform the task up to a third of the time” and accepting this definition within the Third Circuit for such hearings).

When also completing the agency’s Psychiatric Review Technique form on March 3, 2000, Dr. Ortiz’s only textual comment on the form was a handwritten list of positive and negatives under the heading “Dx -- Bipolar Disorder.” Exhibit 5F (R.105 - 13). Under the “positive” column, Dr. Ortiz noted “memory; ability to calculate; concentration; daily living activities (—cleans, shops, meds, bills); household routine (pub. transport ok); meal, clean, shop; supervision ‘fairly able’; simple insts.; appearance; simple decisions.” R.106. Under the “negative” column, Dr. Ortiz noted “stress/concentration; conflict/stress; social judgment; work-related tasks; co-workers; ‘wants to do things her way’; independent; complex instructions;

reliability.” *Id.* Over the next five pages, Dr. Ortiz checked boxes confirming a diagnosis of bipolar syndrome. R.107 - 13.

Walls’s medical history also included a series of clinical treatment plan updates from the Philadelphia Mental Health Center. On April 11, 2000, the center’s records show that there had been no change in Walls’s diagnosis and recorded her Global Assessment of Functioning (GAF) score as 50. R.116. Outpatient notes indicate that Walls had “made progress” but “barriers” had “hindered her from keeping clinic appointments.” *Id.* In an explanatory note, the entry continued “[Walls] had [a] baby during [the] course of this treatment plan. Child care is an issue for her.” *Id.* Walls was also “unable to take psychotropic medication because she [was] breast feeding.” *Id.*

On June 3, 2000, outpatient notes show that Walls was again anxious, depressed, hyperactive, expansive, and had ideas of reference. R.117. Her therapist and doctor reviewed medication options with her and prescribed Risperdal. *Id.* Under “comments and plan,” Dr. Harris had noted a “long history of bipolar disorder. Before [Walls was] unable to take medication because of [her] pregnancy. [She] reports [that] she’s no longer breast feeding.” *Id.*

Walls testified that she had been in treatment through August of 2000 and went “almost every single week to see Ms. Robinson.” R.131. But when Robinson left, Walls “only went a couple of times since” because she was again “nervous and scared to trust in this [new] lady all over again.” R.132. This change in Walls’s attendance record after Robinson left in August comports with the clinic’s documentation for September. On September 20, 2000, Walls’s diagnosis and GAF score remained unchanged. R.118. The outpatient notes from that day indicate that Walls reported she “perceived herself as making progress.” *Id.* However, the

clinician's notes documented problems with discontinuity in treatment, and non-compliance in treatment. *Id.* Walls reported that the previous treatment had worked to help her to prioritize and to "decide which problems she ought to take [] responsibility for" and what the limits should be of when she should take responsibility for them. *Id.* The records did note that Walls was still "motivated" in treatment. *Id.* Her new goals after the September session were to meet over 80 percent of her sessions, to contract to meet for the next four sessions, and to renew that contract every four weeks. *Id.* She still had "pressured speech," an "inability to remain focused," and an "inability to relax" for which her treatment plan suggested a new set of behavioral therapies to self-report and refocus. *Id.*

The ALJ's Opinion

In his decision on December 29, 2000, the ALJ found that Walls was not eligible for SSI benefits because she retained the capacity to adjust to work existing in significant numbers in the national economy and so could not be disabled as defined in the Social Security Act.⁵ R.17. He

⁵ The full record of the ALJ's findings is that:

1. "Claimant has not engaged in substantial gainful activity since the alleged onset of disability.
2. "Claimant's bipolar disorder is a severe impairment, based upon the requirements in the Regulations (20 C.F.R. § 416.921).
3. "This medically determinable impairment does not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulations No. 4.
4. "Claimant's allegations regarding her limitations are not totally credible for the reasons set forth in the body of the decision.
5. "Claimant has the following residual functional capacity: moderate limitations on the abilities to: understand, remember, and carry out detailed instructions; maintain attention and concentration for extended periods; perform activities within a schedule; maintain regular attendance; be punctual within customary tolerances; complete a normal workday and workweek without interruptions from psychologically based symptoms; perform at a

found no existence of a substance abuse or addiction impairment after August 1999 (R.12), but repeatedly minimized Walls's medical records as "sketchy" and claimed that he was "not persuaded that [Walls] is as emotionally debilitated as she insists." R.13, 15.

According to the ALJ, Walls was not "as debilitated and agoraphobic as she alleges" but rather had a poor attitude towards treatment. R.13. As the ALJ wrote, "[b]etween September 1999 and January 29, 2000[, Walls] either failed to appear for or cancelled almost half of her appointments." *Id.* He found her testimony that she had gone to psychotherapy almost once a week until August 2000 when her regular therapist left the clinic to be "contrary to the objective record." *Id.* Furthermore, the ALJ implied, Walls may be unnecessarily resisting taking medication. He expressed doubt whether "the clinic staff recommended that [Walls] avoid taking psychotropic medications during her pregnancy and breastfeeding or whether she has in fact refused to take them when offered." *Id.* The ALJ also found "inconsistency" on the point of when Walls was breast feeding. *Id.* On June 3, 2000, Dr. Harris attempted to prescribe medication for Walls because he thought that she had finished breast feeding. R.13 - 14; Exhibit

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- consistent pace without an unreasonable number and length of rest periods; accept instructions and respond appropriately to criticism from supervisors; get along with co-workers or peers without distracting them or exhibiting behavioral extremes; respond appropriately to changes in the work setting. Claimant has no exertional limitations.
 6. "Claimant has no past relevant work [experience] (20 C.F.R. § 416.965).
 7. "Claimant is a 'younger individual' (20 C.F.R. § 416.963).
 8. "Claimant has a 'limited education' (20 C.F.R. § 416.964).
 9. "Considering the types of work that claimant is still functionally capable of performing in combination with claimant's age, education and work experience, she could be expected to make a vocational adjustment to work that exists in significant numbers in the national economy. Examples of such jobs include work at cleaning occupations such as housekeeper, janitor, and commercial cleaner, gate attendant or security guard or patrol person, and cashier at a self-service gas station.
 10. "Claimant was not under a 'disability,' as defined in the Social Security Act, at any time through the date of this decision (20 C.F.R. § 416.920(f))." R.17.

