

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

ROBERT MCGONIGAL	:	CIVIL ACTION
	:	
v.	:	NO. 03-6530
	:	
JO ANNE BARNHART,	:	
Commissioner of Social Security	:	
Administration	:	

Diamond, J.

October 22, 2004

MEMORANDUM

Plaintiff Robert McGonigal challenges the denial of his claim for Disability Insurance Benefits and Supplemental Security Income under Titles II and XVI of the Social Security Act. The parties' cross motions for summary judgment were referred to Magistrate Judge Thomas J. Rueter, who recommended that I grant the Commissioner's Motion and deny Plaintiff's Motion. Plaintiff has objected to Judge Reuter's Report and Recommendation. I overrule those Objections and adopt the Report and Recommendation.

FACTUAL AND PROCEDURAL HISTORY

Mr. McGonigal is 40 years old, graduated from high school, and attended college for two years. He has a "semi-skilled and skilled work background." (R. 27.) He last worked as a telemarketer in 2000. (R. 22, 38.)

On May 7, 2001, Mr. McGonigal filed an application for DIB and SSI, alleging that he has been disabled since January 1, 2000, due to depressive disorder, obstructive pulmonary

disease, obesity, and left hip bursitis. (R. 17, 18.) On January 28, 2000, the SSA denied his application. (R. 59- 62.)

At Mr. McGonigal's request, on February 3, 2003, Administrative Law Judge Paula Garrety held a hearing at which Lee Levin, a Vocational Expert, and Plaintiff himself testified. (R. 17-30.) On February 21, 2003, the ALJ denied the application, finding that although Plaintiff had depressive disorder, obstructive pulmonary disease, obesity, and left hip bursitis, he could perform simple, repetitive, light work that did not require prolonged standing or walking. (R. 27-29.) The ALJ thus concluded that Mr. McGonigal was not disabled as defined by the Act. (R. 28-30.) The Appeals Council determined that there was no basis for granting review of the ALJ's decision, which, thus, became final pursuant to 42 U.S.C. § 405(g). (R. 6-8.)

After Plaintiff filed suit in this Court, both he and the Commissioner filed cross motions for summary judgment. On September 8, 2004, Judge Rueter recommended that I grant summary judgment in the Commissioner's favor. On September 22, 2004, Mr. McGonigal filed his Objections to Judge Rueter's Report and Recommendation.

STANDARD OF REVIEW

In reviewing the ALJ's decision, a District Court must determine whether the ALJ's findings of fact are supported by substantial evidence. See Montes v. Apfel, No. 99-2377, 2000 U.S. Dist. LEXIS 4030, *2 (E.D. Pa. Mar. 27, 2000) (citing Richardson v. Perales, 402 U.S. 389, 401, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1972)). The definition of "substantial evidence" is extremely well-established: "that which would be sufficient to allow a reasonable fact finder to reach the same conclusion; while it must exceed a scintilla, it need not reach a preponderance of

the evidence." Id. at *2; see also Jesurum v. Sec'y of U.S. Dept. Of Health and Human Services, 48 F.3d 114, 117 (3d Cir. 1995). It is the responsibility of the ALJ, not the District Court, to assess the credibility of witnesses and resolve conflicts in the evidence. See Perry v. Barnhart, No. 02-1289, 2003 U.S. Dist. LEXIS 24663, *18-19 (E.D. Pa. Sep. 26, 2003); see also Perez v. Barnhart, No. 02-5684, 2003 U.S. Dist. LEXIS 9803, *4 (E.D. Pa. May 27, 2003). If the ALJ's findings are supported by substantial evidence, then the District Court is bound by them even if the Court would have found different facts. See Fagnoli v. Massanari, 247 F.3d 34, 38 (3d Cir. 2001) (citing Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999)). The District Court may not "conduct *de novo* review of the Commissioner's decision or re-weigh the evidence of record." Palmer v. Apfel, 995 F. Supp. 549, 552 (E.D. Pa. 1998); see also Montes v. Apfel, No. 99-2377, 2000 U.S. Dist. LEXIS 4030, *2 (E.D. Pa. Mar. 27, 2000) (the District Court is obligated to give the Commissioner's decision great deference).

