

herein. To summarize, the plaintiff filed an application for SSI on June 28, 1999, claiming that **he** was disabled due to a back disorder. Transcript of the Administrative Record ("Tr.") 30. That application was denied initially and upon reconsideration. Tr. 32-32, 38-41. The plaintiff filed a request for a hearing **before** an Administrative Law Judge ("ALJ"), which was conducted on July 13, 2000. On August 18, 2000, the ALJ issued an opinion in which he denied the plaintiff's claim for benefits, finding that because there were a number of **jobs** in the national economy that the plaintiff could perform, he was not under a disability for purposes of the Social Security Act. Tr. 23. The **Social Security Administration Appeals Council** denied the plaintiff's request for review of the ALJ's decision, making the ALJ's decision the final decision of the Commissioner. Tr. 4.

The plaintiff filed the instant complaint seeking review of the Commissioner's final decision. The plaintiff argues **that** the ALJ committed three errors which justify reversing the denial of benefits, or, in the alternative, remanding the case to the ALJ to rectify those errors. The plaintiff first asserts that the ALJ's analysis at step three of the five-step SSI evaluation process was insufficient, and is incapable of meaningful judicial review. The plaintiff **also** argues that the ALJ did not afford appropriate weight **to** the

opinions of the plaintiff's treating physician, Dr. Aczon, or, alternatively, that the ALJ **failed** to adequately explain the weight given to those opinions. Finally, the plaintiff argues that the ALJ improperly evaluated the plaintiff's credibility.

This Court will review **the** ALJ's decision to determine whether there is substantial evidence on the record to support the ALJ's decision. See 42 U.S.C. § 405(g); Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999) (citation omitted). Substantial evidence **has** been defined as "more than a mere scintilla", and requires "such relevant evidence as a reasonable mind might accept as adequate." Plummer, 186 f.3d at 427 (citation omitted).

I. Step Three Analysis

At step three of the five-step **SSI** evaluation process, the **ALJ** is to determine **whether** the claimant's impairment, which the ALJ has already found to be "severe", meets or equals criteria for a listed impairment or impairments in Appendix 1 of Subpart P of Part 404 of 20 C.F.R. If the impairment **meets** or **equals** the criteria of a medical listing, then a finding **of** disabled **is** directed. 20 C.F.R. § 416.920(d). "For a claimant **to** show **that** his impairment matches a listing, it must **meet** *all* of the specified medical criteria" that define a listed

impairment. Sullivan v. Zebley, 493 U.S. 521, 530 (1990); Rosetti v. Shalala, 12 F.3d 1216, 1218 n.5 (3d Cir. 1994). "For a claimant to qualify for benefits by showing that his unlisted impairment, or combination of impairments, is 'equivalent' to a listed impairment, he must present medical findings equal **in** severity to **all** the criteria for the one most similar listed impairment." Sullivan, 493 U.S. at 531.

Although "the burden is on the claimant to present medical findings that show his or her impairment matches a listing or is equal in severity to a listed impairment", the Third Circuit has placed the "responsibility on the ALJ to identify the relevant listed impairment(s)" because it is "the ALJ's duty to investigate the facts and develop the arguments both for and against granting benefits." Burnett v. Comm'r of Soc. Sec. Admin., 220 F.3d 112, 120 n.2 (3d Cir. 2000) (citations omitted).¹

The ALJ in this case held simply that "[n]o treating or examining physician has mentioned findings equivalent in severity to the criteria of any listed impairment." Tr. 16. The

¹ The Third Circuit has also instructed that it is not enough for the ALJ to simply **identify a medical listing and** to conclude summarily, without explanation, that the claimant's impairment does not meet or **equal** that medical listing. See Fargnoli v. Massanari, 247 F.3d 34, 40 n.4 (3d Cir. 2001).

plaintiff argues that this cursory explanation of the step three analysis was insufficient, and constituted error under the Third Circuit's holding in Burnett.

