

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

<b>VALENTINA DYNKO,</b>	:	
<b>Plaintiff</b>	:	<b>No. 03-CV-3222</b>
	:	
<b>v.</b>	:	
	:	
<b>JO ANNE BARNHART,</b>	:	
<b>Commissioner of Social Security,</b>	:	
<b>Defendant</b>	:	

**MEMORANDUM OPINION**

**RUFE, J.**

**November 16, 2004**

Plaintiff seeks judicial review of the Commissioner of the Social Security Administration’s denial of her claim for Supplemental Security Income (“SSI”) under Title XVI of the Social Security Act.<sup>1</sup> The parties’ cross-motions for summary judgment are presently before the Court. United States Magistrate Judge Peter B. Scuderi issued a report recommending that this Court deny Plaintiff’s Motion for Summary Judgment, grant Defendant’s Motion for Summary Judgment, and affirm the Commissioner’s decision. Upon careful, independent review of the administrative record, Judge Scuderi’s Report and Recommendation (“R & R”), and Plaintiff’s objections thereto, the Court overrules Plaintiff’s objections and grants Defendant’s Motion for Summary Judgment.

**I.     PROCEDURAL HISTORY**

Plaintiff applied for SSI benefits on October 24, 1994, alleging disability due to major depression, degenerative disc disease and obesity. An Administrative Law Judge (“ALJ”) found that the latter two health problems limit Plaintiff to medium-exertion work, and Plaintiff does not appeal this finding. The only issue before the Court is whether Plaintiff’s depression, in conjunction with

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<sup>1</sup> 42 U.S.C. §§ 1381-1383h.

her exertional limitations, renders her disabled and eligible for SSI. Plaintiff has had multiple hearings on this issue. The Plaintiff appealed an August 2, 1996 ALJ denial to the Appeals Council, which remanded the case. The ALJ again denied Plaintiff's claim on June 22, 1998, after two additional hearings. The Appeals Council denied Plaintiff's request for review of that decision, and Plaintiff appealed to the United States District Court. On March 8, 2000, the Honorable Charles R. Weiner issued an Order remanding the case with instructions to clarify the degree to which Plaintiff's depression impaired her concentration. A second ALJ ordered a consultative exam and held a fourth hearing before denying Plaintiff's SSI benefits on February 16, 2002. The Appeals Council denied Plaintiff's request for review of the February 16, 2002 ALJ decision. Therefore, the February 16, 2002 ALJ decision is the final decision of the Commissioner for the purpose of this appeal.

On cross-motions for summary judgment, Magistrate Judge Scuderi issued his R & R, finding that the ALJ's decision was supported by substantial evidence. Today, the Court adopts the legal analysis and the conclusions set forth in the R & R. Consistent with its duty, the Court addresses below only those portions of the R & R to which Plaintiff objects.<sup>2</sup>

## **II. FACTUAL BACKGROUND**

Plaintiff first applied for SSI in 1994, at forty-three years of age. Plaintiff was raised and educated in the Ukraine, having completed ten years of education there, some of it at night school. Plaintiff worked in a factory in Russia, in the position of "warp tier."<sup>3</sup> She has not performed factory work since 1980. From 1980 through 1991, Plaintiff worked as a secretary or

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<sup>2</sup> 28 U.S.C. § 636(b)(1).

<sup>3</sup> Plaintiff ran a large machine which wound thread from large spools onto small spools.

typist in Russia. She emigrated from Russia to the United States in 1991. Plaintiff speaks little English.

