

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

AMY L. WITMER,	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	NO. 01-3061
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security,	:	
Defendant.	:	

MEMORANDUM AND ORDER

YOHN, J. MARCH , 2002

Pursuant to 42 U.S.C. § 405(g), Amy Witmer appeals from 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. Witmer and the Commissioner both move for summary judgment. These cross motions for summary judgment were referred to Magistrate Judge Thomas J. Reuter. Magistrate Judge Rueter has submitted a Report and Recommendation that I grant the Commissioner’s motion for summary judgment, and deny Witmer’s motion.

Witmer filed objections to the Magistrate Judge’s Report and Recommendation. Pl’s Objections to the Magistrate Judge’s Report and Recommendation [hereinafter Objections]. Although she listed three objections on the front page of her brief, she chose to argue two different objections in the body of the text. As I cannot address the objections she listed in a vacuum, I here reply to the two objections she made in the body of the text. There she objected that:

1. the Administrative Law Judge (ALJ) “improperly discounted [Witmer’s] credibility on the basis of her daily activities,” Objections at 2; and
2. the ALJ erred in “not considering all of [Witmer’s] medically determinable impairments,” *id.* at 4.

The Commissioner did not file objections to Magistrate Judge Rueter’s Report and Recommendation and so presumably agrees with his findings. For the following reasons, I accept Magistrate Judge Rueter’s Report and Recommendation and grant the Commissioner’s motion for summary judgment.

Background

Witmer applied for disability benefits on January 19, 2000, contending that she was unable to work due to cervical pain, a neck sprain, and degenerative disc disease. R.87 - 89, 115, 149 - 50. On March 29, 2001, Administrative Law Judge John H. Frazee (the ALJ) found that Witmer did not qualify as disabled because she retained the residual functional capacity to perform a significant number of jobs in the national and regional economies. R.14 - 22.

At the time of the hearing before the ALJ, Witmer was a 32-year-old woman with a post-high school education. R.15. Her past work experience included employment as a licensed practical nurse, collections clerk, cashier, mail handler and cafeteria worker. *Id.* She had been trained as a LPN, qualified as an EKG technician, certified as a phlebotomist, and could work as a pharmacy technician. R.45. She told the ALJ that she lived in a one-floor mobile home with her mother and daughter. R.56. At 5 feet 2-1/2 inches, Witmer weighed 214 pounds. R.44.

On a typical day, Witmer woke at eleven in the morning, went to bed at six in the evening, and “just lay in bed all night.” R.58. Despite spending so much time in bed, she contended that she slept only four hours per night. R.59. The medication that her physician prescribed to help her sleep made her “crave” carbohydrates and she could eat all the cookies that a person “la[id] . . . in front of me.” *Id.*

Witmer had a driver’s license and drove five to ten miles per week. R.47. She had driven forty-five minutes to the administrative hearing. R.48. She testified that she could walk one or two hours in an eight-hour period, but that sitting caused her discomfort. R.62. Witmer told the ALJ that she could lift five pounds, and that she was able to shower, bathe, comb and dry her hair, and dress herself. R.62, 53. She reported difficulty curling her hair. R.53.

Witmer admitted that she was active socially, serving as a member of the Women’s Auxiliary at a fire company, volunteering at the Veteran’s Administration, and playing bingo with the men at the hospital. R.57 - 59. She read novels and hunting magazines and watched television approximately twelve hours a day. R.58. She went hunting last year and “bagged” a six-point and a two-point buck with a crossbow. R.54. She goes out for breakfast and shops at the mall with friends. R.60.

