

**FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RONALD A. LOPACINSKI,  
Plaintiff,

v.

JO ANNE BARNHART,  
Commissioner of Social Security  
Defendant.

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CIVIL ACTION

NO. 01-4364

**Memorandum and Order**

YOHN, J.

April \_\_\_\_\_, 2003

Plaintiff, Ronald A. Lopacinski (“plaintiff”), is appealing his denial of disability benefits by the Commissioner of Social Security (“Commissioner”). He brings this appeal for judicial review pursuant to 42 U.S.C.A. § 405(g) of the Social Security Act (“Act”). Presently pending before the court are the parties’ cross motions for summary judgment, the report and recommendation of the magistrate judge, the Commissioner’s objections, and plaintiff’s response thereto. For the reasons explained below, I will deny plaintiff’s motion, grant the Commissioner’s motion, and enter judgment for the latter.<sup>1</sup>

**BACKGROUND**

**I. Procedural History**

On January 28, 2000, plaintiff applied for disability benefits insurance and supplemental security income (collectively “disability benefits”). R. at 87-89, 204, 205-07.<sup>2</sup> His application

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<sup>1</sup> This decision is without prejudice to any rights plaintiff might have to file a new application for benefits based on any change that has occurred in his condition since the hearing before the ALJ or the final decision of the Commissioner.

<sup>2</sup> There is also an application dated March 16, 2000. It appears identical to the January application and both were denied on the same day, July 18, 2000. Although unclear from the

was denied on July 18, 2000. *Id.* at 77-80, 209-12. Plaintiff requested a hearing before an administrative law judge (“ALJ”). Represented by counsel, plaintiff appeared before ALJ Diane C. Moskal on February 22, 2001. *Id.* at 15-19, 22-75, 81-82. On June 24, 2001, the ALJ issued her decision finding that plaintiff retained the ability to perform sedentary and light work, which included his previous position as a financial clerk. *Id.* at 5-14. In her notice of decision, the ALJ advised plaintiff that he could appeal the unfavorable decision directly to the United States District Court for the Eastern District of Pennsylvania. *Id.* at 5. Therefore, the ALJ’s decision became the final decision of the Commissioner. Plaintiff then filed a complaint with this court on August 27, 2001. Subsequently, each party filed a motion for summary judgment. To his motion, plaintiff attached medical evidence that he had never before presented in a prior relevant proceeding.

The case was randomly assigned to a magistrate judge who issued a report and recommendation on September 27, 2002. The magistrate judge has recommended that this court remand plaintiff’s claim for benefits so that ALJ Moskal may reconsider it in light of the additional evidence that plaintiff attached to his motion for summary judgment. In response, the Commissioner filed objections to the magistrate judge’s report and recommendation, to which plaintiff filed a response. I must now consider the issues raised by these submissions and determine the appropriate course of action with respect to plaintiff’s disability benefits claim.

## **II. Factual History**

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faces of these documents, it is likely that one of the applications was for supplemental security income while the other was for disability benefits insurance. Regardless, as neither the parties nor the ALJ distinguished between them, this court will follow their lead and treat them collectively as one denied application.

The magistrate judge included in his report more than fifteen pages of factual history including general background about plaintiff's claim, medical/psychological evidence, and hearing testimony. Mag. Rep. and Recom. at 2-18. Because this review is so thorough and detailed, I see no reason to repeat the magistrate judge's efforts; thus, I will rely on his review of the factual history in this case.

### **STANDARD OF REVIEW**

“Our review of the Commissioner’s final decision is limited to determining whether that decision is supported by substantial evidence.” *Hartranft v. Apfel*, 181 F.3d 358, 360 (3d. Cir. 1999) (citing 42 U.S.C.A. § 405(g) and *Monsour Medical Ctr. v. Heckler*, 806 F.2d 1185, 1190 (3d. Cir. 1986)). “Substantial evidence is more than a mere scintilla.” *Monsour*, 806 F.2d at 1190 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). It “does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (quoted in *Hartranft*, 181 F.3d at 360). In making this determination, the court must “consider[] the evidentiary record as a whole, not just the evidence that is consistent with the agency’s findings.” *Monsour*, 806 F.2d at 1190 (citations omitted). Importantly, “this test is deferential.” *Id.* at 1191. Accordingly, the court “will not set the Commissioner’s decision aside if it is supported by substantial evidence, even if [it] would have decided the factual inquiry differently.” *Hartranft*, 181 F.3d at 360.

### **DISCUSSION**

#### **I. Additional Evidence**

Before this court can embark upon the substantial evidence test, I must first consider the

impact of evidence that plaintiff has presented to this court, which he failed to provide to ALJ Moskal when she considered his claim for benefits. As a reviewing court, I lack the authority to consider this belated evidence in deciding whether the ALJ's determination was justified. A remand to the ALJ for reconsideration in light of this additional evidence is authorized only if the evidence satisfies the Act's requirement for such a remand. I conclude, however, that this untimely additional evidence does not satisfy these requirements; therefore, the evidence does not justify a remand to the ALJ.