Plaintiff argues that because of depression, she cannot concentrate, has difficulty with her memory, and has poor personal and social functioning. Natan Nemirovsky, M.D., diagnosed Plaintiff with depressive disorder in June, 1994.<sup>4</sup> In a comprehensive evaluation, Dr. Nemirovsky found that Plaintiff's personal hygiene was fair, her mood was "helpless, depressed and hopeless," she was tearful, and she had "very poor" concentration and impaired attention span.<sup>5</sup> He recommended treatment with antidepressant medication. Dr. Nemirovsky's treatment notes from the months following the start of Plaintiff's treatment with antidepressant medication clearly indicated that Plaintiff's condition had improved.<sup>6</sup> For example, Plaintiff reported improved mood and a reasonable ability to take care of her home and her son.<sup>7</sup>

Since August 1998, Stuart Levinson, M.D., has been treating Plaintiff for major depression. Plaintiff generally sees him every two to three months for 15 minute appointments described as medication checks.<sup>8</sup> Plaintiff does not engage in psychotherapy with Dr. Levinson. Dr. Levinson reports that Plaintiff has "marked" difficulty with concentration.<sup>9</sup>

Plaintiff had a consultative examination by Javad Mohsenian, M.D., in April 2001.<sup>10</sup>

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<sup>4</sup> Dr. Nemirovsky's Psychiatric Evaluation, Record at 183-185.

<sup>5</sup> Id.

<sup>6</sup> Dr. Nemirovsky's progress notes, Record at 180-183.

<sup>7</sup> Id. at 181.

<sup>8</sup> Mental Impairment Questionnaire, Record at 490.

<sup>9</sup> Id., Record at 450, 489.

<sup>10</sup> Psychiatric evaluation report, Record at 452-455.

Dr. Mohsenian found her “fairly depressed,” but “fairly clean” and able to take care of her basic needs. He noted that she complained of memory problems, but he found her memory adequate. Overall, Dr. Mohsenian found Plaintiff had a “fair” ability to make occupational adjustments but noted she does not speak English and has difficulty relating to her environment.

At the December 20, 2001 ALJ hearing, Richard Saul, M.D., provided expert medical testimony.<sup>11</sup> Based upon his review of Plaintiff’s treating psychiatrist’s progress notes, Dr. Saul concluded that Plaintiff suffers from major depression, but he found that her functional limitations in concentration, activities of daily living, and social functioning were only moderate, not marked or severe. Dr. Saul opined that Plaintiff’s condition would probably improve if she received weekly therapy, preferably with a Russian-speaking therapist, but acknowledged that Plaintiff’s public health insurance might not cover this level of care.

Dr. Saul also testified that Plaintiff would benefit from “some type of job coach, or something else” to help her reenter the work place.<sup>12</sup> He did not further define what level of support she would need, or for how long. He also did not testify that Plaintiff would need this support due to her depression. Rather, Dr. Saul stated that although Plaintiff has lived in this country for nine years, she has not worked here at all and does not speak English, so a “job coach” or someone similar would be helpful to her. A vocational expert (“VE”), Don Millan, testified that he was not sure that Dr. Saul knew what a “job coach” is.<sup>13</sup> In the VE’s opinion, Plaintiff would need assistance in finding a job and acclimating herself to the work environment. The VE testified that a supportive

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<sup>11</sup> Testimony of Dr. Richard Saul, Record at 371-380.

<sup>12</sup> Id. at 380.

<sup>13</sup> Testimony of Don Millan, Record at 391.

supervisor with a basic understanding of Plaintiff's particular problems could help her adjust to a job that consists of simple, repetitive tasks.<sup>14</sup>

The ALJ found no medically documented history of one or more episodes of acute symptoms, signs, and functional limitations, no repeated episodes of decompensation which would exacerbate symptoms, and no documented history of two or more years of inability to function outside of a highly supportive living environment.<sup>15</sup>

### **III. STANDARD OF REVIEW**

The Social Security Act provides for judicial review of any “final decision of the Commissioner of Social Security” in a disability proceeding.<sup>16</sup> The Court may enter a judgment “affirming, modifying or reversing the decision of the Commissioner of Social Security, with or without remanding the case for a rehearing.”<sup>17</sup> However, the Commissioner’s findings “as to any fact, if supported by substantial evidence, shall be conclusive.”<sup>18</sup> 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.”<sup>19</sup>

Substantial evidence has been defined as “more than a mere scintilla” but somewhat

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<sup>14</sup> Id. at 392.