The medical evidence indicated that Witmer had right carpal tunnel syndrome, for which she underwent a surgical release, and degenerative disc disease at L5-S1. R.16. Treatment notes also recorded complaints of headaches, diffuse body pain, fatigue, and burning sensation, but no physician could locate focal deficits. *Id.* In medical tests, Witmer had normal flexion, extension and rotation of the lumbar spine without exacerbation of pain; a lower extremity exam revealed

normal sensation. R.17. Doctors reported that Witmer's symptoms would be consistent with a fibromyalgia condition, but could find no structural abnormalities or pathologic lesions to explain her condition nor could they find indications for intervention pain management. *Id.* Several doctors, however, noted the subjective nature of Witmer's complaints. R.18. They documented her major deconditioning and found her "quite preoccupied with identifying specific causes and treatments for her condition." *Id.*

Based on Witmer's testimony and the medical evidence before him, the ALJ found Witmer's subjective complaints and limitations to be overstated. *Id.* He reviewed the long list of daily activities Witmer could participate in and noted the ambivalence of the medical record in supporting Witmer's subjective complaints. *Id.* The ALJ did credit Witmer's complaints of pain from the carpal tunnel operation, and gave some deference to her limitations in his colloquy with the impartial vocational expert. *Id.* Ultimately though he concluded that Witmer could perform sedentary work of a type existing in significant numbers in the national and regional economies. R.19 - 20.

Reviewing the ALJ's opinion, the Magistrate Judge found that the ALJ had presented substantial evidence for his decision not to award Witmer benefits. Rep. and Rec. at 8 - 12. In discussing the ALJ's finding that Witmer's testimony was not fully credible, the Magistrate Judge noted that the ALJ was specific about the factors that he believed contradicted Witmer's assessment of her own limitations, including the extent of her daily activities and the ambiguity of the medical evidence to support her subjective complaints. *Id.* at 9 - 10. The Magistrate Judge also evaluated the ALJ's application of the agency's five-step analysis, highlighting where the ALJ did consider Witmer's fibromyalgia and headaches in his colloquy with the vocational

expert and in his final evaluation that she could perform jobs existing in the national and regional economies. *Id.* at 11 - 12.

Standards of Review

I review *de novo* the parts of the magistrate judge's report and recommendation to which the Witmer 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.¹ *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 evidence as a reasonable mind might accept as adequate" to reach his conclusion.² *Richardson*,

¹ 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).

² To establish a disability under the Act, a claimant must prove that he 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 his ability to work, 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

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).

Discussion

I examine each of Witmer's objections and find them to be without merit. The Magistrate Judge properly addressed her points and correctly concluded that the ALJ supported his opinion determining that Witmer was not disabled with substantial evidence. In independently reviewing the ALJ's decision, I come to the same conclusion as the Magistrate Judge and will grant the Commissioner's motion for summary judgment.

Witmer's First Objection

Witmer's first objection is that the ALJ "improperly discounted [Witmer's] credibility on the basis of her daily activities." Objections at 2. She argues that, although she is active, her case should be regarded akin to the plaintiff's in *Smith v. Califano*, 637 F.2d 968, 971 (3d Cir. 1981), in which the Third Circuit held that "sporadic or transitory activity does not disprove disability." *Id.* at 981 - 72.

It was one factor in the ALJ's decision that Witmer was capable of performing many

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 his analysis. In the fourth step he determines whether the claimant retains the residual functional capacity to perform work similar to that he 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, he 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).

daily activities. As the Magistrate Judge and the ALJ noted, despite her impairments, Witmer was able to perform household tasks and take care of her personal needs. *Id.* (citing R.53, 55, 57). She did crafts, volunteered at the VA hospital, belonged to the Firemen's Auxiliary, and went hunting and fishing. *Id.* (citing R. 52, 54, 59). Witmer went to the mall and visited friends socially. *Id.* (citing R.60). The medical record also contained references to her vacationing in a cabin in the mountains. *Id.* (citing R.18, 288, 297). The ALJ used these facts to support his finding that Witmer retained the residual functional capacity to perform a significant range of sedentary work. R.21.