As a general rule, "evidence that was not before the ALJ cannot be used to argue that the ALJ's decision was not supported by substantial evidence." *Mathews v. Apfel*, 239 F.3d 589, 594 (3d. Cir. 2001) (citations omitted).<sup>3</sup> In very limited circumstances, however, a reviewing court may remand a case to the Commissioner for reconsideration in light of the additional evidence. Specifically, the court "may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding[.]" 42 U.S.C. 405(g) (Supp. 2002); see *Melkonyan v. Sullivan*, 501 U.S. 89, 100 (1991) (explaining this as one of two remands authorized by the Act).<sup>4</sup> Accordingly, in order

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<sup>3</sup> Plaintiff argues that this additional evidence rule does not apply because there was no appeal to the Appeal's Council since the ALJ authorized plaintiff to bypass that step and file his claim directly with this court. Pl. Resp. to Def. Obj. at 3. Plaintiff cites no law in support of this position. Moreover, the current law relating to the remand standard provides no discernible reason to distinguish claims based on this factor. Accordingly, I will apply the standard as articulated in the Act and as interpreted in the precedential caselaw.

<sup>4</sup> A remand based on this provision is commonly referred to as a "sentence six remand" because this phrase is located in the sixth sentence of section (g). *Melkonyan v. Sullivan*, 501 U.S. 89, 100 (1991); 42 U.S.C.A. § 405(g). This remand authorization is distinguished from the sentence four remand of the same provision.

to qualify for this remand option, three requirements must be satisfied: (1) the additional evidence must be “new”; (2) it must be “material” to determination of plaintiff’s disability benefits claim; and (3) there must “good cause” for plaintiff’s failure to present the new evidence in a prior proceeding. *Mathews*, 239 F.3d at 594.

Additional evidence is “new” if it was “not in existence or available to the claimant at the time of the administrative proceeding . . .” *Sullivan v. Finkelstein*, 496 U.S. 617, 626 (1990). It is not “new” if it is “merely cumulative of what is already in the record.” *Szubak v. Sec. of Health and Hum. Serv’s*, 745 F.2d 831, 833 (3d Cir. 1984). New evidence is “material” for purposes of determining eligibility for remand under 405(g) if it is not only “relevant and probative” but additionally, “the materiality standard requires that there be a reasonable possibility that the new evidence would have changed the outcome of the [Commissioner]’s decision.” *Id.* Finally, it is plaintiff’s burden to show good cause for his failure to present the additional evidence in a timely fashion to the ALJ. *Mathews*, 239 F.3d at 595. Plaintiff’s additional evidence, however, fails to satisfy these three required elements.

I will first consider plaintiff’s additional evidence regarding his physical and mental conditions separately to determine whether either is new or material, then I will consider whether plaintiff has demonstrated good cause for failing to properly present the additional evidence in a prior proceeding.

**A. Evidence of Plaintiff’s Physical Condition: New and Material?**

The first part of plaintiff’s attached evidence includes medical records from Phillip Yussen, M.D., explaining the results of a magnetic resonance imaging (“MRI”) of plaintiff’s lumbar spine on May 15, 2001, with an addendum report dated May 21, 2001. Pl. Mot. for Sum.

J., Ex. A. There are also office notes completed by Steven Schopick, M.D. reflecting appointments with plaintiff on November 6th and 9th of 2001. This additional evidence is neither new nor material.

This evidence is not “new” because it is merely cumulative of the evidence that was before the ALJ concerning plaintiff’s physical condition.<sup>5</sup> In making her determination, the ALJ considered several MRIs of plaintiff’s lumbar spine, including their accompanying explanatory physician’s notes, and innumerable office notes from various physicians. The MRI and office reports that plaintiff now presents for the first time demonstrate findings similar to plaintiff’s previous MRI’s and office visits, the latter of which were considered by the ALJ. In fact, plaintiff nowhere argues that there is anything substantially different in any of these additional reports from the multitude already considered.<sup>6</sup> Consequently, this attached evidence is cumulative of evidence already considered by the ALJ; as such, it is not “new.”

Instead of presenting an argument explaining how this evidence qualifies as new, plaintiff

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<sup>5</sup> The attached records from Dr. Yussen, which explain the results of one of plaintiff’s MRIs, post-date the hearing before the ALJ, however, they pre-date the ALJ’s decision, the final decision of the Commissioner; despite this, plaintiff did not request that the ALJ accept these records before issuing her decision. Plaintiff presents an ambiguous argument in an attempt to explain this failure, stating that his counsel’s experience is that “ALJ . . . most likely made her decision very soon after the hearing, thereby closing the decision-making process” and “in other cases in which medical evidence arrived within weeks of a hearing, and she was not permitted to supplement the record . . .” I find this an unconvincing basis for plaintiff’s inaction. Nonetheless, however, this is irrelevant to the present analysis.