<sup>15</sup> February 16, 2002 ALJ decision, Record at 345.

<sup>16</sup> 42 U.S.C. § 405(g).

<sup>17</sup> Id.

<sup>18</sup> Id.

<sup>19</sup> Schwartz v. Halter, 134 F. Supp. 2d 640, 647 (E.D. Pa. 2001).

less than a preponderance of the evidence, or “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”<sup>20</sup> The standard is “deferential and includes deference to inferences drawn from the facts if they, in turn, are supported by substantial evidence.”<sup>21</sup>

In reviewing the Magistrate Judge’s R & R, the Court must review *de novo* only those portions of the R & R to which Plaintiff objected.<sup>22</sup>

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

In order to determine whether Plaintiff is disabled, the ALJ performed a five-step sequential evaluation, pursuant to 20 C.F.R. § 416.920. The sequence the ALJ uses to evaluate the case is as follows:

(1) if the claimant is currently engaged in substantial gainful employment, she will be found not disabled; (2) if the claimant does not suffer from a “severe impairment” she will be found not disabled; (3) if a severe impairment meets or equals a listed impairment in 20 C.F.R. Part 404, Subpart P, Appendix 1 and has lasted or is expected to last continually for at least twelve months, then the claimant will be found disabled; (4) if the severe impairment does not satisfy the requirements of step (3), the ALJ considers the claimant’s residual functional capacity to determine whether, despite the severe impairment, she can perform work she has done in the past; if she can she will be found not disabled; and (5) if the claimant cannot perform her past, relevant work, the ALJ will consider the claimant’s residual functional capacity, age, education, and past work experience to determine whether she can perform other work which exists in the national economy.<sup>23</sup>

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<sup>20</sup> Richardson v. Perales, 402 U.S. 389, 401 (1971); Jesurum v. Sec’y of the United States Dept. of Health & Human Servs., 48 F.3d 114, 117 (3d Cir. 1995).

<sup>21</sup> Schaudeck v. Comm’r of S.S.A., 181 F.3d 429, 431 (3d Cir. 1999).

<sup>22</sup> 28 U.S.C. § 636(b)(1).

<sup>23</sup> 20 C.F.R. § 416.920.

In a disability proceeding, a claimant bears the initial burden of demonstrating that she is unable to engage in substantial gainful activity by reason of medical impairment which has lasted or is expected to last for a continuous period of at least twelve months.<sup>24</sup> A claimant is considered disabled per se if she demonstrates that she meets the criteria for a listed impairment at step three. If a claimant cannot prove that her disability meets or equals a listing at step three, she can make a prima facie case for disability by proving that her impairments preclude her from returning to her past relevant work at step four.<sup>25</sup> If she is not able to do make such a showing, she will be found not disabled at step four and ALJ will not need to reach step four. If the claimant does prove that she is unable to return to past relevant work, the burden shifts to the Commissioner to prove, at step five, that the claimant can perform jobs that exist in substantial numbers in the nation economy, given her age, education, work experience and disability.<sup>26</sup>

In this case, the ALJ found the following in conducting the sequential analysis: (1) Plaintiff has not engaged in substantial gainful activity since the date of alleged disability onset; (2) Plaintiff has an impairment or combination of impairments that is “severe;” (3) Plaintiff’s impairments do not meet or equal a listed impairment; (4) Plaintiff has the residual functional capacity to perform past relevant work as a thread winder (warp tier), but not past relevant work as a secretary; (5) Plaintiff also has the residual functional capacity to perform other jobs which exist in the national economy, considering her age, education, work experience, language ability and disability. Therefore, the ALJ found Plaintiff not disabled at steps three, four, and five.

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<sup>24</sup> 42 U.S.C. § 423 (d)(1)(A); 20 C.F.R. §§ 404.1505(a); 416.905(a).

