

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

<b>OTTO PERL</b>	:	<b>CIVIL ACTION</b>
	:	
	:	
v.	:	
	:	
<b>JO ANNE BARNHART</b>	:	<b>NO. 03-4580</b>

**MEMORANDUM OPINION**

Davis, J.

March 10, 2005

Presently before the Court is the appeal of Otto Perl (“plaintiff”) from a final decision of the Commissioner of Social Security (“Commissioner”) denying him Disability Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI of the Social Security Act (the “Act”), 42 U.S.C. §§ 401-433 (West 2005). Both parties have filed cross motions for summary judgment. After referral, the Magistrate Judge recommended denying the plaintiff’s motion for summary judgment. Plaintiff filed objections to the Report and Recommendation of the Magistrate Judge. For the following reasons, this Court chooses not to follow the Report and Recommendation of the Magistrate Judge, vacates the decision of the administrative law judge (“ALJ”), and remands the case for a decision consistent with this opinion.

**I. Factual and Procedural History**

Plaintiff was born on November 6, 1955. Plaintiff filed applications for DIB and SSI on August 27, 1999, alleging disability since June 4, 1998 due to pain in his chest, back, and left shoulder. (Tr. 55-58, 300-02). Prior to 1998, plaintiff worked as a refrigeration mechanic. On July 31, 2000, the ALJ found that plaintiff was not disabled under the Act. (Tr. 12-19). Plaintiff

subsequently filed a civil action with the United States District Court for the Eastern District of Pennsylvania, and, on August 4, 2001, the court found that the ALJ erred by failing to properly consider plaintiff's diagnoses of fibromyalgia, costochondritis, and myofascial pain. (Tr. 428-29).

On April 30, 2002, the ALJ convened a second administrative hearing. Plaintiff, as well as medical and vocational experts, testified. (Tr. 366-407). In a decision dated June 13, 2002, the ALJ found that plaintiff was not disabled under the Act. (Tr. 358-65). Specifically, the ALJ found that plaintiff suffered from severe impairments, including costochondritis, occipital neuralgia/cephalalgia chronic pain syndrome, fibromyalgia/myofascial pain, cervical disc disease, and left shoulder degenerative joint disease. (Tr. at 364). The ALJ then reviewed the medical record and found that plaintiff could perform sedentary and light exertional work subject to certain limitations, and that, with this residual functional capacity, plaintiff could perform a number of light and sedentary jobs throughout the national and regional economy. (*Id.*).

On July 1, 2003, the Appeals Council denied plaintiff's request for review, and the ALJ's decision became final. (Tr. 348-49). Shortly thereafter, on August 11, 2003, plaintiff filed a complaint in this Court seeking judicial review of the ALJ's decision pursuant to 42 U.S.C. §§ 405(g), 1383(c)(3). (Doc. No. 1). Defendant filed a motion for summary judgment on August 5, 2004 (Doc. No. 13), which was followed by plaintiff's cross-motion for summary judgment on August 27, 2005 (Doc. No. 15). The case was referred to the Magistrate Judge on September 3, 2004, and a report and recommendation affirming the ALJ's decision was filed on January 31, 2005. (Doc. No. 19). Plaintiff filed written objections on February 18, 2005. (Doc. No. 20).

## **II. Discussion**

The Act provides for judicial review of any “final decision of the Commissioner of Social Security” in a disability proceeding. See 42 U.S.C. § 405(g). The role of this Court on judicial review is to determine whether there is substantial evidence in the record to support the Commissioner’s decision. Jesurum v. Sec’y of United States Dep’t of Health and Human Serv., 48 F.3d 114, 117 (3d Cir. 1995). Substantial evidence requires more than a mere scintilla of evidence, but perhaps less than a preponderance of the evidence. Jesurum, 48 F.3d at 117. It is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richard v. Perales, 402 U.S. 389, 401 (1971) (quoting Consol. Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)).

Under applicable regulations, an application for disability benefits is evaluated according to a five-step sequential process. See 20 C.F.R. § 404.1520. First, the ALJ determines whether the claimant is engaged in a “substantial gainful activity.” Id. § 404.1520(a)(4)(i). If a claimant is engaged in a substantial gainful activity, then she is not disabled; if not, then the ALJ considers the effect of the claimant’s physical or mental impairment. Id. § 404.1520(a)(4)(ii). If the claimant has a “severe impairment” that limits his or her mental ability to do basic work activities, the ALJ then proceeds to the third step: whether the impairment is equivalent to one of a number of listed impairments that the Commissioner acknowledges are so severe as to preclude substantial gainful activity. Id. § 404.1520(a)(4)(iii). If the impairment meets or equals one of the listed impairments, the claimant is conclusively presumed to be disabled. Id. If not, the ALJ then determines whether the impairment prevents the claimant from performing past work. Id. § 404.1520(a)(4)(iv). Prior to this stage, the ALJ assesses the claimant’s residual functional capacity, which measures the most a claimant can do in the work setting based upon her physical

or mental limitations. Id. § 404.1545(a)(1) (defining residual functional capacity). If the claimant’s residual functional capacity indicates an ability to perform past work, the claimant is not disabled; on the other hand, if the claimant’s residual functional capacity indicates an inability to perform past work, the ALJ proceeds to the final step. Id. Here, the ALJ considers the claimant’s residual functional capacity and her “age, education, and past work experience” to determine whether she can perform other substantial gainful work on a regular and continuing basis that exists in the national economy. Id. § 404.1520(a)(4)(v). The claimant is entitled to disability benefits only if she is unable to make an adjustment to this type of work. Id. § 404.1520(g).