In contrast, the office notes from Dr. Schopick post-date not only the Commissioner’s final decision, but also the plaintiff’s complaint which was filed with this court on August 27, 2001.

<sup>6</sup> It is reasonable to presume that if there was evidence that substantially differed from prior evidence, in plaintiff’s favor, he would highlight it for the court. The court’s own review revealed only minor differences, none of which indicate to a non-medical reader a substantial difference.

seems to assume that the mere fact that these documents were never presented to the administrative agency qualifies them as “new” for purposes of this analysis. Pl. Obj. to Mag. Rep. at 2-3. This of course belies the definition of “new” as applied under the Act which excludes cumulative evidence. Therefore, a sentence six remand is inappropriate.<sup>7</sup>

The fact that this evidence is cumulative also precludes a finding that it is material. Given that there is nothing in these additional medical reports that is substantially different from the evidence that was before the ALJ, much less anything to refute the ALJ’s final determination, there cannot exist a reasonable possibility that its presence before the ALJ would have altered her decision. Any minor differences that might exist between these additional reports as compared to the previous reports already considered are insufficient to raise the requisite reasonable possibility in light of the voluminous evidence supporting the ALJ’s decision. Consequently, this additional evidence of plaintiff’s physical condition is not material.

**B. Evidence of Plaintiff’s Mental Condition: New and Material?**

The second part of plaintiff’s additional evidence consists of therapy notes from plaintiff’s appointments at People Acting To Help (“PATH”) from February 13, 2001 to November 13, 2001.<sup>8</sup> Like the evidence of plaintiff’s physical condition, this evidence of plaintiff’s mental condition (most of which is ineligible to this reader in so far as it contains

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<sup>7</sup> Although concluding that any one of the three requirements of a sentence six remand is unsatisfied is sufficient to preclude a remand, in the interest of thoroughness, I will briefly discuss the other two requirements. I will address the materiality requirement now as it applies to the additional evidence of plaintiff’s physical condition, and I will address the good cause requirement below as it applies to all of plaintiff’s additional evidence.

<sup>8</sup> The notes from plaintiff’s first visit to PATH were considered by the ALJ at the February 21, 2001 hearing. R. at 12, 203.

doctors' notes) is neither new nor material. It is not new because it was available to plaintiff at any time because he retained exclusive control over obtaining his own psychological assessment and treatment; he chose not to seek psychological treatment and evaluation prior to the ALJ's hearing. He alleges that his disability began on May 8, 1998; thus, he had over two and a half years before the ALJ's hearing on February 22, 2001 to obtain such evidence.<sup>9</sup> Accordingly, although these records were not literally existent, they were available to plaintiff; thus, they are not new.

Contrary to plaintiff's suggestion, his additional evidence is not now "new" simply because he chose not to obtain and submit it to the ALJ. To so hold would directly contravene an important policy underlying this remand requirement imposed by Congress in its amendment to the Act. As our court of appeals articulated, the goal is "encourage disability claimants to present to the ALJ all relevant evidence concerning the claimant's impairments." *Matthews*, 239 F.3d at 595; *see Szubak*, 745 F.2d at 834 ("A claimant might be tempted to withhold medical reports, or refrain from introducing all relevant evidence, with the idea of 'obtaining another bite of the apple' if the [Commissioner] decides that the claimant is not disabled."). Therefore, I conclude that it is not new.

Even if I were to conclude that this evidence is new, it is not material. The psychological reports, to the extent they are legible, provide more detail than was provided the ALJ; however, this detail does not refute the ALJ's findings and conclusions. The ALJ found that plaintiff was

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<sup>9</sup> Additionally, plaintiff claims to have been depressed and anxious since he was six years old. R. at 51, 55 (Hearing Tr. at 28, 32); Pl. Mot. for Sum. J. at 5. He informed the ALJ that he had obtained psychiatric treatment eight years ago, therefore he was indisputably aware of this option. *Id.* at 57 (Hearing Tr. at 34).

depressed, but not to an extent that precluded substantial work, which is the standard for disability benefits. None of these additional reports suggest otherwise because none of them speak to plaintiff's ability to function in a workplace at all, much less during the relevant time period, which is the only evidence that could contradict the ALJ's conclusions. Our court of appeals addressed a similar situation and held that the evidence was not material. *Raglin v. Massanari*, 2002 WL 1480776, at \*4 (3d. Cir. July 10, 2002) (not precedential). Although not precedential, its analysis is instructive. The Third Circuit explained:

. . . the new evidence is largely repetitive of the evidence in the record. Although it confirms that Raglin has suffered from recurrent depression and learning disabilities, the ALJ did not deny the existence of those conditions. She simply concluded that they did not prevent Raglin from obtaining substantial gainful employment. The new reports do not effectively refute this. . . . The new evidence [plaintiff] presents is therefore not material.

