

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

**GERALDINE KLINGER,**  
**Plaintiff**

v.

**JO ANNE BARNHART,**  
**Commissioner of Social Security,**  
**Defendant**

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**CIVIL ACTION  
NO. 02-1008**

**MEMORANDUM OPINION**

**RUFE, J.**

**July 15, 2003**

Plaintiff seeks judicial review of the decision of the Commissioner of the Social Security Administration denying her claim for Supplemental Security Income (“SSI”) as provided in Title XVI of the Social Security Act. Presently before the Court are the parties’ cross-motions for summary judgment. United States Magistrate Judge Arnold C. Rapoport issued a report recommending that this Court deny Plaintiff’s motion for summary judgment, grant Defendant’s motion, and affirm the Commissioner’s decision. Upon careful and independent consideration of the administrative record, Judge Rapoport’s report, and Plaintiff’s objections thereto, the Court overrules Plaintiff’s objections, and grants Defendant’s motion for summary judgment.

**I. BACKGROUND**

Judge Rapoport sets forth in his Report and Recommendation (“R & R”) an exhaustive review of the procedural history, factual background, and evidence submitted in this case. For the most part, Plaintiff does not object to Judge Rapoport’s recitation of the facts,<sup>1</sup> and the Court

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<sup>1</sup> Plaintiff does make some minor objections to Judge Rapoport’s summary of Plaintiff’s testimony at the September 21, 2001 hearing, but these objections are unfounded. For example, in discussing Plaintiff’s present ability to work, Judge Rapoport wrote, “Plaintiff’s representative stated that Plaintiff could not work because she was

therefore adopts and incorporates that recitation herein. The following summary is presented for informational purposes only.

Plaintiff filed her application for SSI on June 28, 2000, alleging disability since January 1, 1989, due to nervousness, migraines, insomnia, loss of appetite and lack of concentration. The Commissioner of Social Security denied Plaintiff's claims for SSI under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383(c), and Plaintiff thereafter requested a hearing. After a hearing before Administrative Law Judge ("ALJ") Suanne S. Strauss on September 21, 2001, the ALJ found that Plaintiff retained the residual functional capacity ("RFC") to perform work activity, and denied Plaintiff's claim on January 4, 2002. Plaintiff then appealed to this Court.

On cross-motions for summary judgment, Magistrate Judge Arnold Rapoport filed his R & R and recommended a ruling in favor of Defendant, finding that (1) Plaintiff's objections to the ALJ's alleged biased treatment of Plaintiff at the hearing are not supported by the transcript and other evidence, and (2) the ALJ properly weighed and analyzed the opinions of the treating, examining, and testifying physicians. Today the Court adopts the legal reasoning and conclusion set forth in the R & R. Consistent with its duty as set forth in 28 U.S.C. § 636(b)(1), the Court will address below those portions of the R & R to which objection is made.

## **II. STANDARD OF REVIEW**

The Social Security Act provides for judicial review of any "final decision of the

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not reliable, but Plaintiff was unable to explain why she could not work." Plaintiff argues that she did, in fact, testify as to why she could not work. However, the testimony referenced by Plaintiff describes why she was unable to hold a job as check-out clerk *ten years ago*, and not to the relevant issue of why she could not work *at the time of the hearing*. Additionally, when asked whether she "could do a job like that now," Plaintiff clearly stated, "I don't know. I don't have an answer for that." Tr. 54-55. Accordingly, Plaintiff's partial objection to Judge Rapoport's summary is unfounded.

Commissioner of Social Security” in a disability proceeding. 42 U.S.C. § 405(g). The district court may enter a judgment “affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.” Id. However, the Commissioner’s findings “as to any fact, if supported by substantial evidence, shall be conclusive.” Id. Accordingly, the Court’s scope of review is “limited to determining whether the Commissioner applied the correct legal standards and whether the record, as a whole, contains substantial evidence to support the Commissioner’s findings of fact.” Schwartz v. Halter, 134 F. Supp. 2d 640, 647 (E.D. Pa. 2001).

Substantial evidence has been defined as “more than a mere scintilla” but somewhat less than a preponderance of the evidence, or “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971); Jesurum v. Sec’y of the United States Dep’t of Health & Human Servs., 48 F.3d 114, 117 (3d Cir. 1995). The standard is “deferential and includes deference to inferences drawn from the facts if they, in turn, are supported by substantial evidence.” Schaudeck v. Comm’r of S.S.A., 181 F.3d 429, 431 (3d Cir. 1999).

In reviewing Judge Rapoport’s R & R, this Court must review *de novo* only “those portions” of the R & R “to which objection is made.” 28 U.S.C. § 636(b)(1).