Smith and other Third Circuit precedent emphasize that, even when the plaintiff can perform daily activities, (1) subjective complaints of pain should be considered seriously, even where not fully confirmed by objective medical evidence; *Smith*, 637 F.2d at 972; *Bittel v. Richardson*, 441 F.2d 1193, 1195 (3d Cir.1971); (2) subjective pain "may support a claim for disability benefits," *Bittel*, 441 F.2d at 1195, and "may be disabling," *Smith*, 637 F.2d at 972; (3) where such complaints are supported by medical evidence, they should be given great weight, *Taybron v. Harris*, 667 F.2d 412, 415 n.6 (3d Cir.1981); and (4) where a claimant's testimony as to pain is reasonably supported by medical evidence, the ALJ may not discount claimant's pain without contrary medical evidence. *Smith*, 637 F.2d at 972; *Green v. Schweiker*, 749 F.2d 1066, 1068 (3d Cir. 1984).

In the *Smith* case, the ALJ's conclusion had been "just too speculative to be sustainable" and he had failed to consider any of the four points the Third Circuit had emphasized. *Smith*, 637 F.2d at 971. He made "consistent mischaracterizations of the testimony," including, according to the Third Circuit, "basic errors in the findings of fact." *Id.* For example, the ALJ in *Smith*

misunderstood the vocational expert's testimony, and reported the opposite of notations in the medical record. *Id.* He ultimately failed to take the plaintiff's subjective complaints of pain seriously, to acknowledge that subjective pain could support a claim for disability, or to examine how or whether the plaintiff's subjective complaints were supported by the medical evidence in the record. *Id.*

The ALJ in Witmer's case, by contrast, weighed the relevance of Witmer's daily activities after carefully reviewing the medical record and heeded the Third Circuit's admonition to respect the four conditions necessary to evaluate subjective complaints of pain. R.15 - 20. The ALJ did consider Witmer's subjective complaints of pain seriously, finding, for example, that Witmer had a right carpal tunnel release from which "some degree of pain [could be] expected." *Smith*, 637 F.2d at 972; R.18. In his ruling, he found that she had a limited capacity to lift weight, reach above shoulder level, sit for long periods of time, or perform other functions such as kneeling, crawling, climbing, balancing, stooping, or crouching. *Id.* From these accommodations, the ALJ wanted to make it clear that he had given "some deference to [Witmer's] subjective complaints and limitations." *Id.* He acknowledged that subjective pain could be disabling, but found Witmer's particular complaints to be "overstated." *Smith*, 637 F.2d at 972; R.18. When Witmer's complaints were supported by medical evidence, such as her complaints about carpal tunnel syndrome, they were given great weight. *Taybron v. Harris*, 667 F.2d 412, 415 n.6 (3d Cir.1981); R.18. The ALJ in Witmer's case did not have to reach the fourth consideration because he found that her subjective complaints of pain were not reasonably supported by medical evidence. *Smith*, 637 F.2d at 972; R.18. After evaluating the extent of Witmer's daily activities as one factor in his decision, the ALJ documented how he reached this finding and gave

precise examples from the medical record to illustrate why he found elements of her complaints to be overstated. R.17 - 19.

I find Witmer's case to be distinguishable from *Smith* and the ALJ's opinion in *Witmer* consonant with the *Smith* court's guidance. I therefore overrule Witmer's first objection to the Magistrate Judge's Report and Recommendation.

Witmer's Second Objection

Witmer's second objection is that the ALJ erred in "not considering all of [Witmer's] medically determinable impairments." Objections at 4. She contends that she had headaches, and fibromyalgia, a type of myofascial pain syndrome, that the ALJ did not consider at Step 5 of the agency's sequential analysis. *Id.* at 4, 6. At Step 5 of the sequential analysis, the ALJ found that Witmer was not disabled because she could perform other work existing in the national and regional economies. R.21; 20 C.F.R. § 404.1520(f) (2001).

