

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

MICHAEL DYMEK,	:	
	:	
Plaintiff,	:	
	:	
v.	:	No. 03-5492
	:	
	:	
JO ANNE B. BARNHART,	:	
COMMISSIONER OF SOCIAL SECURITY,	:	
Defendant.	:	

MEMORANDUM

GREEN, S.J.

January , 2005

Presently before the Court are the parties' motions for summary judgment. United States Magistrate Judge Thomas J. Reuter filed a Report and Recommendation (the "Report") recommending that this Court grant Defendant's motion for summary judgment and deny Plaintiff's motion for summary judgment. Upon careful and independent consideration of the Report, and Plaintiff's timely filed Objections thereto, for the reasons set forth below, I will approve and adopt the Report.

A district court judge may refer an appeal of a decision of the Commissioner to a magistrate judge. See 28 U.S.C. § 636(b)(1). Within ten days after being served a copy of the magistrate judge's report and recommendation, a party may file timely and specific objections thereto. See 28 U.S.C. § 636(b)(1)(C). The district court judge will then make a *de novo* determination of those portions of the report and recommendation to which objection is made. See id. The district court judge may accept, reject, modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence, or recommit the matter to the magistrate judge with instructions. See id. In reviewing the Commissioner's decision, the district court is bound by the ALJ's findings of fact if they are supported by substantial evidence in the record. See 42 U.S.C. § 405(g). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate." Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999). Moreover, it is the ALJ's responsibility to resolve conflicts in

evidence and to determine the credibility and weight to be afforded to the evidence. Id., 186 F.3d at 429. The ALJ's conclusions and determinations must be accepted unless there is no basis for them in the record. Torres v. Harris, 494 F.Supp. 297, 301, aff'd 659 F.2d 1071 (3d Cir. 1981).

Discussion

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Plaintiff timely filed three Objections to the Magistrate Judge's Report and Recommendation.

A. The Magistrate Improperly Upholds the ALJ's Evaluation of the Medical Evidence.

Plaintiff first objects to the Magistrate's acceptance of the ALJ's alleged outright rejection of treating physician Dr. Yevelson's opinion that Plaintiff could not perform even sedentary work and that he could only sit for one hour per day. Plaintiff argues - without authority - that the ALJ was required to engage in further analysis about what weight Dr. Yevelson's opinion should have been granted. This court is bound by the ALJ's findings of fact if they are supported by substantial evidence in the record. See 42 U.S.C. § 405(g). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate. In addition to stating that Plaintiff engaged in martial arts activities and was able to manage his income properties, the ALJ also noted that the January 26, 1999 report of Dr. Yevelson stated that Plaintiff's normal lower extremity muscle strength was 5/5, that Plaintiff was able to walk on his heels and toes without difficulty, and that Plaintiff's gait was overall normal. (Record at 354). Moreover, Plaintiff was referred to and examined by Dr. Bruno, a physiatry specialist on December 30, 1998. Dr. Bruno, while noting Plaintiff's moderately restricted range of motion and multiple areas of tenderness, also noted that both Plaintiff's upper and lower extremity muscle strength tested at 5/5. (Record at 395-396). Dr. Bruno

further encouraged Plaintiff to use his exercise cycle and recommended that Plaintiff look into a fibromyalgia pool class. Id. This evidence contradicts Dr. Yevelson's determination that Plaintiff could only sit for one hour per day and also supports the ALJ's determination that Dr. Yevelson's opinion should not have been afforded controlling weight. Despite Plaintiff's objections and arguments to the contrary, the ALJ is not required to set forth an exhaustive explanation and calculation of the weight afforded to the opinion of the treating physician. In light of the contradictory medical evidence found in the record regarding Plaintiff's ability to exercise to stay flexible, normal gait and only moderately restricted range of motion, this court concluded that the ALJ could have properly discounted Dr. Yevelson's opinion and afforded it less than controlling weight. Plaintiff's objection on this ground is overruled.

B. The Magistrate Improperly Upholds the ALJ's Evaluation of Plaintiff's Subjective Complaints.

Plaintiff's next objection is to the Magistrate Judge's finding that although the ALJ failed to credit Plaintiff's claim that the side-effects of his pain medication make him unable to focus, the Report erroneously rejects all of Plaintiff's testimony about his limitations because the record lacks objective evidence to support Plaintiff's subjective claims. A claimant's testimony regarding pain and an inability to work is entitled to great weight, but may be rejected if an ALJ specifically addresses the claimant's testimony in his decision, states his reasons for rejecting it, and shows support for his conclusion in the record. See Matullo v. Bowen, 926 F.2d 240, 245 (3d Cir. 1990); Dobrowolsky v. Califano, 606 F.2d 403, 409 (3d Cir. 1979). A careful review of the record shows that the ALJ addressed Plaintiff's testimony, stated his reasons for rejecting portions of it, and supported his reasons with evidence in the record.

As the Magistrate Judge noted, Plaintiff's testimony regarding his limitations and inability to work conflicts with some of the portions of the record. Dr. Bruno states that Plaintiff informed him that he regularly engages in Tai Chi (although only for 3 days per week) to stay

flexible. (Record at 395-96). Specifically, Plaintiff's testimony regarding his inability to sit or stand for more than very short periods of time undermines the medical evidence which states that he exercises regularly, was overall physically fit, and on the advice of physicians recommended some forms of aerobic exercise. Plaintiff's subjective complaints are inconsistent with the medical evidence which demonstrates that he had only moderately restricted range of motion and could walk with no difficulty and had normal gait. There is no evidence in the record that Plaintiff ever complained to any of his physicians of an inability to sit or walk for more than an hour or to lift objects of any nature. Upon careful and independent consideration, I find that Plaintiff's subjective testimony about his pain and/or limitations may be somewhat discredited when compared to the objective medical evidence. Of course, it is not for this Court to pit Plaintiff's testimony against itself or weigh it against his medical reports; the only determination that I make is whether substantial evidence supports the ALJ's findings and conclusions. I conclude, after a careful review of the record, that there is substantial evidence to support the ALJ's decision that Plaintiff's testimony regarding his limitations and inability to work was not fully credible, and, therefore, Plaintiff's objection to the Magistrate Judge's conclusion on this point will also be overruled.

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JO ANNE B. BARNHART,		:	
COMMISSIONER OF SOCIAL SECURITY,		:	
Defendant.		:	

ORDER

AND NOW, this 19th day of January 2005, upon consideration of the parties' cross-motions for summary judgment, the Report and Recommendation filed by United States Magistrate Thomas J. Rueter, and Plaintiff's Objections thereto, **IT IS HEREBY ORDERED** that:

- A. Petitioner's Objections are **OVERRULED**;
- B. The Report and Recommendation, is **APPROVED** and **ADOPTED**;
- C. Defendant's motion for summary judgment is **GRANTED**;
- D. Plaintiff's motion for summary judgment is **DENIED**;
- E. The Clerk of the Court shall mark this case closed.

BY THE COURT:

S/ _____

CLIFFORD SCOTT GREEN, S.J.