The extent of District Court review of a Magistrate Judge's Report is committed to the Court's discretion. See Jozefick v. Shalala, 854 F. Supp. 342, 347 (M.D. Pa., 1994); see also Thomas v. Arn, 474 U.S. 140, 154 (1985); Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984); Heiser v. Ryan, 813 F. Supp. 388, 391 (W.D. Pa. 1993), aff'd, 15 F.3d 299 (3d Cir. 1994). The District Court must review *de novo* those portions of the Report to which objection is made. 28 U.S.C. § 636 (b)(1)(c) (2004); see generally Goney v. Clark, 749 F.2d 5, 7 (3d Cir. 1984). The Court may "accept, reject or modify, in whole or in part, the magistrate's findings or recommendations." Brophy v. Halter, 153 F. Supp. 2d 667, 669 (E.D. Pa. 2001).

DISCUSSION

Mr. McGonigal objects to the Report and Recommendation on six grounds. He argues that the ALJ erred in: (1) rejecting the opinions of Mr. McGonigal's treating psychologist, Dr. Deeney, and treating physician, Dr. Moreno; (2) finding that Mr. McGonigal's cervical spine impairment was not severe; (3) ignoring the findings of a state agency psychologist; (4) failing to include the mental limitations noted by Dr. Deeney in the hypothetical question presented to the vocational expert; (5) basing Mr. McGonigal's credibility evaluation solely on his daily activities; and (6) concluding that Mr. McGonigal could perform his previous work.

Opinions of Drs. Deeney and Moreno

Mr. McGonigal argues that the ALJ improperly rejected the medical source statement of Mr. McGonigal's treating psychiatrist, Dr. Deeney, and the opinion of his treating physician, Dr. Moreno. Plaintiff is correct that generally "a court considering a claim for disability benefits must give greater weight to the findings of a treating physician than to the findings of a physician who has examined the claimant only once or not at all." Mason v. Shalala, 994 F.2d 1058, 1067 (3d Cir. 1993). The Court is not obligated to accept those findings, however, unless they are "well supported by medically acceptable clinical and laboratory techniques and [are] not inconsistent with other substantial evidence [in the record]." Mason, 994 F.2d at 1067; see also Plummer v. Apfel, 186 F.3d 422, 429 (3d Cir. 1999); Newhouse v. Heckler, 753 F.2d 283, 286 (3d Cir. 1985). The treating physician's opinion as to disability is not dispositive. See Adorno v. Shalala, 40 F.3d 43, 47-48. Rather, the Commissioner reserves the ability to determine disability under the Act. 20 C.F.R. §§ 404.1527(e)(1), 416.927(e)(1).

Dr. Deeney

In his medical source statement, Dr. Deeney described what he believed was Mr. McGonigal's inability to work. (R. 355-56.) The ALJ did not give this opinion decisive weight because it was, at points, inconsistent with the assessment of Lori Rodriguez, a nurse-therapist who also assessed Plaintiff. Although Mr. McGonigal contends that these inconsistencies were "of no consequence," the ALJ found that they were, at points, glaring. (R. 25.) For example, the ALJ noted that Deeney and Rodriguez disagreed as to Mr. McGonigal's ability to get along with others, the frequency and severity of his panic attacks, and his potential to decompensate in the future. (R. 25, 355-56, 357-58.) As significant, the ALJ noted inconsistencies between Deeney's and Rodriguez's opinions and the opinions of other physicians and therapists (such as Dr. Chiampi) who also examined Mr. McGonigal. (R. 25.) Considering all these inconsistencies, the ALJ found that *neither* Deeney nor Rodriguez was credible. (Id.) Accordingly, the ALJ refused to give their findings controlling weight. (Id.) Plainly, this was permissible. See S.S.R. 96-2p, 111 (Supp. 2003) (ALJ may disregard a therapist's assessment if it contradicts itself or is inconsistent with the record); see also Jones v. Sullivan, 954 F.2d 125, 129 (3d Cir. 1991); Adorno v. Shalala, 40 F.3d 43, 48 (3d Cir. 1994); Harris v. Barnhart, No. 03-0213, 2004 U.S. Dist. LEXIS 12927 (E.D. Pa. Jul. 7, 2004).