*Id.*

Similarly, plaintiff's additional evidence confirms that he suffers from depression and musculoskeletal disorder, which precisely mirrors the ALJ's findings. R. at 9, 13. The ALJ concluded, however, that these impairments "have not been of sufficient severity such as to meet or equal" that required for social security benefits. *Id.* at 13. Accordingly, these additional psychological reports are not material as this term is applied in the context of sentence six remand analysis.<sup>10</sup>

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<sup>10</sup> Although plaintiff does not discuss this point, to the extent that the additional evidence demonstrates that his asserted physical and/or mental conditions have deteriorated or impairments have newly developed since the ALJ's decision, such a situation would nevertheless preclude a finding of materiality in the context of this remand analysis. Our court of appeals explained that "an implicit materiality requirement is that the new evidence relate to the time period for which benefits were denied, and that it not concern evidence of a later-acquired disability or of the subsequent deterioration of the previously non-disabling condition." *Szubak v. Sec'y of Health and Hum. Serv's.*, 745 F.2d 831, 833 (3d Cir. 1984); see *Newhouse v. Heckler*,

### C. Good Cause for Failure to Present this Evidence

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753 F.2d 283, 287 (3d Cir. 1985) (confirming this rule). More recently, the Third Circuit addressed the materiality of a medical report that post-dated the ALJ's decision, finding that remand was unjustified because the new report "states only that [plaintiff] would be incapable of working in the future, but does not evaluate her ability to work in the past. [Plaintiff's] condition may have been less severe in the past . . ." *Raglin v. Massanari*, 2002 WL 1480776, at \*4 (3d Cir. July 10, 2002) (not precedential). Applying this rule of materiality, one of our sister courts refused to remand a case when presented with additional evidence comparable to the present plaintiff's additional evidence, medical reports that post-dated the ALJ's decision, and moreover, reports that related to an accident plaintiff suffered after the ALJ's determination. *Ordo v. Apfel*, 2001 WL 1159856 (E.D. Pa Aug. 30, 2001).

Similarly here, where plaintiff has presented additional evidence of his musculoskeletal impairment, exacerbated by an accident that occurred subsequent to the ALJ's decision and evidence of his psychological impairment as of dates subsequent to that decision, such additional evidence is not material. Nothing in this additional evidence reflects that it relates back to the disability time period in question. As such, this additional evidence is not relevant to my consideration of the ALJ's decision but rather is relevant to a potential new claim for benefits.

When our court of appeals articulated this materiality rule, it cited the holding of *Ward v. Schweiker*, 686 F.2d 762, 765 (9th Cir. 1982) (cited in *Szubak*, 745 F.2d at 833). In *Ward*, the Ninth Circuit elucidated the proper course of action in an instance like the present, where plaintiff has additional evidence that bears on his/her disability but is immaterial because it does not relate to the time period that is the subject of the pending disability claim. The court stated that "[a]lthough later discovered evidence may be considered probative of the nature of the disease or disability, the new medical evidence was not material to the [Commissioner]'s action terminating benefits . . . although it could form the basis for a new claim." *Ward*, 686 F.2d at 765-66. In *Raglin*, the Third Circuit noted that during the pendency of plaintiff's appeal from denial of benefits based on an earlier claim, she had reapplied based on new evidence regarding her condition. In fact, she had prevailed on the latter claim and was receiving benefits for the time period relating to the later application. 2002 WL 1480776, at \*1. The court found that the ALJ's decision regarding the earlier claim was supported by substantial evidence and thus affirmed the denial; the new evidence that supported her later claim was not material to the earlier claim and thus did not support a sentence six remand. *Id.* at \*4.

Accordingly, where new evidence is obtained that may reflect a deterioration of a previously non-disabling condition or a later-acquired disability, plaintiff may re-apply for benefits. This re-application option complements the legislature's choice to drastically limit remand based on additional evidence. Therefore, this court's determination that plaintiff's additional evidence does not qualify this case for a remand is not intended to foreclose plaintiff from seeking disability benefits based on his current condition if he now qualifies.

Even if these medical reports regarding plaintiff's physical and mental conditions could be deemed new and material, the third requirement is lacking because plaintiff has failed to provide a good cause explanation for his failure to obtain and submit this evidence prior to the ALJ's decision. In his motion for summary judgment, plaintiff's sole mention of the additional evidence now in question was to casually note that "[u]pdated medical treatment records and test results are attached hereto for the Court's consideration, and marked Exhibit 'A'. The attached records are from Path Inc., Plaintiff's mental health treatment source, and from his orthopaedic specialist, Steven Schopick, M.D." Pl. Mot. for Sum. J. at 1-2. Nowhere in his motion did plaintiff explain, or even state, a good cause for his failure to present them to the ALJ.