6F. At the hearing in November of 2000, however, Walls testified that she was concerned about taking medications because she “feared them and was still breastfeeding.” R.13.

The ALJ concluded that Walls had “only mild limitations on social functioning.” R.14. He found no “objective substantiation of [Walls’s] panic attacks, and [Walls’s] agoraphobia is not as marked as she would have us believe.” *Id.* The ALJ noted that Walls had been able to live with her boyfriend, his mother,⁶ and her baby, and that clinic staff praised her “care-taking skills” for the baby. *Id.* Although Walls “disliked people and was paranoid and mistrustful around them” as well as “reclusive because she feared attacks,” the ALJ noted that she was able to take “public transportation to psychotherapy almost once a week for one year.”⁷ *Id.* She could “care for her baby” and take him on “public transportation alone, although she missed stops at times.” *Id.* Walls could “shop” and “get along with her neighbors.” *Id.*

The ALJ also found “no more than a mild restriction on daily activities.” R.14. According to the ALJ, as of January 2000, Walls could “cook, clean, shop, take public transportation, care for her baby, and pay her bills.”⁸ R.14, Exhibit 6F. She could watch

⁶ Although the ALJ implies in his opinion that Walls still lives with her boyfriend’s mother, this appears to be at odds with the testimony during Walls’s hearing. In the ALJ’s opinion, he argues that she cannot be badly agoraphobic because “[s]he has been able to live with her boyfriend and his mother and care for her baby.” R.14. In Walls’s testimony during the hearing though she discusses speaking with her boyfriend’s mother on the phone (R.134), and how, although his mother used to be “like [her] mom,” the woman “[wouldn’t] speak to [her]” after Walls got a restraining order against her son. R.135.

⁷ This odd contradiction of his earlier condemnation of Walls for not regularly attending her psychotherapy sessions may call into question the ALJ’s interpretation of Walls’s attendance records. The actual contents of those records are reproduced in the “medical records” section of this Memorandum.

⁸ For this information, the ALJ cites the Daily Activities Questionnaire completed by Walls’s boyfriend’s mother in January 2000. See discussion of this source later in the

television, although the ALJ acknowledged that she “became restless.” R.14. It is not clear how the ALJ established that Walls had “no problem remembering to pay bills and to feed her two cats and dog.” *Id.* (no citation given).

The ALJ next concluded that Walls had only “moderate difficulty with concentration, persistence, or pace.” *Id.* Describing the record as “sparse,” the ALJ dismissed Dr. Harris’s description of Walls’s difficulty concentrating as not “particularly serious.” *Id.*; Exhibit 3F. He was willing to grant that Walls had moderate limitations in concentration, persistence, or pace because of her testimony that “she became panicky and nervous on jobs, and this was a reason she felt she could not function.” *Id.* The ALJ however found “no evidence of an episode of decompensation of extended duration” because Walls could not prove she had “a chronic affective disorder of at least two years duration.” *Id.*

The bulk of the ALJ opinion concerns his determination that Walls retained the residual functional capacity to perform work existing in significant numbers in the national economy. R.14 - 17. He was ultimately persuaded that Walls was not “as emotionally debilitated as she insists.” R.15. He chose to credit exclusively Dr. Ortiz’s report on behalf of the agency that Walls had “moderate” restrictions on functioning rather than Robinson’s opinion as Walls’s therapist or Dr. Harris’s opinion as Walls’s treating psychiatrist. *Id.* The ALJ dismissed Robinson’s conclusion that Walls is disabled by her bipolar disorder because “there [was] no indication that this therapist is either a psychiatrist or a licensed or certified psychologist” *Id.* Furthermore, the ALJ wrote, “even a physician’s opinion concerning disability is on an issue

Memorandum.

reserved to the Commissioner and is not binding upon me.” *Id.* Thus, he concluded, “I would not give this opinion much weight.” *Id.*

The ALJ dismissed Dr. Harris’s opinion that Walls had poor or no ability to socialize and could not perform in a work setting, “in light of [] very skimpy clinic notes.” *Id.* Dr. Harris’s assessment was also performed “only six months into [Walls’s] psychotherapy . . . and he has since declared that she has made progress.” *Id.* The ALJ also attacked Dr. Harris’s opinion as “problematical” because Dr. Harris did not change his GAF score of 50 for Walls in his April 2000 report although the ALJ read the clinic records as “conceding that [Walls] had made some progress.” *Id.* Walls had also told Dr. Harris that she felt she had made “good” progress. *Id.* For the ALJ, Dr. Harris’s decision not to change the GAF score “call[ed] into question the accuracy of his assessments of functioning in general.” *Id.* Furthermore, the ALJ speculated about the “severity of [the] psychopathology if [Walls] apparently assigned clinic attendance a low priority.” *Id.*