Mr. McGonigal also argues that Dr. Deeney's assessment would have carried greater weight if the ALJ had considered the assessment in conjunction with the results of Plaintiff's Global Assessment of Functioning Test, which ostensibly supported Dr. Deeney's opinion that Plaintiff was unable to work. Mr. McGonigal argues that a GAF score of "50" necessarily means he is unable to work. Yet, as the ALJ found, "a score of 50 . . . indicates that [Plaintiff's]

depression was not of such severity that it affected his ability to function to a significant or substantial degree” (R. 25.) See Diagnostic and Statistical Manual of Mental Disorders 32, 34 (4th ed. 1994) (a score in the “50-61” range indicates “moderate symptoms” or “moderate difficulty” in social, occupational, or school functioning); see also Lozada v. Barnhart, 331 F. Supp. 2d 325 (E.D. Pa. 2004) (citing the Diagnostic and Statistical Manual of Mental Disorders). As significant, the ALJ found that the “the majority of progress notes [from his other treating physicians] indicated that [Plaintiff] did well with treatment, including medication, and that his symptoms improved.” (R. 25.) For example, Dr. Chiampi (another treating physician), concluded that Mr. McGonigal had responded well to medication and experienced only mild restrictions on daily living activities. (R. 317-19).

Plaintiff asks me to reweigh all this medical and vocational evidence, and then credit only that evidence supporting the claim of disability. That is precisely what I am *not* permitted to do. See Palmer, 995 F. Supp. at 552. The ALJ refused to give Dr. Deeney’s assessment dispositive weight, and instead credited other evidence showing that Plaintiff is not disabled. I find that substantial evidence supports the ALJ’s findings.

Dr. Moreno

Mr. McGonigal also argues that the ALJ improperly rejected the opinion of Mr. McGonigal’s treating physician, Dr. Moreno, that Mr. McGonigal is substantially limited in his ability to move, stand, walk, or sit. (R. 273-74.) A treating physician’s opinion is due greater weight only if he supports his opinions with explanations. See Newhouse, 753 F.2d at 286 (“[The ALJ] may afford a treating physician’s opinion more or less weight depending upon the

extent to which supporting explanations are provided.”). Because Dr. Moreno failed to provide proper support for his opinions, the ALJ afforded his opinion less weight. See Newhouse, 753 F.2d at 286.

After examining Dr. Moreno’s opinions, the ALJ noted several substantial inconsistencies. (R. 19.) On January 8, 2001, Dr. Moreno reported that Mr. McGonigal’s extremities and neurological functions were normal. (R. 19, 285-86.) On February 27, 2002, he assessed Mr. McGonigal’s function as “less than sedentary” in part due to back pain. (R. 19, 273-75.) Yet, Dr. Moreno never mentioned lower back pain in his previous reports. (R. 19.) Rather, it was not until March 6, 2002, that Dr. Moreno first noted Plaintiff complaining of lower back pain. (R. 19, 378.) The complaint was made only twice more, once in June and once in July 2002. (R. 380, 381.) The ALJ accordingly found that Dr. Moreno's assessment of Plaintiff was not credible. (R. 19.) See 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2); see also Newhouse, 753 F.2d at 286 (a treating physician’s opinion is entitled to controlling weight only if it is supported by medically acceptable techniques, by explanation, and by the record). I find that substantial evidence supports the ALJ’s findings.

