

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

JULIO N. MILLET	:	CIVIL ACTION
	:	
	:	
v.	:	NO: 03-5634
	:	
JO ANNE B. BARNHART,	:	
Commissioner of the Social	:	
Security Administration	:	

MEMORANDUM AND ORDER

AND NOW, this 1st day of November, 2004, upon consideration of the cross-motions for summary judgment (Doc. Nos. 8 and 12) the Court makes the following findings and conclusions:

- A. On July 31, 2001, Julio N. Millet, Sr. (“Millet”) applied for both disability insurance benefits (“DIB”) under Title II of the Social Security Act, (“Act”) 42 U.S.C. §§ 401-433 and for supplemental security income (“SSI”) under Title XVI of the Act, 42 U.S.C. §§ 1381-1383f. (Tr. 141-147, 351-352). Throughout the administrative process, including a September 11, 2002, hearing before an administrative law judge (“ALJ”), Millet’s claims were denied. (Tr. 12-14, 15-26, 27-31, 32-89, 90-91, 98-101, 346-350). The Appeals Council affirmed the ALJ’s decision on September 26, 2003. (Tr. 5-8). Pursuant to 42 U.S.C. § 405(g), Millet initiated the instant action for judicial review.
- B. The ALJ found that Millet has “status post cataract surgery with lens implant, bilateral (with good correction), mild degenerative joint disease and degenerative disc disease, headaches (has had for at least 7 years), and chronic pain syndrome, impairments that are severe.” (Tr. 17 ¶ 9). The ALJ concluded that none of Millet’s impairments considered singly or in combination met or equalled any of the listed impairments. (*Id.*, Tr. 24 Finding No. 4); 20 C.F.R. Appendix 1 to Subpart P of Part 404. The ALJ further concluded that Millet could not perform his past relevant work, but was not disabled, and had the Residual Functional Capacity (“RFC”) to perform a significant range of light work. (Tr. 15 ¶ 3, 22 ¶¶ 26-28, 23 ¶ 32, 24 ¶ 37, 24-25 Finding Nos. 1, 7, 8, 12, 14). With the testimony of a Vocational Expert (“VE”), the ALJ further concluded that Millet was able to make an adjustment to work that exists in significant numbers in the national economy including a cleaner. (Tr. 23-24 ¶ 35, 25 Finding No. 13).
- C. The role of this Court on judicial review is to determine whether there is substantial evidence in the record to support the Commissioner’s final decision. *Doak v. Heckler*, 790 F.2d 26, 28 (3d Cir. 1986); *Newhouse v. Heckler*, 753 F.2d 283, 285 (3d Cir. 1985)

(citing 42 U.S.C. § 405(g)). The factual findings of the Commissioner must be accepted as conclusive, provided that they are supported by substantial evidence. Richarson v. Perales, 402 U.S. 389, 390 (1971) (citing 42 U.S.C. 405(g)). Substantial evidence has been defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Id. at 401 (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); see also Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). It is more than a mere scintilla but may be less than a preponderance. See Brown v. Bowen, 854 F.2d 1211, 1213 (3d Cir. 1988). If the ALJ’s conclusion is supported by substantial evidence, this Court may not set aside the Commissioner’s decision even if it would have decided the factual inquiry differently. Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999); see 42 U.S.C. § 405(g).

D. Millet alleges that the ALJ: (1) failed to consider his impairments in combination; (2) erred in finding him to be not credible; and (3) improperly dismissed medical evidence that supported the existence of a sleep disorder and several mental impairments. After a thorough review and analysis of the record, I agree with Millet’s contention that the ALJ erred in dismissing medical evidence of mental impairments, but do not agree that the ALJ erred in dismissing evidence of sleep apnea.

1. Millet argues that the ALJ improperly dismissed medical evidence that he suffers from a sleep disorder and several mental impairments. More specifically, Millet argues that these impairments are medically documented in the reports of consultative examiner, Donald P. Masey, Psy. D. (Tr. 235-244) and treating physician, Barry Penchansky, M.D. (279-293, 296-307, 313-327, 328-342, 345). The ALJ found Millet’s alleged attention deficit disorder, learning disability, anxiety, sleep apnea, and personality disorder not to be medically determinable impairments.¹ (Tr. 17 ¶ 10).

2. I agree that the ALJ improperly undervalued Dr. Masey’s opinion, however, the ALJ’s rejection of Dr. Penchansky was appropriate. It is also clear that other evidence exists in the record that the ALJ did not consider. Furthermore, the ALJ appears not to have used the appropriate legal standard in discerning whether Millet’s impairments were medically severe. At step two the ALJ determines whether the claimant has a medically severe impairment. Newell v. Comm’r of Soc. Sec., 347 F.3d 541, 546 (3d Cir. 2003). The inquiry into whether an impairment is severe “is a *de minimis* screening device to dispose of groundless claims.” Newell v. Comm’r of Soc. Sec., 347 F.3d 541, 546 (3d Cir. 2003). Since the ALJ’s consideration of some evidence was improper and she applied the incorrect legal standard, the case must be remanded.