In Burnett, the claimant's **SSI** application was denied when the ALJ concluded, in similar summary fashion, that the claimant's impairment "failed to equal the level of severity of any disabling condition contained in Appendix 1, Subpart **P** of Social Security Regulations No.4." Burnett, 220 F.3d at **119**. On appeal, the District Court affirmed the Commissioner's denial of benefits. The Third Circuit reversed. The Court criticized the ALJ's cursory step three analysis, and held that because there was "no way to review the ALJ's hopelessly inadequate **step** three ruling", remand was appropriate for a "discussion of the evidence and an explanation *of* reasoning supporting **a** determination that [the claimant's] 'severe' impairment does not meet or **is** not equivalent to a listed impairment." Id. at 120.

The Burnett court instructed that because it **was** "within the realm of the ALJ's expertise to determine the closest applicable listed impairment, based on the medical evidence, **when** examining whether a claimant's impairments meet or **equal a** listed impairment", it was necessary for the ALJ on remand to identify **the listing** considered and to explain why the medical evidence did not support a finding of disability under the listing. Id.

The Court finds that Burnett is controlling here.' As in Burnett, the ALJ in this case failed to identify the relevant medical listing or to provide any analysis of the medical evidence as applied to any of the medical listings in the regulations. Although the ALJ did explore the medical evidence in the record in making the determination about the plaintiff's residual functional capacity,³ this discussion at no **point** contained any analysis of the evidence to explain why the plaintiff's severe impairment did not meet or equal a medical

² The Commissioner's efforts to distinguish Burnett are unpersuasive. The Commissioner argues that because the evidence before the ALJ here did "not create a colorable issue as to whether Plaintiff could be found disabled under the Listings", Burnett doesn't apply. Def.'s Br. at 7-8. However, there is no way for the Court to determine, on judicial review, whether the evidence created a colorable issue regarding the listings because the ALJ failed to identify the relevant listing, to analyze the evidence as applied to that listing, or to otherwise support the summary conclusion that the impairment did not meet or equal a medical listing. Moreover, the Third Circuit "requires the ALJ to set forth the reasons for his decision." Burnett, 220 F.3d at 119. The Commissioner's argument that the evidence presented no colorable issue as to the listings is a conclusion that the ALJ was required to support with a discussion of the relevant medical evidence. Nothing in Burnett counsels otherwise.

³ A determination of the claimant's residual functional capacity is necessary for steps four and five of the **SSI** evaluation process. At step four, the Commissioner must determine whether, given the claimant's residual functional capacity, the claimant can return to his past relevant **work**. 20 C.F.R. § 416.920(e). At step five, the **Commissioner** determines whether, in light of the claimant's residual functional capacity, the claimant can perform other work available in the economy. 20 C.F.R. § 416.920(f).

listing. In addition, because the relevant medical listing(s) were not identified by the ALJ, there is no way for the Court to determine if the ALJ's discussion of the medical evidence in determining the plaintiff's residual functional capacity supported the conclusion that the plaintiff's impairment did not meet **or** equal a medical listing.

The Third Circuit has explained that the chief reason why an administrative decision should be accompanied **by** a clear and satisfactory explication **of** the basis on which it rests is to assist a court in performing its statutory function of judicial review. Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981). This explication of the basis on which an administrative determination rests "helps to avoid judicial usurpation of administrative functions, assures more careful administrative consideration, and helps the parties plan their cases for judicial review." Id.

In this case, as in Burnett, the Court **is** unable to conduct a meaningful review of the ALJ's conclusion that the plaintiff's severe impairment **does** not meet or equal a medical listing. It **is** not this Court's role to review the record, to **identify** the relevant **medical** listing, and to then weigh the evidence in order to determine if the plaintiff's impairment meets or equals the relevant medical listing. These tasks are

within the ALJ's area of expertise, and are for the ALJ in the first instance. Burnett, 220 F.3d 120 n.2.

Because the Court has no way to conduct meaningful judicial review of the ALJ's step three conclusion, this case will be remanded for a discussion of the medical evidence as applied to the relevant medical listings. The Commissioner **shall** also provide an explanation of the reasoning supporting the determination that the plaintiff's severe impairment does or does not meet or is or is not equivalent to a **listed** medical impairment. See Burnett, 220 F.3d at 120.