The ALJ easily found that Walls had no past relevant work experience, but turned next to the question of what other jobs Walls could perform in the national economy. R.16. The ALJ wrote that he asked the vocational expert to consider a hypothetical individual of Walls’s age, education, and work background who had only the functional limitations as reported by Dr. Ortiz. *Id.* Such a person would not be able to tolerate stressful work, but had no physiological limitations. *Id.* Given these factors, the vocational expert testified that such an individual could perform in one of three fields: cleaning jobs such as housekeeper, janitor, or commercial cleaner; security jobs such as gate attendant, security guard, or patrol person; or a cashier job at the self-service gas station. *Id.* As for the availability of these jobs, there were 4,000 cleaning jobs

locally and 350,000 nationally at the light level, 4,500 cleaning jobs locally and 800,000 nationally at the medium level, and 6,000 cleaning jobs locally and one million nationally at the heavy exertional level. *Id.* There were 3,000 security jobs locally and 400,000 nationally. *Id.* If Walls could be a cashier at a self-service gas station, there were 40,000 such jobs locally and 1.5 million such jobs nationally. *Id.*

In closing, the ALJ concluded that Walls would be capable of performing one of these jobs existing in the national and regional economies, and therefore held that she could not be disabled under the Social Security Act. R.16 - 17.

Standards of Review

I review *de novo* the parts of the magistrate judge's report and recommendation to which Walls objects. 28 U.S.C. § 636(b)(1)(C) (West Supp. 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.⁹ *Plummer v. Apfel*, 186 F.3d 422, 427 (3d Cir. 1999) (citing *Adorno v. Shalala* 40 F.3d 43, 46 (3d Cir. 1994)). Substantial 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

⁹ 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 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) (West Supp. 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.¹⁰ 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).

Discussion

Examining Walls's six objections individually, I find some of them to have merit. Although her last objection to the quality of the record is not persuasive, and I decline to rule on Walls's objection regarding Social Security Rule 85-15 as not dispositive in her case, her remaining substantive objections to the ALJ's evaluation of evidence compel me to remand.

Walls's First Objection

Walls's first objection is that the Magistrate Judge's Report and Recommendation failed to "refute or reject [Walls's] argument that her failure to appear for several appointments for a limited time [neither] negated her diagnosis of bipolar disorder, nor . . . lessen[ed] the impact of the limitations . . . her treating psychiatrist" described. Objections at 1 - 2. The Magistrate Judge however wrote that the ALJ did not "negate" Walls's diagnosis of bipolar disorder through his

¹⁰ 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).

comments about her attendance at therapy sessions, but rather used alleged inconsistencies between Walls's testimony and the medical records to explain why he did not find Walls's descriptions of her limitations credible. Rep. and Rec. at 7. I must agree. The ALJ primarily used evidence of Walls's inconsistent clinic attendance to support his conclusion that Walls was not "as debilitated and agoraphobic as she alleges." R.13. In an odd reversal though he also referred to Walls's *positive* consistency in taking "public transportation to psychotherapy almost one a week for one year" to illustrate why he found she only had "mild limitations on social functioning."¹¹ R.14

Insofar as Walls's objection here raises a question of how the ALJ read the medical record and whether he presented substantial evidence to explain why he did not find Walls's descriptions of her limitations credible, that question is at the heart of the separate analysis to be done in answering Walls's later objections to the Magistrate Judge's Report and Recommendation. I therefore defer analysis of that formulation of the objection for those sections of this Memorandum.

¹¹ The ALJ perhaps did inappropriately speculate on "the severity of [Walls's] psychopathology" as she "apparently assigned clinic attendance a low priority," but this comment alone did not cross the line into the ALJ substituting his opinion for those of her doctors. R.15. An ALJ cannot substitute his judgment for that of doctors in determining the severity of a claimant's condition, *Fowler v. Califano*, 596 F.2d 600, 603 (3d Cir. 1979); if the ALJ's implication is instead that Walls did not need to attend many therapy sessions because her condition could be treated through a more minor course of treatment, it remained the agency's burden to so demonstrate this. *Johnson v. Secretary of Health and Human Services*, 794 F.2d 1106, 1113 (6th Cir. 1986) ("In order for an impairment that would otherwise produce a finding of disability to be declared treatable, there must be a factual basis and findings of fact on the issue. The Secretary must show that the disability is clearly treatable."); *see also Kent v. Schweiker*, 710 F.2d 110, 115 (3d Cir. 1983) (holding that it is particularly inappropriate for an ALJ to speculate on the appropriate treatment for a claimant's medical condition). The ALJ though pulls back from writing that Walls's inconsistent attendance is evidence of an altered diagnosis, so I do not find error on this point.

Walls's Second Objection

Walls's second objection is that the Magistrate Judge's Report and Recommendation failed to discuss whether the ALJ presented substantial evidence to support his credibility findings regarding Walls's reasons for not taking her medication. Objections at 2. Here I agree that the Magistrate Judge's Report and Recommendation needed to treat this subject. In the ALJ's underlying opinion, he implied that Walls's testimony about her limitations may not be fully credible because the record appeared "inconsisten[t]" on the point of when Walls could take medication and when she could not because she was breast feeding. R.13 - 14. The ALJ wrote that on June 3, 2000, Dr. Harris wrote a prescription for Walls because he thought that she had finished breast feeding. *Id.* At the hearing in November of 2000, however, Walls testified that she was concerned about taking medications because she "feared them and was still breastfeeding." R.13.