a. Dr. Masey

The ALJ found that Millet’s complaints alone failed to provide, as

¹ Since sleep apnea was diagnosed only by Dr. Penchansky, and the report containing this diagnosis was properly rejected, I did not need to consider whether this was a medically determinable impairment. (Tr. 21 ¶ 22, 13F 328-343).

required, the medical evidence necessary to substantiate the presence of medically determinable impairments. See 42 U.S.C. § 423(d)(5)(A). An ALJ may discredit a physician’s opinion that was premised largely on the claimant’s own explanations of her symptoms and limitations when the claimant’s explanations are properly discounted. Morris v. Barnhart, 78 Fed. Appx. 820, 825 (3d Cir. 2003). However, the ALJ did not entirely discount Millet’s complaints since she found Millet to be “generally credible but not to the extent of limitations alleged.” (Tr. 21-22 ¶ 25); Hartranft v. Apfel, 181 F.3d 358, 362 (3d Cir. 1999) (It is the ALJ who “must determine the extent to which a claimant is accurately stating the degree of pain or the extent to which he or she is disabled by it.”).² Therefore, without an explicit rejection of Dr. Masey’s opinion, or an implicit rejection of Dr. Masey’s opinion as being a recitation Millet’s complaints, the opinion may properly be used to substantiate the presence of medically determinable impairments.

b. Dr. Penchansky

In further attempting to eliminate support for a mental limitation, the ALJ explicitly rejected Exhibits 11F and 13F, two reports by Dr. Penchansky. (Tr. 21 ¶¶ 22-24, 308-311, 328-343). These reports were properly rejected because the ALJ found that they showed “minimal diagnostic findings, minimal examination findings, and no mental health treatment nor any indication that it was recommended.” (Tr. 21 ¶ 22); See 20 C.F.R. §§ 404.1527(d)(2); 416.927(d)(2). The remainder of Dr. Penchansky’s reports not explicitly rejected by the ALJ did not bolster Millet’s claim either because they did not contain evidence of a mental limitation or were submitted for the first time to the Appeals Council. (Exhibit 8F, 279-293; Exhibit 12F, 312-327; Exhibit AC-1, Tr. 354-359).³

c. Sources that support a medically determinable mental impairment

The record contains medical evidence that supports both the existence of the mental impairments at issue and a depression impairment not cited in the ALJ’s decision. The ALJ omitted, acknowledged but did not adequately address, or unsuccessfully rejected this evidence including: (Tr. 189) the Disability Report-Field Office statement that “claimant seems very ‘slow’ had a hard time understanding basic concepts and little memory of work or medical history had to

² Given the numerous inconsistencies that the ALJ found between Millet’s testimony and the record, it cannot be said that the ALJ erred in concluding that Millet’s complaints were only generally credible. (Tr. 21 ¶ 25).

³ The Appeals Council considered this evidence and determined that it would not have changed the ALJ’s decision. (Tr. 5-8). When a claimant seeks to rely on evidence that was not before the ALJ, the District Court may remand to the Commissioner, but only if the evidence is new and material and if there was good cause for not having been presented previously to the ALJ. Fisher v. Massanari, 28 Fed. Appx. 158, 159 (3d Cir. 2002) (citing Matthews v. Apfel, 239 F.3d 589, 593 (3d Cir. 2001)). Since there was no evidence that the additional evidence was new, material, or was not presented earlier for good cause, I did not consider this evidence in my substantial evidence review. Fisher, 28 Fed. Appx. at 160 (holding that a claimant’s failure to raise this issue at the District Court level, caused claimant to waive consideration of “good cause” before the court).

have everything read to him, and had problems concentrating;” (Tr. 240) Dr. Masey’s diagnosis of major depressive disorder, and personality disorder (with schizotypal and paranoid traits); and (Tr. 262) a Mental RFC assessment finding moderate limitations in some areas of concentration and persistence and social interaction and which acknowledges a learning disorder and a history of depression and pain. (Tr. 18- 20 ¶¶ 14-21).

3. Despite the government’s argument, the fact that the ALJ gave Millet the benefit of the doubt in incorporating some mental limitations in the RFC determination does not correct the ALJ’s error. (Tr. 22 ¶ 26). There is not sufficient evidence on the mental limitations at issue for the ALJ’s decision to find them to be not medically determinable and severe. Moreover, the ALJ failed entirely to address depression as a mental limitation which appears in the record as both a complaint of Millet’s and a diagnosis by Dr. Masey. (Tr. 62-65, 235-244, 262). The action must be remanded to revisit whether Millet’s alleged mental limitations are medically determinable and severe and whether when considered in combination with his other impairments, he is disabled within the meaning of the Social Security Act.

Upon careful and independent consideration, the record reveals as above analyzed that the Commissioner did not apply the correct legal standards and that the record does not contain substantial evidence to support the ALJ’s findings of fact and conclusions of law. As a result, the action must be remanded to the Commissioner under sentence four of 42 U.S.C. § 405(g).

Therefore, it is hereby **ORDERED** that:

1. The motion for summary judgment by Julio N. Millet is **GRANTED**; to the extent that the matter is remanded for further proceedings consistent with this order.
2. The motion for summary judgment by the defendant is **DENIED**.
3. The Clerk of Court is hereby directed to mark this case closed for administrative purposes.

LOWELL A. REED, JR., S.J.