Cervical Spine Impairment

Mr. McGonigal’s next contends that his spine impairment was severe, and objects to the ALJ’s contrary finding. Once again, the ALJ’s finding is amply supported. (R. 19.) The ALJ relied on: (1) Mr. McGonigal’s June 18, 1999 and July 14, 2000 spinal x-rays, both of which showed only slight narrowing; (2) the physicians’ reports, which showed that Plaintiff suffered no sensory change and failed to show impairment; (3) Dr. Moreno’s January 8, 2001 report,

which showed that Mr. McGonigal's extremities and neurological examination were normal; (4) Dr. Kramer's September 25, 2001 report, which showed that Mr. McGonigal did not need a cane and did not suffer from numbness, knife pain, or lower leg pain; (5) Dr. Buschiazzo's December 21, 2001 report, which revealed no cervical spine deformities or limitations, and concluded that Plaintiff had normal range of motion and could walk within normal limits; and (6) Mr. McGonigal's December 18, 2002 electrodiagnostic study, which showed that despite some signs of degenerative disc disease, his condition did not result in central canal, lateral recess, or neural foraminal stenosis. (R. 19-21.) I find that substantial evidence supports the ALJ's finding that Mr. McGonigal's cervical spine impairment was not severe.

Mental Impairment

The ALJ found that Mr. McGonigal suffered "mild to moderate" limitations in social functioning and concentration, persistence, or pace. Plaintiff objects that this finding is inconsistent with the state agency assessment of "moderate" limitations in these areas. In fact, the ALJ considered both state agency assessments of Mr. McGonigal, concluding that both were "well supported by the medical evidence of record and . . . entitled to considerable weight." (R. 26.) In the ALJ's view, those assessments were consistent with her finding of "mild to moderate" mental impairment. The assessments indicated that Mr. McGonigal has only "mild" restrictions of activities of daily living, including taking care of personal needs, paying bills, and housework. (Id.) The assessments also showed that Mr. McGonigal has only "mild to moderate" difficulties in maintaining social function, and that although he "sometimes has difficulty going out in public" or "getting along with family [and] friends," he gets along with authority, is able to

live with his roommate and her daughter, and has been helped by his medication and treatment. (Id.) Significantly, the ALJ found that the detailed psychiatric treatment notes from Plaintiff's treating physicians "indicated that [he] did well with treatment, including medication, and that his symptoms improved." (R. 25, 26.)

Based on the additional medical information in the record and Mr. McGonigal's improvement through treatment and medication, the ALJ found that Mr. McGonigal's limitations in social functioning and maintaining concentration, persistence, or pace were "mild to moderate" rather than "moderate." (R. 26). I find that substantial evidence supports that finding.

Hypothetical Question to Vocational Expert

Mr. McGonigal next objects that the ALJ improperly failed to include in her hypothetical question to the Vocational Expert the mental limitations indicated by Dr. Deeney in his assessment. The ALJ explained, however, that because she previously found that Dr. Deeney's assessment of Plaintiff was both incredible and unsupported, she was not required to include it in the hypothetical question. See Plummer, 186 F.3d at 431 (the ALJ needs to include only those limitations that she finds are supported by the medical record); see also Chrupcala v. Hecker, 829 F. 3d 1269, 1276 (3d Cir. 1987) (same) (R. 25, 313, 317-19, 331, 333, 355-358.) In these circumstances, the ALJ properly concluded included in her hypothetical question only those limitations that were supported by medical evidence.

Plaintiff's Credibility

The ALJ did not believe Mr. McGonigal's testimony regarding his impairments and their impact on his ability to work. (R. 22.) Mr. McGonigal argues that this credibility analysis is “inadequate” because it does not sufficiently describe the other factors on which the ALJ based her credibility determination besides Plaintiff's description of his daily activities.

In fact, the record confirms that the ALJ considered extensive evidence contradicting Plaintiff's testimony, including reports of treating and examining practitioners and Mr. McGonigal's medical history. (R 22-23) The ALJ then determined that the “objective medical evidence and clinical findings of record do not show an impairment or impairments with the degree of severity likely to produce pain and other symptoms to a disabling degree as required under the definition of disability contained in the Social Security Act and implementing regulations.” (R. 22.) Thus, it is clear that the ALJ considered many other factors besides Plaintiff's description of his daily activities. (R. 19-26.)