There does not, however, appear to be substantial evidence to assert an "inconsistency" between Walls's testimony and the medical record on this point. The ALJ asked Walls directly at the hearing whether she was currently breast feeding her child and she answered that she was. R.129. The ALJ recorded this answer in his opinion. R.13. Walls also explained to the ALJ that she had been experiencing difficulty in weaning her son (R.138), and that she would be willing to take medication for her bipolar disorder once she thought it would be safe for her child. R.140. She confirmed that Dr. Harris had told her not to take psychiatric medications while breast feeding (R.139 - 40), information able to be independently confirmed twice in her medical records by the content of Dr. Harris's medical notes in January and April of 2000. R.116

("[Walls] is 'unable to take psychotropic medication because she is breastfeeding.'"); R.115 (recommending that Walls should be started on antidepressants only after she finished breast feeding). Moreover, her motivation to be in treatment was repeatedly gauged as "strong." R.83, 118. The medical records document that it was Walls who asked her doctor in January 2000 for information on medications that would be "safe" mood stabilizers for her to take while breast feeding. R.84. Given these facts, it is difficult to understand how the ALJ could assert that it was "not clear whether the clinic staff recommended that [Walls] avoid taking psychotropic medications during her pregnancy and breastfeeding or whether she has in fact refused to take them when offered." R.13. Both the medical evidence and Walls's testimony show that Walls was instructed to avoid taking psychotropic medications while pregnant or breast feeding and this is why she refused to take them when offered. R.138; *see also Physicians Desk Reference* 1581, 3090 (2001) (advising doctors not to prescribe Risperdal or lithium, two common treatments for bipolar disorder, when patients are pregnant or breast feeding).

Furthermore, although there is not much caselaw on a claimant's right to not take medications that could endanger her child while breastfeeding, courts have generally permitted a claimant to refuse treatment for a disability for much less dire reasons. *See, e.g., Harris v. Heckler*, 756 F.2d 431, 436 n.2 (6th Cir. 1985) (holding that a claimant's failure to lose weight did not constitute a refusal to undertake treatment); *Lymore v. Heckler*, 1986 WL 9895, *3 (E.D.Pa. 1986) (holding that an alcoholic's inability to stay in treatment despite numerous attempts was not a refusal to undertake treatment). Title 20 of the C.F.R. at section 416.930 does permit the Commissioner to deny benefits to claimants who do not follow prescribed treatments for their disabilities. 20 C.F.R. § 416.930 (2001). But two points should be made here in

relation to Walls's case. First, no doctor ever instructed Walls to take psychotropic medications while breast feeding. *See generally Shultz v. Bowen*, 662 F. Supp. 1074, 1077 (E.D.Pa. 1986) (Pollak, J.) (finding that, in the absence of a doctor's direct order, denying benefits to a claimant on this ground cannot be "supported by substantial evidence"). Dr. Harris instead specifically warned Walls against taking such drugs while breast feeding (R.139 - 40), and only wrote her a prescription for Risperdal when he thought she was no longer breast feeding. R.117. Second, 20 C.F.R. § 416.930 recognizes that there are "acceptable reasons for failure to follow prescribed treatment." 20 C.F.R. § 416.930(c) (2001). The regulation lists non-exhaustive examples of acceptable reasons such as when a treatment "because of its enormity, . . . unusual nature, . . . or other reason is very risky for you." *Id.* Aside from the immediate danger to the child had Walls taken psychotropic drugs while pregnant or breast feeding, she could have been in danger of triggering a miscarriage or severe health problems from hormonal imbalances: these are clearly not the type of risks that the Social Security Administration could mandate a claimant undertake to be awarded SSI payments.

I therefore sustain Walls's objection to the Magistrate Judge's Report and Recommendation on this point although I remand with instructions to the ALJ to gather additional evidence on Walls's condition after she has finished breast feeding to determine whether she should be considered disabled.

Walls's Third Objection

Walls's third objection is that the Magistrate Judge erred in not evaluating whether the ALJ presented substantial evidence to support his conclusion that Walls's activities of daily

living undermined her testimony about the extent to which her symptoms limited her ability to function. Objections at 4. I agree. In the ALJ's opinion, he concluded that Walls only had mild limitations on social functioning. R.14. The ALJ acknowledged that Walls "disliked people and was paranoid and mistrustful around them" as well as "reclusive because she feared attacks," but he noted that she was able to take "public transportation to psychotherapy almost once a week for one year." *Id.* Walls could take care of her baby and take him on public transportation alone, although she missed stops. *Id.* She could also "shop" and "get along with her neighbors." *Id.*

In finding no more than a mild restriction on Walls's daily activities, the ALJ wrote that as of January 2000, Walls could "cook, clean, shop, take public transportation, care for her baby, and pay her bills." *Id.* She could watch television, although she became restless. *Id.* Ultimately the ALJ asserted that Walls could function at a reasonable level because she had "no problem" remembering to pay bills and to feed her pets. *Id.* (no citation given).

The Third Circuit has held, however, that "[i]t is well established that sporadic or transitory activity does not disprove disability." *Smith v. Califano*, 637 F.2d 968, 971 - 72 (3d Cir. 1981). Having a disability does not mean that "a claimant must vegetate in a dark room excluded from all forms of human and social activity." *Id.* at 971. Rather, at times, a claimant's "sporadic and transitory activities may [even] demonstrate not his ability but his inability to engage in substantial gainful activity." *Id.* at 972 (quoting *Willem v. Richardson*, 490 F.2d 1247, 1249 n.4 (8th Cir. 1974), which in turn quoted *Wilson v. Richardson*, 455 F.2d 304, 307 (4th Cir. 1972)).