It is not until after the magistrate judge filed a report and recommendation discussing the issue of good cause that plaintiff attempted to explain his reason for failing to present his additional evidence previously. Plaintiff seems to posit two arguments related to the good cause requirement.<sup>11</sup> First, he states that "much of the evidence did not exist, or at least was [not] known to exist, to Plaintiff's counsel before an ALJ reached a decision." Resp. to Def. Obj. at 5.<sup>12</sup> It is impossible to discern a reasonable meaning of this statement as applied to plaintiff's evidence. It was available at any time. If any of this evidence did not exist, it was because

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<sup>11</sup> Plaintiff's brief in response to defendant's objections consists of approximately five and a half pages of "legal argument" that fails to cite one case and consists of myriad concepts and assertions, some of which are related to my analysis. Pl. Resp. to Def. Obj. 2-6. Thus, the court has attempted, in fairness, to parse out arguments that support his position.

<sup>12</sup> The court presumes that plaintiff inadvertently omitted the word "not," otherwise this argument would, at best, make no sense, and at worst, weaken plaintiff's position.

plaintiff simply chose not to obtain it.<sup>13</sup>

Second, plaintiff suggests that it was impossible for his counsel to obtain this evidence before the ALJ hearing. Resp. to Def. Obj. at 5-6. For the same reason, that plaintiff could have obtained it at any time, this argument fails.

Plaintiff's position contravenes the overarching policy that prompted Congress to amend the Act and limit remands of this type. The legislature revealed its motive when it explained that before the amendment "[t]he court could remand . . . to the ALJ without cause or other reason which was weakening the appeal process at that level." 125 Cong. Rec. 23383 (1979) (quoted in *Melkonyan*, 501 U.S. at 101). As the Supreme Court noted, "[i]t is evident from these passages that Congress believed courts were often remanding Social Security cases without good reason. While normally courts have inherent power . . . to remand cases, both the structure of § 405(g), as amended, and the accompanying legislative history show Congress' clear intent to limit courts to two kinds of remands in these cases." *Melkonyan*, 501 U.S. at 101. Thus, to remand in instances comparable to the present case, where good cause is starkly absent, would effectuate the very result Congress attempted to halt by its amendment because it "would turn the procedure into an informal, end-run method of appealing an adverse ruling by the [Commissioner]."

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<sup>13</sup> Even if this court was to generously infer from his response that plaintiff did not understand that psychological evidence could affect the ALJ's determination of his benefits, this would not constitute good cause. First, it would strain credulity to suggest that plaintiff did not know this, considering "mood disorders" was part of his original benefits application. R. at 76, 205. Second, even if I believed that plaintiff did not understand its importance, this is not good cause because he *should have* known this. *Mathews*, 239 F.3d at 595 (deciding it was not good cause where plaintiff "did not realize the importance of obtaining a vocational evaluation" because she "should have known that her ability to work was an issue at the ALJ hearing . . ."). Similarly, plaintiff here should have known that psychological evidence would be relevant because he was claiming disability on grounds that included physical ailments and "severe depression/anxiety." R. at 101.

*Szubak*, 745 F.2d at 834.

Because the three requirements of a sentence six remand are not satisfied with respect to this claimant's additional evidence, the Act does not authorize a remand. I must now address the question of whether the ALJ's decision is supported by substantial evidence of record.

## **II. Substantial Evidence Review**

Plaintiff challenges the ALJ's finding that he possessed sufficient residual functional capacity to return to sedentary and light level work. Pl. Mot. for Sum. J. at 3. I conclude that this finding by the ALJ is supported by substantial evidence, and thus I will enter summary judgment for the Commissioner.

The Act "defines disability in terms of the effect a physical or mental impairment has on a person's ability to function in the workplace." *Heckler v. Campbell*, 461 U.S. 458, 459-60 (1983). It provides disability benefits only to those claimants who "are unable 'to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment.'" *Id.* (quoting 42 U.S.C. 423(d)(1)(A)). When evaluating a claim for disability benefits, the Commissioner applies a five-step sequential analysis. 20 C.F.R. § 404.1520; *Sykes v. Apfel*, 228 F.2d 259, 262-63 (3d Cir. 2000). Specifically, the Commissioner must consider, in this order, whether the claimant: (1) worked during the alleged period of disability; (2) has a severe impairment; (3) has an impairment that meets or equals the requirements of a listed impairment; (4) has an impairment that prevents him from returning to his past relevant work; and (5) whether he can perform any other work in the national economy. *Id.*<sup>14</sup> The claimant

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<sup>14</sup> Specifically, the inquiry proceeds in the following manner. If the first inquiry, whether claimant worked during the time of his alleged disability, is answered in the affirmative, then the evaluation is finished and claimant is unqualified for benefits. Conversely, if the first inquiry is

bears the burden of proof as to steps one, two, and four of this analysis.<sup>15</sup> In the present case, it is only step four that is contested.