<sup>25</sup> See Mason v. Shalala, 994 F.2d 1058, 1064 (3d. Cir. 1993).

<sup>26</sup> Id.

Plaintiff has objected to the ALJ's finding that Plaintiff was not disabled at steps four and five. Specifically, she objects that her work as a warp tier should not have been considered past *relevant* work at step four, that her need for a job coach would preclude her from competitive employment, and that her limitations in concentration, persistence and pace were not properly considered at step five of the sequential analysis.

**A. Whether the Magistrate Judge Erred in Affirming the ALJ's Step Four Denial.**

Plaintiff argues that the ALJ's step four denial, based upon his finding that she could perform her prior work as a warp tier, was incorrect. Specifically, she argues that she did this work more than fifteen years before the ALJ decision, and the ALJ improperly considered it past *relevant* work at step four.<sup>27</sup> Although the Plaintiff is correct, for the following reasons the Court finds this to be harmless error.

First, the ALJ considered Plaintiff's more recent past relevant work as a secretary in addition to her distant past work as warp tier. Plaintiff had performed secretarial work for approximately ten years in Russia, ending in 1991. The ALJ found that Plaintiff's depression would prevent her from working as a secretary or typist. Specifically, her problems with concentration would make secretarial work too difficult for her.

Second, the ALJ did not place the burden on Plaintiff to prove that she was not able to perform her past work as a warp tier, as step four of the sequential disability evaluation process requires.<sup>28</sup> Instead, he analyzed her ability to work as a work tier according to the requirements of

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<sup>27</sup> Work experience from more than fifteen years prior to the hearing is generally not considered *relevant* past work, because work procedures can change over time. 20 C.F.R. § 416.965(a).

<sup>28</sup> Mason, 994 F.2d at 1064.

step five: he posed a hypothetical question to a vocational expert (“VE”), as though the burden had shifted to the Social Security Administration to prove Plaintiff could do the job of warp tier.<sup>29</sup> The VE answered the hypothetical affirmatively.<sup>30</sup> Admittedly, the ALJ did not ask the VE whether warp tier positions existed in substantial numbers in the national economy, but, as the Court notes below, the error is harmless here.

Third, despite finding that Plaintiff could engage in prior work as a warp tier at step four, the ALJ did proceed to step five of the sequential disability evaluation. The ALJ posed an additional hypothetical question to the VE, who testified that a person of Plaintiff’s age, work history, language ability, education, and symptom profile could perform several jobs, other than warp tier, that exist in significant numbers in the national economy.<sup>31</sup> Because the ALJ found that step five provided an alternative basis for his decision, the Court will not reverse or remand the ALJ’s decision because of the problematic step four denial.

**B. Whether the Magistrate Judge Failed to Address Plaintiff’s Argument that Plaintiff’s Need for a Job Coach Precludes Competitive Employment.**

Plaintiff alleges that her need for a job coach necessarily precludes the ability to engage in competitive employment. This is not necessarily true. The Court must look at the actual recommendation for a job coach in this case, and determine whether the need for such support would preclude competitive employment. A medical expert, Dr. Saul, recommended such assistance to help Plaintiff find and begin employment. However, he did not testify that Plaintiff requires a job coach because she has depression; but only that she has never worked in the United States and has

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<sup>29</sup> VE testimony, Record at 383.

<sup>30</sup> Id.

<sup>31</sup> VE testimony, Record at 383-385.

limited English language skills.<sup>32</sup>

Plaintiff's counsel later asked the VE whether Plaintiff would require a job coach. The VE opined that she might need help finding a job and help with the transition to work. The VE noted the transition support might be provided by a supervisor who understood Plaintiff's limitations.<sup>33</sup>

In short, nothing in the testimony of either expert suggests that Plaintiff would need the assistance of a job coach on an ongoing, daily basis to maintain employment. Therefore, the Court find that the expert testimony regarding Plaintiff's need for a job coach is not clearly inconsistent with the ALJ's finding that Plaintiff is not disabled. The ALJ's finding that Plaintiff's need for a job coach does not preclude her employment is supported by substantial evidence.