Examining the ALJ's list of Walls's activities, Walls's experience performing these activities appears to fit the situation the Third Circuit describes as highlighting the extent of

Walls's inability to engage in substantial gainful activity rather than her ability to do so. For example, the ALJ referred three times in this section of his opinion to Walls's ability to take public transportation. R.14. But Walls testified at her hearing that the very act of taking public transportation created anxiety and stress, reinforcing her disability and re-immersing her in the irrational reactions that are the hallmark of mental illness. R.137. In her words, "I get on the train, I get very nervous, and I just start, a lot of times I get into depressions and, and stress, whatever's on my mind, and I'll, when I sit down on the trolley or the subway, my mind just starts getting into some deep thinking and I miss my stop, or forget which stop I was getting off, or whatever." *Id.* This problem had happened to Walls as recently as the morning of the hearing and the day before. *Id.*

It is testament then to Walls's dedication to treatment that she had subjected herself to this experience in order to take "public transportation to psychotherapy almost once a week for one year." R.14. The only other occasion upon which the ALJ notes Walls took public transportation was to "care for her baby," another time in which it was imperative for Walls to force herself to perform the activity despite the fact that taking public transportation triggered such a traumatic response. *Id.*

Furthermore, at other points in this section of his opinion, the ALJ appears to have inexplicably credited the testimony of Walls's boyfriend's mother over other sources of evidence in his description of Walls's domestic life. It is clearly the role of the ALJ to make credibility determinations about what testimony to believe, *Van Horn v. Schneider*, 717 F.2d 871, 873 (3d Cir. 1983), but when testimony conflicts, an ALJ may not "reject evidence for no reason or the wrong reason." *Cotter v. Harris*, 642 F.2d 700, 707 (3d Cir. 1981). As the Third Circuit has

written, “[w]here there is conflicting probative evidence in the record, we recognize a particularly acute need for an explanation of the reasoning behind the ALJ’s conclusions, and will vacate or remand a case where such an explanation is not provided.” *Fargnoli v. Massanari*, 247 F.3d 34, 42 (3d Cir. 2001).

One such example of where the ALJ failed to provide an explanation for his choice of what evidence to credit in the face of conflicting testimony is on the issue of whether Walls paid her own bills. The ALJ asserted twice that Walls could pay her bills, once in a list and then again in claiming that she had “no problem remembering to pay bills.” R.14. For his first statement, the ALJ cites the Daily Activities Questionnaire completed by Walls’s boyfriend’s mother in January 2000. *Id.* He gives no citation for the second assertion. At the hearing, however, the ALJ asked Walls directly whether she paid her bills and she told him that she did not. R.136. Her boyfriend paid the bills and “it gets thrown in my face all the time.” *Id.* Walls did not write checks for her bills: her boyfriend “[gave] me money and I [paid] the landlord when she [came] to the house to pick it up. I won’t go to the office.” *Id.*

The ALJ never explicitly weighed the competing evidence from these two sources as required, *Cotter*, 642 F.2d at 707; *Fargnoli*, 247 F.3d at 42, and several critical points must be noted about the potential weight of the statement by Walls’s boyfriend’s mother. First, in that questionnaire, the boyfriend’s mother answered yes to the question whether Walls could “handle his/her own bills” but did not relate that she had ever seen Walls pay bills. R.69. This does not then necessarily support the ALJ’s opinion that Walls did “pay her bills,” much less that Walls had “no problem paying her bills.” R.14. The boyfriend’s mother also continued that Walls has a “compulsive disorder,” suffers from “mood swings,” was not “able to trust people,” was fine

with “immediate family but not with strangers,” remained “very paranoid,” and was “easily set off by criticism.” R.68 - 72.

Second, the boyfriend’s mother’s statement must be understood in the context of the change in interpersonal dynamics Walls described after she was granted a restraining order against the woman’s son. R.134 - 35. At that point, the boyfriend’s mother was no longer on speaking terms with Walls and could not have wished her well. *Id.* Thus, given the quality of the relationship between the two women by January 2000, the boyfriend’s mother’s comments above which do acknowledge Walls’s limitations and aid her case become even more significant.

In the face of these major problems in the ALJ’s opinion, I cannot find that he provided substantial evidence to support his conclusion that Walls’s activities of daily living should undermine her testimony about the extent to which her symptoms limited her ability to function. *Smith*, 637 F.2d at 971; *Fargnoli*, 247 F.3d at 42; *see also Cotter*, 642 F.2d at 707. I therefore sustain Walls’s objection on this point.

Walls’s Fourth Objection

Walls’s fourth objection is that the Magistrate Judge erred as a matter of law in not reversing the ALJ’s finding that Walls could perform jobs existing in significant numbers within the national and regional economies because substantial medical evidence did not support such a conclusion. Objections at 5 - 8. Walls argues that the ALJ improperly dismissed the findings of her therapist and treating physician in choosing to credit Dr. Ortiz’s evaluation over those of Robinson and Dr. Harris. *Id.* at 5 - 6. She notes that no type of job would be available within the

national or regional economies if their testimony about her limitations were credited, and that the vocational expert at trial confirmed this was true.¹² *Id.* at 5; R.145.