In this case, the ALJ proceeded through the analysis until she reached the fourth inquiry to which she answered in the affirmative, thereby ending the inquiry and rendering plaintiff ineligible for benefits. R. at 13-14. The ALJ found that “the claimant has a severe musculoskeletal disorder”<sup>16</sup> yet it did not preclude him from substantial employment. The ALJ found that “[t]he claimant has the residual functional capacity to perform sedentary and light work . . . [his] past relevant work was sedentary exertionally and ranged from semiskilled to skilled in nature . . . [Thus, he] is able to perform his past relevant work.” *Id.* at 13-14. It is this determination that plaintiff argues is not supported by substantial evidence.

There is much more than substantial evidence supporting this finding by the ALJ. The supporting evidence consists of reports of treating and examining physicians, medical history and treatment, plaintiff’s presentation at the hearing, and plaintiff’s own assertions about his daily

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answered in the negative, the Commissioner considers the second. If the answer to the second inquiry is negative, then the claimant is ineligible for disability benefits. However, if this second inquiry is answered in the affirmative, the Commissioner inquires whether the impairment meets the criteria of a listed impairment. If the Commissioner concludes that it does, then a presumption arises that the claimant is disabled and lacks the capacity to work. If she concludes to the contrary, she assesses the fourth inquiry, whether despite his severe impairment(s) the claimant has the capacity to return to his past work. If the answer is affirmative, then plaintiff is not disabled under the Act. If the Commissioner concludes that the claimant lacks such capacity, then she proceeds to the final step, which renders claimant disabled under the Act only if it is answered in the negative. *Sykes v. Apfel*, 228 F.3d 259, 262-63 (2000).

<sup>15</sup> “Because step three involves a conclusive presumption based on the listings, no one bears that burden of proof. *Sykes*, 228 F.3d at 263. The burden of proof as to the fifth step is born by the government. *Id.* at 265.

<sup>16</sup> The ALJ also concluded that plaintiff had “no severe mental impairment.” R. at 13.

activities and lifestyle. At the same time, there is very little credible evidence that fails to support the ALJ's finding.

There is an abundance of supporting evidence from physicians' notes and reports. First, for the period following the alleged onset in May of 1998, through November 1998, there are the progress notes from Dr. Sturtz'. R. 148-151. In the latest legible progress note to date,<sup>17</sup> from August 21, 1998, the physical examination of him was "essentially unremarkable." *Id.* at 149. At this time, Dr. Sturtz also noted that plaintiff "was recommended to have chiropractic care and water therapy and . . . to this point, has been resistant to that." *Id.* Previously, on June 15, 1998, Dr. Sturtz reported that plaintiff had chronic disc disease and is treating his pain using Tylenol with Codeine. *Id.* at 150. This doctor also explained that plaintiff's neurological exam was "essentially normal" and that "[t]here was no motor or sensory dysfunction." Additionally, "[t]he range of motion of the lumbar spin was essentially normal."

Second, there are consultation notes from neurologist Howard Levin, M.D., dated October 13, 1998. *Id.* at 139-141. Dr. Levin confirmed the presence of degeneration in plaintiff's lumbar spine, yet reported that he "do[es] not feel that the finding on Mr. Lopacinski's neurologic exam or MRI study suggest the need for surgical intervention . . ." *Id.* at 141. He prescribed "another trial of physical therapy and would possibly try him on aquatic therapy rather than land therapy." *Id.*

Third, there are examination notes from Dr. McPhilemy, spanning from April 1999 until

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<sup>17</sup> This is the latest that is legible. There are three progress notes, including one that is later, dated November 4, 1998, that are handwritten and illegible. R. at 148. There is no indication, nor does plaintiff suggest, that these contain any evidence contrary to those that are legible.

November 1999. The latest record, dated November 22, 1999, is based substantially on an MRI, and confirms plaintiff's degenerative disc disease and with accompanying pain in the neck and lower extremities as well as noting mild scoliosis. *Id.* at 153. Dr. McPhilemy "recommended that the patient continue with exercises for strengthening and stretching" as well as "an aquatic exercise program." *Id.* Notably, this doctor also "suggested that [plaintiff] have an EMG/NCV . . . but to date this has not been done because the patient is afraid of needles." *Id.*

Fourth, there are notes from Dr. Tehrani dated May 21, 2000, which are based in part on MRI results. These notes confirm that plaintiff "has refused undergoing epidural injections." *R.* at 169. The doctor reported that plaintiff "feels that the Hydrocodone and Elavil has helped him a little bit, however, he continues to have a constant pain . . ." Furthermore, Dr. Tehrani stated that "[p]hysical examination reveals a 45-year-old, white male, in no acute distress." *Id.* at 170. With respect to plaintiff's mobility, "he was able to perform the lateral rotations . . . each direction. He has good toe and heel walk. Express some pain on the lower back upon heel walking. Straight leg elevation test was negative bilaterally." *Id.* Importantly, "[h]e had no difficulty getting on and off the examining table, getting in and out of supine position. He also was able to tie and untie his shoes easily . . . He walks without difficulty and has a steady gait and station." *Id.* at 170-71.