### **III. OBJECTIONS TO THE R & R**

Plaintiff makes two overall objections to Judge Rapoport’s R & R, which are discussed below.

#### **A. Whether Judge Rapoport Failed to Properly Analyze Plaintiff’s Objection to the ALJ’s Conduct**

Although not specifically described as such in her Objections, Plaintiff's argument has two components: the ALJ's treatment of Plaintiff during the hearing, and the basis for the ALJ's conclusions in her written decision.

**1. Whether the ALJ Mistreated Plaintiff During the Hearing**

Plaintiff contends that the ALJ's "rude and impatient" conduct toward Plaintiff during the hearing evidenced her bias against Plaintiff, and that such bias denied Plaintiff a full and fair hearing because it made her too anxious to answer questions. In support of this argument, Plaintiff cites a portion of the record in which the ALJ asked Plaintiff the same question four different times. Transcript of Administrative Record of Proceedings ("Tr.") 45-48.

Judge Rapoport rejected this argument on the basis that Plaintiff failed to adhere to regulations requiring that complaints of bias be raised with the ALJ:

An administrative law judge shall not conduct a hearing if he or she is prejudiced or partial with respect to any party. . . . If you object to the administrative law judge who will conduct the hearing, *you must notify the administrative law judge at your earliest opportunity*. The administrative law judge shall consider your objections and shall decide whether to proceed with the hearing or withdraw.

20 C.F.R. §§ 404.940, 416.1440 (2003) (emphasis added); see also Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995) (quoting regulations and discussing claim of biased ALJ). Judge Rapoport noted that Plaintiff failed to adhere to these regulations because she made no objection to the alleged improper behavior by the ALJ during the hearing. Moreover, Judge Rapoport noted that the ALJ permissibly inferred from the exchange at the hearing that Plaintiff was being evasive. Finally, Judge Rapoport noted that the transcript is devoid of any other "incident" involving the ALJ's questioning.

Without citation to any legal authority, Plaintiff argues that there is nothing in the regulations or case law requiring counsel at the hearing to interrupt the ALJ, object to the conduct, and ask the ALJ to recuse herself. To the contrary, it appears from the plain language of the regulations, as well as subsequent case law, that this is exactly what is required, and that failure to do so results in waiver of the opportunity to allege bias against the ALJ. See 20 C.F.R. §§ 404.940, 416.1440 (“If you object to the administrative law judge who will conduct the hearing, you must notify the administrative law judge at your earliest opportunity.”) Ventura, 55 F.3d at 902 (“claimant in the instant case *abided by the procedures set forth in the regulations*” when her representative alleged that the ALJ was prejudiced and requested that he disqualify himself); Hernandez v. Sullivan, No. 91-10480-WD, 1992 WL 184227, at \*7 (D. Mass. Mar. 31, 1992) (when claimant is represented by counsel, failure to raise objection of ALJ’s bias at the hearing operates as a waiver of the issue). Accordingly, Plaintiff’s objection on this ground is overruled.

## **2. Whether the ALJ’s Written Decision Evidences Bias Against Plaintiff**

Judge Rapoport addressed several arguments raised by Plaintiff directed at a showing of bias in the ALJ’s written decision. First, Plaintiff points to the ALJ’s conclusion that Plaintiff was filing for SSI because her welfare benefits were about to be discontinued. See Tr. 11 (“She is admittedly facing a welfare cut-off unless she prevails in this matter, thus enhancing her need to exaggerate her symptoms.”). Plaintiff argued that the ALJ reached this conclusion improperly, and without supporting evidence. In rejecting the evidentiary argument, Judge Rapoport cited to the following portion of Plaintiff’s hearing testimony:

Q: Are you on welfare?

A: Yes.

Q: Have they threatened to cut you off? They advised you?

A: They gave you, gave you, they gave, they - - Since they started that welfare reform, they said now I, I have like, have up to five years or something like that with this four form. And they said my time is running out. They just recently called me and told me that just recently.

Tr. 55. Based on this exchange, Judge Rapoport properly determined that the ALJ had sufficient evidentiary basis for the conclusion that Plaintiff's welfare benefits were about to be terminated, and that this fact cast doubt on the merits of her SSI claim.

Plaintiff contends that with respect to this portion of the ALJ's decision, Judge Rapoport failed to address her legal argument "that it was impermissible for the ALJ to assume Ms. Klinger was exaggerating based on this alleged termination [of welfare benefits]." Plaintiff cites a Seventh Circuit opinion, wherein Judge Richard A. Posner insightfully observed:

The administrative law judge made a number of unfounded sociological speculations which bespeak a lack of imagination concerning the lives of many of the people who apply for social security disability benefits. . . . The administrative law judge thought [claimant's] testimony further undermined by the fact that she did not apply for disability benefits until her son reached the age of 18 and was therefore no longer eligible for AFDC benefits. It is fortunate rather than otherwise that not every person in the United States who might be eligible to feed at the public trough does so at the first opportunity. Many people are ignorant of the full range of available benefits, or reluctant to undergo arduous administrative proceedings in which they are called liars, until desperation resulting from a personal crisis or as here the cut off of other public funds drives them to seek additional information or to overcome their reluctance to run the bureaucratic gauntlet.