In relaying his hypothetical to the vocational expert, the ALJ did chose to credit exclusively Dr. Ortiz's meta assessment of Walls's ability to function over the direct medical record compiled by Robinson as Walls's therapist or Dr. Harris as Walls's treating psychiatrist. R.15, 16. He dismissed Robinson's conclusion that Walls was disabled by her bipolar disorder because she was not a psychiatrist or a licensed or certified psychologist. R.15. The ALJ also stated that he was not bound by a physician's opinion on disability. *Id.*

¹² At Walls's hearing, her attorney asked the vocational expert whether there were any jobs that could be performed by someone with Walls's limitations as described by Dr. Harris. R.144 - 45. He answered that there were none. *Id.* The transcript reads in pertinent part:

- Q: “. . . . Assume someone with claimant's background and assume the Judge would find credible reports completed by Dr. Harris, her treating physician . . . [L]et me give you the restrictions imposed by Dr. Harris and then you can respond. He makes notes in his report that in terms of occupational adjustments, . . . that [Walls] is unable to follow work rules, which means to do things her way, she's unable to relate to fellow workers; unable to deal with the public; ability to use judgment is fair; ability to interact with supervisors is fair. Unable to deal with work stresses; unable to function independently; unable to maintain concentration. She's unable to understand, remember and carry out complex job instructions or details, but not complex job instructions [sic]. He says she has fair ability to understand, remember, and carry out simple job instructions. In addition, she has a fair ability to maintain personal feelings, is unable to behave in an emotionally stable manner, is unable to relate predictably in social situations and is unable to demonstrate reliability. If the Judge assumes that, that that is [a] credible and fair assessment of her capacity, would she be able to do any of her past relevant work?
- A: “No.
- Q: “Okay. Would she be able to do any of the jobs that you described in response to the Judge's hypothetical?
- A: “No.
- Q: “Okay. Would there be any other kind of work that exists in the national economy at any exertional level that she would be capable of performing?
- A: “No.” R.144 - 45.

The ALJ then dismissed Dr. Harris's opinion that Walls had poor or no ability to socialize and could not perform in a work setting because of three problems with the doctor's testimony. *Id.* The ALJ protested that Dr. Harris's clinical notes were "skimpy," that his assessment had been only six months into Walls's therapy, and that Dr. Harris's opinion was "problematical" because he had not changed his GAF score of 50 for Walls in his April 2000 report although the ALJ read the clinic records as conceding that Walls had made progress. *Id.* The ALJ contended that Dr. Harris's decision not to change the GAF score "call[ed] into question the accuracy of his assessments of functioning in general." *Id.* He then went on to speculate about the "severity of [the] psychopathology if [Walls] apparently assigned clinic attendance a low priority." *Id.*

The Third Circuit, however, has stated that "[a] cardinal principle guiding disability eligibility determinations is that the ALJ accord treating physicians' reports great weight, especially 'when their opinions reflect expert judgment based on continuing observation of the patient's condition over a prolonged period of time.'" *Morales v. Apfel*, 225 F.3d 310, 316 (3d Cir. 2000) (quoting *Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999) and *Rocco v. Heckler*, 826 F.2d 1348, 1350 (3d Cir. 1987)). Where, as here, the opinion of a treating physician conflicts with that of a non-treating physician, the ALJ may choose whom to credit but "cannot reject evidence for no reason or for the wrong reason." *Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999) (citing *Mason v. Shalala*, 994 F.2d 058, 1066 (3d Cir. 1993)). In rejecting a treating physician's opinion, an ALJ may not make "speculative inferences from medical reports," but may reject "a treating physician's opinion outright only on the basis of contradictory medical evidence" and not due to his own credibility judgements, speculation, or lay opinion. *Morales*, 225 F.3d at 318 (quoting *Plummer*, 186 F.3d at 429); see *Frankenfield v. Bowen*, 861 F.2d 405,

408 (3d Cir. 1988); *Kent v. Schweiker*, 710 F.2d 110, 115 (3d Cir. 1983). Moreover, the Third Circuit has found that “evidence will not satisfy the substantiality test if it is overwhelmed by other evidence – particularly certain types of evidence (e.g., that offered by treating physicians) – or if it really constitutes not evidence but mere conclusion.” *Kent*, 710 F.2d at 114.

Here I cannot find that the ALJ’s choice to discredit entirely the testimony of the treating physician and to rely exclusively on the report of a non-treating physician who never examined the patient to be supported by substantial evidence. In considering claims for disability benefits, greater weight should almost always be given to the findings of a “treating physician than to a physician who has examined the claimant as a consultant.” *Adorno v. Shalala* 40 F.3d 43, 47 (3d Cir. 1994). As the Third Circuit has recognized, this does not mean that the statement of a claimant’s treating physician supporting an assertion that she is “disabled” is dispositive of the issue, *Wright v. Sullivan*, 900 F.2d 675, 683 (3d Cir. 1990). Rather, it means that the ALJ must explicitly “weigh the relative worth of a treating physician’s report against the reports submitted by other physicians.” *Adorno*, 40 F.3d at 48 (citing *Dobrowolsky v. Califano*, 606 F.2d 403, 407 (3d Cir. 1979), *Brewster v. Heckler*, 786 F.2d 581, 584 (3d Cir. 1986), and *Cotter*, 642 F.2d at 705). He must properly provide some explanation for the rejection of “probative evidence [that] would suggest a contrary disposition.” *Id.* (citing *Brewster*, 786 F.2d at 585, and *Steward v. Secretary of H.E.W.*, 714 F.2d 287, 290 (3d Cir. 1983)).