II. Consideration of Treating Physician Evidence

In the course of examining the medical evidence in order to determine the plaintiff's residual functional capacity, the **ALJ** discounted the medical opinion of the plaintiff's treating physician, Dr. Aczon. The ALJ referred explicitly to a January 3, 2000 letter written **by** Dr. Aczon which concluded that the plaintiff was "unable to work" due to his medical condition and pain. Tr. 17 & 175. This opinion was rejected **by the** ALJ for three reasons: (1) because an opinion that the claimant is unable to **work** is an issue reserved to the Commissioner; (2) the opinion was "not supported by the medical evidence of record"; and (3) the opinion was undercut by the claimant's activities as

admitted by the claimant at the hearing. Tr. 17. The plaintiff **argues** that the ALJ failed to **afford** proper weight **to** the opinion of Dr. Aczon, and failed to consider a Medical Source Statement from Dr. Aczon that was submitted in support of the plaintiff's claim for benefits.

"In considering a claim for disability benefits, greater weight should 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). See Morales v. Apfel, 225 F.3d 310, 317 (3d Cir. 2000) ("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 a continuing observation **of** the patient's condition over a prolonged period of time.'"') (citation omitted). However, a treating physician's statement that a claimant is disabled or unable to work "is not dispositive of the issue." Adorno, 40 F.3d at 47-48.

In addition, controlling weight need not be given **to** the treating physician's opinion if there is contrary medical evidence in the record. If 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." *Morales*, 225 F.3d at 317 (citation omitted). Although the ALJ may accept some parts of the medical evidence and reject other parts, the ALJ must "provide some explanation for a rejection of probative evidence which would suggest a contrary disposition to the one reached.'" *Adorne*, 40 F.3d at 48.

In this case, although there were several sources of medical evidence from Dr. Aczon in the record, the ALJ **referred** explicitly only to the January 3, 2000 letter from Dr. Aczon indicating that the **plaintiff was** "unable to seek gainful employment" due to chronic low back pain. Tr. 17 & 175. The ALJ correctly noted that Dr. Aczon's conclusion about the plaintiff's inability to work was not binding on the ALJ, **because** the ultimate conclusion regarding the ability to work **is** reserved **for** the Commissioner. See Adorno, 40 F.3d at 47-48; 20 C.F.R. § 416.927(d)(3). The ALJ failed, however, to explain why Dr. Aczon's opinion was not supported by the medical evidence of record or how *it* was contradicted by the plaintiff's testimony at the hearing.

The ALJ did refer to much of the medical evidence in the record. He summarized the medical reports of **Drs. Alemo and Alavi**, **and recited the findings** of the plaintiff's **residual**

functional capacity made by state medical examiners.⁴ Tr. 17-19. He also summarized the testimony of the plaintiff. Tr. 20. In addition, in the Findings portion of his opinion, the ALJ indicates that the medical **reports** were "**considered** under the standards set forth in the Regulations (20 CFR **416.927**, 20 CFR 416.928) and Social Security Rulings 96-2p and 96-5p." Tr. 22. At no point, however, does the ALJ's opinion explain the relative weight given to the medical opinions recited, or explain how he applied the standards as outlined **by** the regulations and rulings for weighing medical evidence.

For example, the regulations for evaluating **opinion** evidence indicate that the following factors will be considered in deciding **what** weight to be given to any medical opinion: the examining relationship between the doctor and the claimant; the length, nature and extent of the treatment relationship; the extent to which the medical source presents relevant evidence in support of an opinion; the extent to which the opinion is consistent with the record as a whole; and, whether the medical issues are related to the medical source's area of specialty.

⁴ **The** ALJ also recited medical evidence relating to the plaintiff's mental state. Tr. 19-20. However, as the plaintiff has **made it clear that** his claim for benefits **is based** solely on his **back** impairment, the Court need not consider the ALJ's treatment of the evidence relating to the plaintiff's mental state.

See 20 C.F.R. §416.927(d). In addition, the regulations **provide** that the Social Security Administration will "always give good reasons in our notice of determination or decision for the weight we give [the] treating source's opinion." Id. at § 416.927(d) (2); See 20 C.F.R. § 404.1527(f) (2) (ii) (noting that the ALJ must explain in his decision the weight given to the opinions of treating sources and to other sources of medical opinions).