Fifth, there are notes composed by Dr. Resnick dated December 14, 2000, in which he confirms plaintiff's degenerative disc disease. *Id.* at 194. Notably, he confirms Dr. Tehrani's evaluation that plaintiff is "in no acute distress." *Id.* It appears that not one of these numerous doctors imposed any restrictions on plaintiff.

Sixth, on June 10, 2000, a state agency physician completed a Psychiatric Review

Technique Form measuring plaintiff's mental functioning. R. 173-81. Although this physician indicated that plaintiff exhibited signs of affective disorder and depression, he reported that plaintiff experienced only slight limitations in daily living activities and social functioning. *Id.* at 173, 174, 176, 180. This report also revealed that plaintiff never experienced decompensation or deterioration in a work setting. *Id.* at 180.

Seventh, on June 12, 2000, a second state agency physician completed a residual functional capacity assessment for plaintiff. R. at 182-89. Based on this assessment, the physician concluded that plaintiff could lift and/or carry ten pounds frequently and twenty pounds occasionally, push and/or pull the same, stand and/or walk for about six hours in a eight-hour workday, and sit for about six hours in the same amount of time. R. at 182-89. This physician also concluded that plaintiff had no other physical, communicative, or environmental limitations. *Id.* at 184-86. Moreover, he noted that although there was radiological evidence documenting disorders of plaintiff's spine, except for tenderness, the findings were within normal limits. *Id.* at 187. Finally, the physician remarked that plaintiff's reports of symptoms and restrictions of daily activities were disproportionate to the medical evidence, thereby rendering them only partially credible.

As the ALJ properly assessed, plaintiff's treatment has been routine and non-aggressive. *Id.* at 12. Despite the doctors' advice to try aquatic therapy, plaintiff did not. R. at 149. Despite advice to continue regular physical therapy, plaintiff did not. *Id.* at 54 (Hearing tr. at 31).<sup>18</sup> Despite advice that he try epidural injections, plaintiff did not, reasoning that "you don't know

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<sup>18</sup> Plaintiff quit after only one session of physical therapy, asserting to Dr. Levin that the therapy worsened his pain. R. at 54-55 (Hearing Tr. at 31-32).

what that stuff they put in your body is.” *Id.* at 40 (Hearing Tr. at 17). Despite advice that he obtain an EMG/NCV of his upper and lower extremities, plaintiff did not, allegedly due to a phobia of needles and his belief that regardless of treatment “it’s going to get worse.” *Id.* at 52 (Hearing Tr. at 29). Notably, however, plaintiff admitted that he routinely permits blood tests. *Id.* at 53 (Hearing Tr. at 30).

With respect to plaintiff’s claim for disability based on anxiety and depression, it was not until February 2001 that the claimant actually sought routine behavioral therapy for these conditions. *Id.* at 56 (Hearing Tr. at 33). Even then, plaintiff explained that the only reason he pursued non-drug psychiatric treatment at such a late date was because his physician could no longer prescribe him medication for depression and anxiety. *Id.* at 46 (Hearing Tr. at 23).<sup>19</sup>

Moreover, plaintiff’s presentation at the hearing before the ALJ supports the conclusion that despite his physical disability, he retains the ability to perform light and sedentary work. In her opinion, the ALJ described her observations:

[Plaintiff] walks independently. He moved very freely. He was observed to stand up quickly and reach easily across the hearing room table to get tissues. He sat comfortably and he was up and out of his chair very quickly and fluidly at the conclusion of the hearing. His testimony was also articulate and well-presented . . .

R. at 12.<sup>20</sup>

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<sup>19</sup> At his hearing, plaintiff told the ALJ that Dr. Porter could only prescribe him psychiatric medications for a total of two years without plaintiff seeing a psychiatrist or psychologist, and plaintiff’s two years had expired. R. at 46 (Hearing Tr. at 23).

<sup>20</sup> Plaintiff posits that by considering personal observations as evidence that the ALJ improperly applied a “‘sit and squirm’ test.” Pl. Mot. for Sum. J. at 7. Our court of appeals has explained that “an ALJ may consider his own observations of the claimant and this Court cannot second-guess the ALJ’s credibility judgments.” *Morales v. Apfel*, 225 F.3d 310, 318 (3d. Cir. 2000). The only instance in which a reviewing court may second-guess and override such an

Finally, plaintiff's admitted daily activities support the ALJ's conclusion that despite his condition, he has the ability to perform at least light and sedentary work. He drives short distances. He microwaves food, drags trash outside, washes his car with a hose, carries grocery bags from the car to inside his home one at a time. He walks up and down stairs at home approximately four times a day. Plaintiff also listens to radio, watches television, performs some housework, takes naps, and helps his son with homework.