Turning specifically to the ALJ’s evaluation of Dr. Harris’s testimony, the ALJ claimed that Dr. Harris’s opinion was based on “skimpy” clinic notes, that the evaluation occurred only six months into Walls’s therapy, and that Dr. Harris’s decision not to revise Walls’s GAF score “call[ed] into question the accuracy of his assessment of functioning in general.” R.15. But each

of these problems could only be more pronounced in Dr. Ortiz's report. Dr. Harris developed his report on February 24, 2000 on the basis of his own observation of Walls and the clinical notes he had compiled. R.97 - 100. Dr. Ortiz completed his report on March 3, 2000 --- a grand total of eight days later given that 2000 was a leap year --- on the basis of medical records he had no hand in generating and regarding a patient he had never met. R.101 - 03. Hence *both* evaluations occurred only six months into Walls's therapy but one had far better knowledge of the patient than the other. Moreover, Dr. Harris continued to treat Walls after he wrote the report the ALJ cited, so was able to develop and relate a more complete record of Walls's condition through later clinical notes that comport with his diagnosis. Finally, Dr. Harris's decision to assign a GAF score of 50 to Walls in April 2000 and to leave that score unchanged in September of 2000 is explained in the medical record. R.116, 118. Dr. Harris's note that Walls had "made progress" accompanied his April 2000 score and was incorporated into it. R.116. The ALJ apparently misunderstood the record to imply that the "made progress" note had been recorded at some other time. R.15. In September 2000, however, when Walls told Dr. Harris that she thought she had made "progress," candid clinical notes in her record indicate that Dr. Harris was less convinced due to the discontinuity of her treatment and her non-compliance in therapy.¹³ R.118. Dr. Ortiz, who never examined Walls a first time and did not posit a GAF score, certainly would have had no opportunity to review his evaluation as Dr. Harris was able to.

Moreover, in evaluating the relative weight of Dr. Harris's report versus Dr. Ortiz's report, it must be noted that Dr. Harris's report contains pages of patient history and significant depth of

¹³ This non-compliance is presumably due to the change in Walls's attitude toward treatment after her first therapist left. R131 - 32.

analysis. R.97 - 100. Dr. Ortiz's report, by contrast, consists of a few lines of text to accompany pages of checked boxes. R.101 - 03. As the Third Circuit has written, the type of report that Dr. Harris completed shows much more study and should carry more weight than "form reports in which a physician's obligation is only to check a box or [to] fill in a blank." *Mason v. Shalala*, 994 F.2d 1058, 1065 (3d Cir. 1993). This type of cursory report is "weak evidence at best." *Id.* Additionally, Dr. Ortiz's four sentences on Walls's condition were highly conclusory and his short list of positives and negatives unenlightening. Exhibits 4F - 5F, R.101 - 13. Thus his report borders on not even satisfying the Third Circuit's substantiality test as necessary to be weighed against Dr. Harris's analysis. *Kent*, 710 F.2d at 114. Given that the ALJ conducted none of this analysis of the relative weights of the reports, much less critically examined whether Dr. Ortiz's report should be relevant at all, I cannot find that his conclusion not to credit Dr. Harris's report was supported by substantial evidence.

A similar problem with the ALJ's opinion appears in his dismissal of Robinson's testimony as Walls's treating therapist. In brief, the ALJ chose not to analyze the substance of Robinson's opinion because he questioned her credentials. R.15. As documented in the medical record, Robinson had a Master of Social Work degree. *See, e.g.*, R.114. Although this does not make her a psychiatrist or a "licensed or certified psychologist," she was Walls's treating therapist. R.15. Under 20 C.F.R. § 416.913, the ALJ was empowered to accept testimony from "other medical sources" including, but not limited to, claimant's "therapists." 20 C.F.R. § 416.913(d)(1) (2001). Moreover, the ALJ's protest over Robinson's credentials as a medical professional is particularly artificial given that much of the primary mental health care in the United States is administered by those who have a Master of Social Work degree, a fact recently

recognized by the Surgeon General among other commentators. *See* Report of the Surgeon General's Conference on Children's Mental Health: A National Action Agenda (January 3, 2001), *available at* <http://www.surgeongeneral.gov/topics/cmh/childreport.htm>. Thus, as the Third Circuit found when an ALJ similarly attempted to reject the evidence of a medical professional on the ground that she was not board certified, the ALJ's argument for rejecting outright the content of Robinson's testimony remains "unconvincing." *Mason v. Shalala*, 994 F.2d 1058, 1066 (3d Cir. 1993).

After dismissing Robinson's credentials, the ALJ went on to assert that "even a physician's opinion concerning disability is on an issue reserved to the Commissioner and is not binding upon me." *Id.* Although it may be true that the statement of a claimant's treating physician supporting an assertion that she is "disabled" is not dispositive of the issue, this is not cause for an ALJ to escape explicitly "weigh[ing] the relative worth of a treating [medical professional's] report against the reports submitted by other physicians." *Adorno*, 40 F.3d at 48 (citing *Dobrowolsky v. Califano*, 606 F.2d 403, 407 (3d Cir. 1979), *Brewster v. Heckler*, 786 F.2d 581, 584 (3d Cir. 1986), and *Cotter*, 642 F.2d at 705). The ALJ in Walls's case failed to address the content of Robinson's evaluation as a professional, much less explicitly weigh the relative worth of her observations against other evidence in the record. I do not then find his exclusion of Robinson's testimony to be supported by substantial evidence.