**C. Whether the Magistrate Judge Erred in his Evaluation of the Medical Evidence Regarding Plaintiff's Limitations in Concentration, Persistence and Pace.**

Finally, the Plaintiff argues that the ALJ failed to include her deficiencies in concentration, persistence and pace in his hypothetical to the VE at step five. The Court disagrees. The medical experts in this case both opined that Plaintiff has moderate deficiencies of concentration.<sup>34</sup> The ALJ asked the VE to consider whether an individual with Plaintiff's profile, including her "lower level" of concentration, could perform jobs that exist in the national economy.<sup>35</sup>

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<sup>32</sup> Dr. Saul's testimony, Record at 380.

<sup>33</sup> VE's testimony, Record at 391.

<sup>34</sup> One of the experts testified that Plaintiff "often" experiences such deficiencies. This is considered equivalent to a moderate deficiency. The Social Security Administration uses the following five-point scale for evaluating the *frequency* of functional limitations: never, seldom, often, frequent, or constant. The regulations favor evaluating the *severity* of limitation using the following five-point scale: none, mild, moderate, marked, or severe. 20 C.F.R. § 404.1520a. The Court will adopt Plaintiff's view that "often" and "moderate" fall on the same point on a five-point continuum, and therefore can be considered equivalent findings. See Plaintiff's Objections at 6.

<sup>35</sup> VE testimony, Record at 383, 384.

Presumably, the ALJ meant that the VE should consider the Plaintiff's concentration problems to be more severe than the VE had in hypothetical questions posed at the prior hearing regarding Plaintiff. At the prior hearing, the ALJ found Plaintiff "seldom" had problems with concentration, which is equivalent to finding a mild deficit in the domain.<sup>36</sup> A moderate impairment in concentration is the next step below a mild impairment on the five-point scale used by the Social Security Administration.<sup>37</sup> Certainly the question would have been more precise if the ALJ had asked about a "moderate deficiency" in concentration, rather than a "lower level" of concentration. Nevertheless, upon reading the VE's responses to the ALJ's hypothetical questions, it is clear that the VE correctly understood that he was to consider Plaintiff's concentration to be moderately or often impaired.<sup>38</sup> The VE testified that Plaintiff could do some unskilled jobs that exist in substantial numbers in the national economy, despite her level of impairment.<sup>39</sup> The VE listed the jobs and their numbers in the national and local economies.<sup>40</sup> Therefore, the Court finds that the Social Security Administration satisfied its burden of proof at step five, and the ALJ's finding at step five was based on substantial evidence.

An appropriate order follows.

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<sup>36</sup> *See supra* note 27.

<sup>37</sup> 20 C.F.R. §404.1520a.

<sup>38</sup> VE testimony, Record at 383-384.

<sup>39</sup> Id.

<sup>40</sup> Id.

**IN THE UNITED STATES DISTRICT COURT  
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<b>VALENTINA DYNKO,</b>	:	
<b>Plaintiff</b>	:	<b>No. 03-CV-3222</b>
	:	
<b>v.</b>	:	
	:	
<b>JO ANNE BARNHART,</b>	:	
<b>Commissioner of Social Security,</b>	:	
<b>Defendant</b>	:	

**ORDER**

**AND NOW**, this 18th day of November, 2004, upon careful consideration of Plaintiff's Motion for Summary Judgment [Doc. # 19], Defendant's Motion for Summary Judgment [Doc. # 20], the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi [Doc. # 23], and Plaintiff's Objections thereto [Doc. # 24], 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**; and
5. The Clerk of Court shall mark this case **CLOSED** for administrative purposes.

It is so **ORDERED**.

**BY THE COURT:**

/s/ Cynthia M. Rufe, J.  
**CYNTHIA M. RUFÉ, J.**