A claimant's testimony regarding subjective complaints is generally entitled to great weight, *only* if it is supported by credible evidence. See Burns v. Barnhart, 312 F.2d 113, 129 (3d Cir. 2002). It is within the ALJ's discretion to evaluate the credibility of the claimant. See Horn v. Schweiker, 717 F.2d 871, 873 (3d Cir. 1983). Having evaluated considerable evidence, the ALJ here determined that the credible evidence contradicted Mr. McGonigal's testimony, and that his ailments were not as debilitating as he described. This finding was well within the ALJ's province and, so, cannot be disturbed by me.

Ability to Perform Past Relevant Work

The ALJ concluded that Mr. McGonigal retained the "Residual Functioning Capacity" to perform "the exertional demands of a range of light work in a clean environment consisting of simple, repetitive, one to two step tasks and requiring no prolonged standing or walking." (R. 29.) Accordingly, she found that Plaintiff retained the ability to perform his previous work. (Id.) Mr. McGonigal argues that this conclusion was wrong because his previous work required the performance of certain activities that are precluded by his RFC analysis. Magistrate Judge Rueter concluded that even "[a]ssuming [P]laintiff is correct, that his RFC precludes the performance of past work, he nonetheless is not disabled under the Act because the VE identified other work he could perform in the economy consistent with his RFC." (R. 28, 30; Report and Recommendation at 29-30.) Thus, "[a]ny error by the ALJ at step four of the evaluation process [-- determining whether Plaintiff could perform his previous work -- was] harmless." (Report and Recommendation at 29-30.)

Mr. McGonigal now objects that the "harmless error doctrine" is inapplicable to Social Security matters, and that even if it does apply, that the error was not harmless. First, Plaintiff is incorrect; the Third Circuit *has* applied the "harmless error doctrine" to Social Security disputes concerning sequential evaluations. See Matullo v. Bowen, 926 F.2d 240 (3d Cir. 1990); see also Gray v. Apfel, CIV. No 0-1254, 2000 U.S. Dist. LEXIS 14532 (E.D. Pa. 2000). Second, although Mr. McGonigal is correct that at step five the Commissioner was obligated to show that Plaintiff was capable of performing other work, the Commissioner met her burden here by establishing that Plaintiff "could perform the jobs of bench work assembly, inspecting and sorting, and data entry." (R. 28, 30.) See Jones v. Barnhart, 364 F.3d 501, 502 (3d Cir. 2004).

Accordingly, I agree with Judge Rueter: there is substantial evidence supporting the finding that Mr. McGonigal is able to perform relevant work in the economy consistent with his RFC.

Conclusion

After reviewing Mr. McGonigal's Objections *de novo*, I conclude that the ALJ's legal rulings are correct and her factual findings are supported by substantial evidence. Accordingly, I adopt Judge Rueter's Report and Recommendation. An appropriate order follows.

BY THE COURT.

Date

Paul S. Diamond, J.

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

ROBERT MCGONIGAL	:	CIVIL ACTION
	:	
v.	:	NO. 03-6530
	:	
JO ANNE BARNHART,	:	
Commissioner of Social Security	:	
Administration	:	

ORDER

AND NOW, this 22nd day of October, 2004, upon consideration of the Cross Motions for Summary Judgment, the Report and Recommendation of Magistrate Judge Thomas J. Rueter, and Plaintiff's Objections to the Report and Recommendation, it is **ORDERED** that:

1. Plaintiff's Objections to the Report and Recommendation are **OVERRULED**;
2. The Report and Recommendation is **APPROVED** and **ADOPTED**;
3. Plaintiff's Motion for Summary Judgment is **DENIED**; and
4. Defendant's Motion for Summary Judgment is **GRANTED**.

The Clerk of Court shall close this matter for statistical purposes.

BY THE COURT:

Paul S. Diamond, J.