Finally, the ALJ's conclusion that Walls could perform a job existing in significant numbers in the national and regional economies is suspect because it posited a description of Walls's limitations that could not be supported by substantial evidence. R.16; *Doak v. Heckler*, 790 F.2d 26, 30 (3d Cir. 1986) (reversing an ALJ's conclusion that a claimant could perform jobs

existing in significant numbers because his questions to the vocational expert were not supported by substantial evidence); *Brophy v. Halter*, 153 F. Supp. 2d 667, 674 - 75 (E.D.Pa. 2001) (same). As the Third Circuit has held in such cases, once the hypothetical posed to the vocational expert at trial is flawed, the expert's testimony in response to the ALJ's question no longer satisfies the substantiality test. *Morales v. Apfel*, 225 F.3d 310, 320 (3d Cir. 2000) ("Because the ALJ did not give proper consideration to the opinions of [doctors] . . . the vocational expert testimony does not meet the substantiality test."). Indeed, once asked to credit Dr. Harris's description of Walls's limitations, the vocational expert instead concluded that there were no jobs in the national or regional economies Walls could perform. R.144 - 45. Accordingly, I note the lack of substantial evidence that infused the ALJ's decision about the availability of jobs in the national and regional economies that Walls could perform and sustain her fourth objection to the Magistrate Judge's Report and Recommendation.

Walls's Fifth Objection

Walls's fifth objection is that the Magistrate Judge erred by failing to address the implications or impact of Social Security Ruling 85-15 concerning Walls's individual ability to handle stress in the work positions identified by the vocational expert. Objections at 9. Social Security Rule 85-15 requires the Commissioner to conduct a particularized assessment of the individual's ability in evaluating claims of stress and mental illness. In the Commissioner's words, "[s]ince mental illness is defined and characterized by maladaptive behavior, it is not unusual that the mentally impaired have difficulty accommodating to the demands of work and work-like settings This section is not intended to set out any presumptive limitations for

disorders, but to emphasize the importance of thoroughness in evaluation on an individualized basis.” Titles I and XVI: Capability To Do Other Work — The Medical-Vocational Rules as a Framework for Evaluating Solely Nonexertional Impairments, SSR 85-15, 1985 WL 56857, *5 (S.S.A. 1985).

There is not much caselaw however in the Third Circuit on the effect of SSR 85-15. One unpublished opinion from the Eastern District cites a First Circuit case for the proposition that “stress is not a characteristic of a job, but instead reflects an individual’s subjective response to a particular situation.” *Cavanaugh v. Bowen*, 1989 WL 45901, *7 (E.D.Pa. 1989) (quoting *Lancellotta v. Secretary of Health and Human Services*, 806 F.2d 284, 285 (1st Cir. 1986)). This reference though is not particularly helpful in the case before me. Thus, as Walls’s objection here is not dispositive, I decline to rule on the issue of whether SSR 85-15 should have had more impact on the methodology of the ALJ’s opinion. The ALJ may, of course, desire to give this objection consideration on remand.

Walls’s Sixth Objection

Walls’s sixth objection is that the Magistrate Judge erred in finding that the case did not need to be remanded for further hearing because of the large number of “inaudibles” in the transcript at key junctures. Objections at 10. Here I agree with the Magistrate Judge’s conclusion that the record is still intelligible and properly provides an opportunity to verify the proceedings before the ALJ. Rep. and Rec. at 15. Walls’s case is easily distinguishable from the few times in which courts have remanded because the quality of the record was so poor that, for example, they had no record at all of a quarter of the hearing and this eliminated the testimony of

one witness in its entirety. *Mullen v. Secretary of Health and Human Services*, 878 F. Supp. 682, 683 (D. Del. 1995). Another example of a case in which a court remanded documented that the record was so poor that a key doctor's testimony had been rendered virtually incomprehensible. *Dandeneau v. Heckler*, 607 F. Supp. 583, 584 (D.Me. 1985). Although the Commissioner bears the burden of compiling and filing a transcript of the record "including the evidence upon which the findings and decisions complained of are based," she has adequately satisfied this burden in Walls's case. 42 U.S.C. § 405(g) (West Supp. 2001). I overrule Walls's objection on this point.

Conclusion

For the reasons stated above, I sustain Walls's second, third, and fourth objections to the Magistrate Judge's Report and Recommendation as the ALJ could not support his conclusions on these subjects with substantial evidence. *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 v. Apfel*, 225 F.3d 310, 316 (3d Cir. 2000) (defining substantial evidence as such relevant evidence a reasonable mind might accept as adequate to support a conclusion). I therefore remand Walls's case to the Commissioner for further proceedings consistent with this Memorandum and Opinion.

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

PATRICIA WALLS,	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	NO. 01-2361
	:	
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 the plaintiff's motion for remand, and after careful review of the Report and Recommendation of the United States Magistrate Judge and the plaintiff's objections thereto, IT IS HEREBY ORDERED that:

1. There was not substantial evidence in the medical record to support the ALJ's determination that the plaintiff was not disabled and could perform a job existing in significant numbers in the national and regional economies.
2. The motion of plaintiff Patricia Walls for summary judgment is DENIED.
3. The motion of defendant Jo Anne B. Barnhart, Commissioner of Social Security, for summary judgment is DENIED.
4. The motion of plaintiff Patricia Walls for remand is GRANTED.

5. Judgement is entered to reverse the decision of the Commissioner and to REMAND the matter to the Commissioner for proceedings consistent with the attached Memorandum including the expansion of the record to document Walls's condition after she finishes breast feeding and is able to take appropriate medication.

BY THE COURT:

William H. Yohn, Jr.