In presenting the medical evidence in his decision, the ALJ did not explicitly apply these factors to determine what weight to give to the various medical evidence. Nor **is** the Court able to determine from his decision whether and to what extent these factors were applied. Indeed, because there is no explanation of what weight was afforded to the medical evidence, it is difficult for the Court to review whether **there is** substantial evidence in the record supporting the ALJ's treatment of the medical evidence or the ALJ's conclusion that the opinion of Dr. Aczon was to be discounted.

Particularly troubling **is** the fact that **the** ALJ never once referred to Dr. Aczon's Medical Source Statement, dated July 10, 2000. Tr. 184-85. This Statement contained **a** medical **opinion of the plaintiff's treating physician** regarding the plaintiff's ability to perform certain work-related physical

activities - information directly relevant to the determination of the plaintiff's residual functional capacity. The Statement indicates that, in Dr. Aczon's opinion, the plaintiff could lift 1-3 pounds occasionally, could stand and walk for 1-2 hours, and could sit for two hours. Tr. 184. These conclusions conflict with the other medical opinions relied on by the ALJ, and with the ALJ's final determination regarding the plaintiff's residual functional capacity. Tr. 150 (Dr. Alvai's Medical Source Statement indicating that the plaintiff could lift 25 pounds occasionally and had no limitation on sitting); Tr. 21 (ALJ concluding that the "medical evidence **of** record fails to document that the claimant can only sit 2 hours in an 8 hour day and 1 to 2 **hours** standing and walking").

As Medical Source Statements constitute medical opinion evidence, an adjudicator "must consider them" together with all other relevant medical evidence in assessing an individual's residual functional capacity. Social Security Ruling ("SSR") 96-5p, 1996 WL 374183 (S.S.A.), at *5 (July 2, 1996). In addition, Medical Source Statements must be given weight in accordance with the factors outlined above regarding medical opinion testimony. Id. The failure **of** the ALJ to mention Dr. **Aczon's** Medical Source Statement makes it impossible for this Court to determine what

weight **it** was afforded, or indeed, if it was considered at all.⁵ In the absence of an explanation regarding what consideration and weight was afforded to Dr. Aczon's Medical Source Statement, the Court "cannot tell if significant probative evidence was not credited or simply ignored." Burnett, 220 F.3d at 121 (citations omitted).

In addition, although the ALJ indicated that he was discounting the opinion of Dr. Aczon because it **was** "undercut by the claimant's activities" as 'admitted by the claimant at the hearing", the ALJ does not discuss which admissions by the plaintiff undermined the opinion of Dr. Aczon.⁶ Without **this**

⁵ The Court notes that it seems particularly important to **consider giving** substantial weight to Dr. Aczon's Medical Source Statement because when **this** statement was completed on July 10, 2000, Dr. Aczon had the benefit of access to the medical reports of Drs. Buck and Alemo, as well as the results of recent **x-ray** and MRI tests done in March of 2000. See Tr. 179 (Alemo report **dated March 23, 2000**) & 182 (Buck report **dated April 6, 2000**). Neither of these reports nor the recent x-ray or MRI tests were available to Dr. Alavi when he completed his Medical Source Statement, upon which the ALJ relied, in December of 1999. Tr. 146-151.

⁶ In fact, a review of the transcript reveals that the plaintiff's testimony may well be consistent with the medical opinion of Dr. Aczon. The only "admission" that plainly contradicts Dr. Aczon's opinions as outlined in the Medical Source Statement is the plaintiff's statement that he can lift up to 15 or 20 pounds. Tr. 217. However, it is unclear whether this statement, or some other admission, is the **basis** for **the** ALJ's conclusion that the plaintiff's testimony **undercuts Dr.** Aczon's medical opinion. Further, after reviewing the transcript of the plaintiff's testimony, the Court **is** concerned with the
(continued..)

analysis, it is difficult for this Court sitting on appeal to determine whether or not the ALJ's conclusions regarding the medical evidence properly considered the relevant factors and were otherwise supported by substantial evidence. The ALJ has simply failed to "provide some explanation for a rejection of probative evidence which would suggest a contrary disposition to the one reached." Adorno, 40 F.3d at 48.