Sarchet v. Chater, 78 F.3d 305, 308 (7th Cir. 1996). Judge Posner's observations are cogent and well taken, and suggest that the ALJ's observation in this case was sociologically insensitive and possibly inaccurate. As Plaintiff notes, if threats to welfare benefits are determinative, then this reason could be used in innumerable disability cases, as many SSI claimants face similar circumstances. As such, the Court agrees that this is not a proper basis upon which to doubt a claimant's credibility.

However, it is another matter altogether to say that the ALJ's reliance on this factor in her written decision is evidence of bias. In Sarchet, the ALJ's reliance on imminent termination of other public assistance was only one among a host of factors that demonstrated the ALJ's bias, and where the court found that "the reasons given by the trier of fact do not build an accurate and logical bridge between the evidence and the result." Id. at 307. Among the many ALJ errors cited by the Seventh Circuit were "a pervasive misunderstanding" of claimant's disease; inaccurate description of the claimant's testimony; misunderstanding the testimony of the vocational expert; ignoring a long list of claimant's medical ailments; and drawing unfounded conclusions from the claimant's testimony. See id. at 307-08. Although the Court may disagree with the general assumption underlying the ALJ's conclusion that imminent termination of Plaintiff's welfare benefits caused Plaintiff to exaggerate her disability, this alone is insufficient evidence of ALJ bias. Due process guarantees a full and fair hearing, with an unbiased judge, such that a record may be constructed containing relevant information regarding a claimant's entitlement to social security benefits See Ventura, 55 F.3d 900. A single "unfounded sociological speculation" by the ALJ in this case did not transgress this right. Sarchet, 78 F.3d at 308.

Plaintiff next objects that the ALJ went out of her way in her written decision to remark upon claimant's demeanor at the hearing, including sighs and eye rolling. See Tr. 8 ("The testimony was accented by deep sighs and eye rolling."). Plaintiff contends that this observation has nothing to do with her credibility, but rather points up the ALJ's dislike for Plaintiff. As Judge Rapoport correctly noted, an ALJ is permitted to use her observations of a claimant in her credibility assessment. See Frazier v. Apfel, No. 99-715, 2000 WL 288246, at \*9 (E.D. Pa.) (general rule is to accord deference to ALJ's credibility assessments), aff'd, 234 F.3d 1264 (3d Cir. 2000) (Table).

Thus, this objection is overruled.

Third, Plaintiff objects that the ALJ found the claimant to be lacking in credibility because she did not have a sustained or consistent work record. See Tr. 11 (“The claimant has never worked and therefore is not entitled to the enhanced credibility accorded to persons with long, consistent work records.”).<sup>2</sup> Courts are permitted to use this as a reason to doubt a claimant’s overall credibility. See, e.g., Comstock v. Chater, 91 F.3d 1143,1147 (8th Cir. 1996) (agreeing that prior work history that is not “particularly notable and has been characterized by fairly low earnings and some significant breaks in employment” is one factor that may cast doubt on claims of disability). Therefore, this objection is overruled.

Finally, Plaintiff objects that the ALJ improperly relied on the fact that Plaintiff was able to care for her own appearance and to raise her eight-year-old daughter. However, these factors were only two of several cited by the ALJ and Judge Rapoport, including failure to attend scheduled psychotherapy sessions; neurological and consultive evaluations finding no abnormalities; and Plaintiff’s self-reported activities of daily living such as cleaning up, shopping, cooking, paying bills, maintaining a residence, and using public transportation. Thus, Judge Rapoport, taking all of these factors into consideration, correctly concluded that the evidence supported the ALJ’s finding that Plaintiff had the mental capacity to perform the jobs that the vocational expert identified. See Policy Interpretation Ruling Titles II and XVI, 1996 WL 374186, at \*4 (S.S.A. July 2, 1996) (“If an individual's statements about pain or other symptoms are not substantiated by the objective medical

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<sup>2</sup> As Plaintiff correctly notes, the ALJ’s statement that Plaintiff “has never worked” is technically incorrect. Ten years ago, Plaintiff did work as a supermarket checker for approximately one or two months. Tr. 52. This error is of no consequence, however, because it remains true that Plaintiff did not have a relevant work record under applicable regulations. See 20 C.F.R. § 416.965 (“We consider that your experience applies when it was done within the last 15 years. . . . If you . . . worked only off-and-on or for brief periods of time during the 15-year period, we generally consider that these do not apply.”).

evidence, the adjudicator must consider *all of the evidence in the case record*, including any statements by the individual and other persons concerning the individual's symptoms.”) (emphasis added). Accordingly, Plaintiff's objection is overruled.