All of this evidence supports the ALJ's conclusion. The only contradictory evidence is that of plaintiff's own assertions and that of one doctor.<sup>21</sup> In completing an Employability Assessment Form from the Pennsylvania Department of Public Welfare, Dr. Porter indicated that plaintiff was permanently disabled<sup>22</sup> by virtue of his degenerative disc disease and his depression and anxiety. *Id.* at 197. Dr. Porter's notes, however, are handwritten and illegible, so the basis for this conclusion is unknown. *Id.* at 198-202. As the ALJ noted, Dr. Porter's conclusion contradicts the plentiful well-documented medical sources of record, as outlined above. *Id.* at 12. As to plaintiff's own assertions that his disability prevents him from working, this is belied by

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evaluation is when it contradicts "the medical opinion of a treating physician that is supported by the record." *Id.* The present case, in contrast, is the antithesis of such a situation. The ALJ's partial accreditation of plaintiff's testimony is consistent with the great majority of the medical records and opinions of treating physicians. In fact, it only contradicts one, that of Dr. Porter, which is a medical opinion *unsupported* by the record. As such, the ALJ's consideration and assessment of plaintiff's demeanor at the hearing was entirely appropriate.

<sup>21</sup> Plaintiff's mother-in-law testified that plaintiff was in serious pain, however, she admitted that this assertion was based exclusively on what he tells her about his condition. R. at 68 (Hearing Tr. at 45). Accordingly, her testimony is essentially the same evidence as that of plaintiff's assertions, and is worthy of no additional weight.

<sup>22</sup> This form defines disability as a condition that "precludes any gainful employment." R. at 197.

his mobility in court and his self-confessed daily activities.<sup>23</sup>

Even taking this contradictory evidence into account, the evidence supporting the ALJ's determination is more than substantial. There is sufficient evidence for a reasonable mind to accept as adequate to support the ALJ's decision that plaintiff has the ability to perform meaningful employment in the form of sedentary and light work, which includes plaintiff's prior employment as a clerk.<sup>24</sup> Consequently, pursuant to the fourth step of the five-step analysis, the ALJ concluded that plaintiff retained the ability to return to his prior work, and thus, was not qualified for disability benefits. Therefore, summary judgment must be granted in favor of the Commissioner.

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<sup>23</sup> Plaintiff argues that the ALJ failed to give sufficient weight to his claims of chronic pain for which he took medications and that she did not grant sufficient credibility to plaintiff's testimony by placing her own opinion above that of the medical test results. Pl. Mot. for Sum. J. at 4. To the contrary, the ALJ assigned plaintiff's testimony the weight and credibility it was due based on the balance of all the evidence, including medical reports, observation of plaintiff, and his own assertions about daily activity. Consequently, the ALJ granted it some weight by concluding that it could not be "totally credited." *Id.* at 13. Regardless, however, the question for this court is not whether I would have granted more or less weight to this testimony, but rather whether there is substantial evidence supporting the ALJ finding that is now challenged by plaintiff.

<sup>24</sup> At the hearing before the ALJ, vocational expert Carolyn Rutherford testified to this effect:

- Q: Is there anything in that assessment [of plaintiff] as prepared by the state agency which would lead you to believe that [plaintiff] could not return to his prior relevant work?
- A: No. This would indicate consistency with light exertional level, and all records indicate that the work he previously performed has been sedentary.

R. at 73-74 (Hearing at 50-51). Plaintiff does not challenge the conclusion that his prior work was of a sedentary and light nature; he challenges only the conclusion that he retains the ability to engage in sedentary and light work.

## CONCLUSION

For the reasons explicated above, I will deny plaintiff's motion for summary judgment and grant the Commissioner's motion for the same. First, in determining whether the ALJ's decision was supported by substantial evidence, I may not consider the additional evidence attached to plaintiff's motion, as such an analysis is limited to the evidence that was properly before the ALJ when she made her decision. Additionally, because plaintiff's additional evidence does not satisfy the requirements for remand under the Act, I am not authorized to remand his case to the ALJ for reconsideration in light of that evidence. Second, because the decision by the ALJ that is now challenged by plaintiff is supported by substantial evidence, judgment must be entered for the Commissioner.

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

RONALD A. LOPACINSKI,  
Plaintiff,

v.

JO ANNE B. BARNHART  
Commissioner of Social Security  
Defendant.

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CIVIL ACTION

NO. 01-4364

**ORDER**

And now on this \_\_\_\_\_ day of April, 2003, upon consideration of the parties' cross-motions for summary judgment (Docs. 7 and 10), and after careful review of the Report and Recommendation of the United States Magistrate Judge (Doc. 13), the Commissioner's objections (Doc. 14) and plaintiff's response thereto (Doc. 15), it is hereby ORDERED that:

1. The Commissioner's objections are SUSTAINED;
2. Plaintiff's motion for summary judgment is DENIED; and
3. Defendant's motion for summary judgment is GRANTED.
4. Judgment is entered AFFIRMING the decision of the Commissioner.

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William H. Yohn, Jr., Judge