Because the Court cannot determine whether the ALJ's treatment of the medical opinions of the plaintiff's treating physician was supported by substantial evidence, the Court must remand this issue to the Commissioner. On remand, the Commissioner shall expressly consider all of the medical evidence, including the Medical Source Statement, submitted by the plaintiff's treating physician. In evaluating this evidence, the Commissioner shall determine and explain, in light of the relevant factors outlined in the regulations and rulings, what

(...continued)

ALJ's conclusion that the plaintiff's reports of pain and incapacity were undercut by the fact that the plaintiff was taking only Tylenol and Motrin as needed. Tr. 20. Given the fact that, as recognized by the ALJ, the plaintiff was not prescribed narcotic pain medication because he is a former substance abuser, it does not seem to logically follow that **failing to take such medication undercuts his** complaints of **pain** and incapacity. This testimony regarding the plaintiff's pain and his need to spend time in bed during the day does not appear contradict the medical opinion evidence submitted **by** Dr. Aczon.

weight **is** to be given to each piece of medical evidence considered.

III. The Plaintiff's Credibility

In general, an ALJ "must give great weight **to** a claimant's subjective testimony of the inability to perform even light **or** sedentary work when this testimony is supported by competent medical evidence." ~~Schaudeck v. Comm'r of Soc. Sec. Admin.~~, 181 F.3d 429, 433 (3d Cir. 1999). **An ALJ** can, however, "reject such claims if he does not find them credible." Id. In assessing the credibility of a claimant, the ALJ should consider:

1. The individual's daily activities;
2. The location, duration, frequency, and intensity **of** the individual's pain or other symptoms;
3. Factors that precipitate and aggravate *the* symptoms;
4. The type, dosage, effectiveness, and side effects of any medication **the** individual takes or **has** taken to alleviate pain or other symptoms;
5. Treatment, other than medication, the individual receives or has received for relief of pain or other symptoms;
6. **Any** measures other than treatment the individual uses or has used to relieve pain or other symptoms; and,
7. Any other factors concerning the individuals functional limitations and restrictions due to pain or other Symptoms.

SSR 96-7p, 1996 WL 374186 (S.S.A.), at *3 (July 2, 1996).

In **this case**, the ALJ found that the plaintiff's "assertions concerning his impairments and their impact on his

ability to work are not entirely credible in light of the claimant's own description **of** his activities and the objective medical evidence.,, Tr. 22. **The** plaintiff argues that the **ALJ** did not properly evaluate the plaintiff's credibility in reaching this conclusion.

A review of the ALJ's opinion reveals, however, that in discussing the plaintiff's testimony, the ALJ considered the plaintiff's's daily activities, the nature and frequency of his pain, factors that aggravate the condition, the type of medicine used, and his course of treatment. See Tr. 20. These considerations comport with the factors outlined above. For that reason, the Court finds that the ALJ's conclusion regarding the credibility of the plaintiff **took** into account the appropriate factors and is *supported* by substantial evidence in the record.

An appropriate Order follows.

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

MARTIN HEMPHILL,
Plaintiff

CIVIL ACTION

v.

LARRY G. MASSANARI, Acting
Commissioner of Social
Security Administration,
Defendant

No. 01-1064

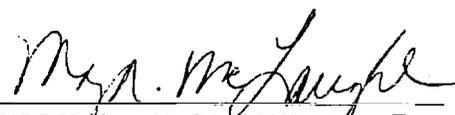
ORDER

AND NOW, this 4th day of April, 2002, upon consideration of the plaintiff's Motion for Summary Judgment (Docket #7), the defendant's Motion for Summary Judgment (Docket #10), the plaintiff's Reply brief in support of his motion for summary judgment, the Report and Recommendation filed by Chief Magistrate Judge James R. Melinson, and the Objections filed by the plaintiff to the Report and Recommendation, **and** after a careful review of the administrative record, **IS** HEREBY ORDERED that:

The Report and Recommendation is DISAPPROVED. The defendant's motion for summary judgement is DENIED, and the plaintiff's motion for summary judgment is DENIED. The plaintiff's request for Remand to the Commissioner of the Social

Security Administration is GRANTED. The case shall be remanded for further administrative proceedings consistent with and for the reasons given in a Memorandum **of** today's date.

BY THE COURT:


MARY A. McLAUGHLIN, J.

reed 4/5/02

Peter Pennola, Esq.
Nicholas Cerullo, Esq.
Rafael Melendez, Esq.

Judge Robinson