**B. Whether the ALJ and Judge Rapoport Properly Weighed and Analyzed the Opinion of Dr. Saul**

Plaintiff objects to the ALJ's reliance on the testimony of a medical expert, Dr. Richard B. Saul. Dr. Saul testified as an impartial Medical Advisor to the ALJ; he did not treat or examine Plaintiff. Tr. 10. First, Plaintiff contends that Dr. Saul was not sufficiently familiar with the record, and makes much of the fact that Dr. Saul could not identify specific portions of the record without referring to the documents themselves. However, the hearing transcript reveals that Dr. Saul testified extensively about the facts contained in the medical record. Tr. 35-39. The fact that Dr. Saul needed to reference the voluminous physical record during counsel's questioning is of no significance.<sup>3</sup> Tr. 41-42.

Second, Plaintiff contends that Dr. Saul improperly ignored clear symptoms of Plaintiff's bipolar disorder as documented by a treating physician, Dr. Jerry Kear (specifically, flights of ideas, tangential and pressured speech), discounting them as typical of anyone undergoing a psychological evaluation. Tr. 43. Of course, a treating physician's opinion is entitled to “substantial and at times even controlling weight.” *Fagnoli v. Massanari*, 247 F.3d 34, 43 (3d Cir. 2001) (citing 20 C.F.R. § 404.1527(d)). Plaintiff argues that Dr. Saul's opinion is “absurd” because such symptoms are widely recognized as symptoms of bipolar disorder, and because Dr. Kear and Dr. Sidney Segal, who also evaluated Plaintiff, see Tr. 223, would not have mentioned these symptoms

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<sup>3</sup> Moreover, Dr. Saul testified at one point that his opinion was at least partly based on what was *missing* from the record. Tr. 42.

if they were of no significance.

A careful review of the ALJ's opinion reveals that the ALJ did not specifically address Dr. Saul's opinion regarding the significance of the aforementioned symptoms. See Tr. 10-11. Therefore, there is no support in the record for Plaintiff's contention that it was "clearly error" for the ALJ "to accept such groundless assertions as a true and valid basis for the rejection of Dr. Kear's opinion. . . ." In fact, the ALJ concluded that Dr. Kear's opinion "cannot be accorded significant weight" for other reasons, specifically because Dr. Kear reached inconsistent conclusions on two occasions based on the same information. Tr. 10. Accordingly, Plaintiff's objection is overruled.

Lastly, Plaintiff objects that Judge Rapoport relied on the opinion of a health provider who described Plaintiff's ability to perform work-related mental functioning as "fair." Plaintiff contends that a grade of "fair" is not consistent with acceptable functional levels of employment. While the Tenth Circuit has held that a rating of "fair" is evidence of disability, the Eighth Circuit has held that a "fair" rating places a claimant in "the balance between poor ability to function and greater ability to function," thus requiring the judge to determine whether a review of the record reveals that "the balance tips toward functional ability or toward disability." Cantrell v. Apfel, 231 F.3d 1104, 1107-08 (8th Cir. 2000); see Cruse v. United States Dep't of Health and Human Servs., 49 F.3d 614, 618 (10th Cir. 1995). The Court is satisfied that the balance of the evidence, as discussed in both the ALJ's written decision and in Judge Rapoport's R & R, tips the scales toward functional ability, and that the ALJ's decision was supported by substantial evidence. Accordingly, the Plaintiff's objection is overruled.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT  
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**CIVIL ACTION  
NO. 02-1008**

**ORDER**

**AND NOW**, this 15th day of July, 2003, upon careful consideration of Plaintiff's Motion for Summary Judgment [Doc. # 10], Defendant's Motion for Summary Judgment [Doc. # 11], Plaintiff's Reply Brief [Doc. # 13], the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport [Doc. # 16], and Plaintiff's Objections thereto [Doc. # 17], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED**:

1. The Report and Recommendation is **APPROVED** and **ADOPTED**;
2. Plaintiff's Objections are **OVERRULED**;
3. Plaintiff's Motion for Summary Judgment is **DENIED**;
4. Defendant's Motion for Summary Judgment is **GRANTED**;
5. The Clerk of Court is hereby directed to mark this case closed for administrative purposes.

It is so **ORDERED**.

**BY THE COURT:**

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**CYNTHIA M. RUFÉ, J.**