Headaches and fibromyalgia have a high component of subjective reporting to them. *See* R.16 (noting that a doctor's report that Witmer's complaints were predominately subjective); Rep. and Rec. at 9 - 10 (expounding on this point); *see also Preston v. Secretary of Health and Human Services*, 854 F.2d 815, 817 (6th Cir. 1998) (per curiam) (noting, for example, in discussing a plaintiff's fibromyalgia, that "[t]here are no objective tests which can conclusively confirm the disease"); *cf.* Objections at 6 (discussing the nature of fibromyalgia and other myofascial pain syndromes). The Social Security Administration's controlling regulation on subjective medical complaints reads in pertinent part: "[i]n determining whether you are disabled, we consider all your symptoms, including pain, and the extent to which your symptoms

can reasonably be accepted as consistent with the objective medical evidence, and other evidence.” 20 C.F.R. § 416.929(a) (2001). The regulation is specific that “statements about your pain or other symptoms *will not alone* establish that you are disabled; there must be medical signs and laboratory findings which show that you have a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged” *Id.* (emphasis added).

As required under 20 C.F.R. § 416.929(a), the ALJ required Witmer to present medical evidence to support her subjective complaints. 20 C.F.R. § 416.929(a); *Mason v. Shalala*, 994 F.2d 1058, 1067 - 68 (3d Cir. 1993). In examining the evidence for fibromyalgia, for example, the ALJ reported though that “the results of objective testing . . . revealed that [Witmer] had no herniations, stenosis, cord lesions or radiculopathy.” R.16 - 17, 159 - 61, 173 - 74; Rep. and Rec. at 9. Dr. Artuso diagnosed probable fibromyalgia, but reported that Witmer had no structural abnormalities or pathologic lesions to explain her condition and no indication for intervention pain management. R.17 (citing Exhibit 17). He could not identify any classic myofascial or fibromyalgia points in the lumbar region. R.17. The doctor instead found that Witmer was significantly deconditioned and quite preoccupied with identifying specific causes and treatments for her condition. *Id.* Dr. Kumar could also find no focal deficits and similarly reported that Witmer’s complaints were predominantly subjective. R.16. A chest x-ray in January of 1990 found that Witmer’s cervical rib was normal, as did an x-ray of her thoracic inlet spine. R.17 (citing Exhibit 16F at 7). Serological tests ruled out a systemic condition to explain Witmer’s complaints. R.17, 323; Rep. and Rec. at 9. Even Dr. Novosel, Witmer’s treating physician for ten years, noted that both he and his staff had observed that Witmer had a tendency to magnify

symptoms. R.289; Rep. and Rec. at 9. Thus, after reviewing the medical evidence Witmer presented and finding a lack of support for her subjective complaints, the ALJ found her claims of pain for these maladies to be overstated. R. 16 - 18; Rep. and Rec. at 9.

Nonetheless, the ALJ also made allowances for Witmer's subjective complaints in his colloquy with the impartial vocational expert. R.17 - 20; Rep. and Rec. at 11 - 12. Based on Witmer's testimony that she suffered "chronic pain in her legs, arms, back, neck and headaches two to three times per week," R.17, the ALJ held that she would be restricted from "kneeling, crawling and climbing, [could] occasionally balanc[e], stoop[,], and crouch[, but] should avoid unprotected heights." R.18. When the ALJ posed these restrictions to the impartial vocational expert, the vocational expert opined that a person with these restrictions could perform a job assembling, packaging, or inspecting. R.65-66. There were 1,000 jobs assembling, 1,200 jobs packaging, and 1,300 jobs inspecting in the local economy. R.20. The ALJ reviewed the vocational expert's testimony and the totality of the evidence presented before him before finding that Witmer was not disabled within the meaning of the Social Security Act. *Id.*

Accordingly, I find that there was substantial evidence to support the ALJ's conclusion that Witmer was not disabled at Step 5 and overrule Witmer's second objection. I agree with the recommendation of the Magistrate Judge, and will grant the Commissioner's motion for summary judgment.

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FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

AMY L. WITMER,	:	
Plaintiff	:	CIVIL ACTION
	:	
v.	:	NO. 01-3061
	:	
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 Thomas J. Rueter 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 Amy L. Witmer for summary judgment is DENIED.
3. The motion of defendant Jo Anne B. Barnhart, Commissioner of Social Security, for summary judgment is GRANTED.
4. Judgment is entered affirming the decision of the Commissioner.

BY THE COURT:

William H. Yohn, Jr.