Plaintiff presents two primary arguments in favor of reversing, or, in the alternative, vacating the ALJ’s decision and remanding for further consideration. First, plaintiff argues that the ALJ’s determination of plaintiff’s residual functional capacity was not supported by substantial evidence. (Pl. Mot., at 20-33). Second, plaintiff argues that new evidence submitted after the hearing meets the standard for a remand pursuant to 42 U.S.C. § 405(g). (Pl. Mot., at 33-35). This Court agrees that the validity of these arguments warrant a remand.

**A. The ALJ erred in his determination of plaintiff’s residual functional capacity.**

Prior to performing step four of the sequential process, the ALJ calculated plaintiff’s residual functional capacity. The ALJ determined that plaintiff was capable of performing sedentary and light exertional work subject to an array of non-exertional limitations.<sup>1</sup> (Tr. at

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<sup>1</sup>These limitations include: (i) claimant cannot occasionally or frequently twist his neck, but can infrequently twist his neck; (ii) claimant cannot occasionally or frequently bend or stoop to floor level but is able to bend to do desk work; (iii) claimant is restricting from overhead reaching, handling or lifting with his left arm and shoulder; (iv) claimant is restricted from work

364). Plaintiff argues that the ALJ failed to devise and apply the correct residual functional capacity because the ALJ erroneously discredited plaintiff's testimony and the assessments of his three treating doctors. (Pl. Mot. For SJ., at 21). Specifically, plaintiff argues that "the medical evidence including the opinion of three treating physicians, documented that Mr. Perl's [sic] would be unable to work on a regular and continuing basis." (Id.).

Two important principles guide this Court's assessment of whether the ALJ properly credited the testimony of plaintiff and plaintiff's treating physicians in fashioning the appropriate residual functional capacity. First, a claimant's testimony regarding his or her subjective pain is entitled to great weight, particularly when supported by competent medical evidence. Chrupcala v. Heckler, 829 F.2d 1269, 1276 n. 10 (3d Cir. 1987) ("Where a claimant's testimony as to pain is reasonably supported by medical evidence, the ALJ may not discount claimant's pain without contrary medical evidence."); Dobrowolsky v. Califano, 606 F.2d 403, 409 (3d Cir. 1979). Second, the ALJ must also 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." Morales v. Apfel, 225 F.3d 310, 317 (3d Cir. 2000) (internal citations omitted). Indeed, neither the report of a treating physician nor the subjective complaints of pain by a claimant may be discredited unless there exists contrary medical evidence. Mason v. Shalala, 994 F.2d 1058, 1067-68 (3d Cir. 1993); Frankenfield, 861 F.2d at 408 (ALJ is bound by the determination of a treating physician except in limited circumstances,

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at heights; (v) claimant is restricted from working near dangerous machinery; (vi) claimant is able to perform simple and routine work but is unable to perform complex or detailed work; and (vii) claimant is able to perform objectively low stress jobs but is unable to perform objectively high stress jobs. (Tr. at 364).

such as the presence of contradictory medical evidence); Witmer v. Barnhart, 2002 WL 485663, at \*3 (E.D. Pa. March 28, 2002).

This presumption of deference to the testimony of a claimant and the reports of his treating doctors, barring contrary evidence, is particularly significant when the alleged disability concerns a diagnosis of fibromyalgia. Fibromyalgia is a disease involving muscle and musculoskeletal pain, accompanied by stiffness and fatigue due in part to sleep disturbances. See Alvarado v. Chater, 1997 WL 43008, at \*1-2 (E.D. Pa. Jan. 24, 1997). Fibromyalgia complicates the five-step sequential methodology for determining disability benefits because “its cause or causes are unknown, there is no cure, and of greatest importance to disability law, its symptoms are entirely subjective.” Sarchet v. Chater, 78 F.3d 305, 306-307 (7<sup>th</sup> Cir. 1996). Indeed, “there are no objective tests which can conclusively confirm the disease; rather, it is a process of diagnosis by exclusion and testing of certain ‘focal tender points’ on the body for acute tenderness which is characteristic in fibrositis patients.” Preston v. Sec’y of Health and Human Serv., 854 F.2d 815, 817 (6<sup>th</sup> Cir. 1988). Accordingly, because objective tests may not be able to verify a diagnosis of fibromyalgia, the reports of treating physicians, as well as the testimony of the claimant, become even more important in the calculus for making a disability determination. See, e.g., Green-Younger v. Barnhart, 335 F.3d 99, 108 (2d Cir. 2002) (reversible error when ALJ discredits claimant’s subjective testimony and opinion of treating physicians in favor of “objective” evidence of fibromyalgia, a disease “that eludes such measurement”); Alvarado, 1997 WL 43008, at \*1 (reversible error when ALJ relies upon lack of objective laboratory testing to find claimant suffering from fibromyalgia not credible); see also SSA Memorandum, Fibromyalgia, Chronic Fatigue Syndrome, and Objective Medical Evidence

Requirements for Disability Adjudication (“SSA Fibromyalgia Memorandum”) (May 11, 1998) (recognizing vitality of reports from treating physicians that document symptoms in determining residual functional capacity of claimant suffering from fibromyalgia because such observations may be the only type of “medically acceptable clinical technique” available).

**1. Plaintiff’s testimony and the assessments of plaintiff’s treating sources established the severity of plaintiff’s fibromyalgia and the limitations this disease posed on plaintiff’s capacity to engage in substantial gainful employment.**

The ALJ heard testimony from plaintiff and received the reports of three treating doctors indicating that plaintiff suffered from fibromyalgia, and that, due to the severity of this disease, plaintiff’s residual functional capacity was subject to a myriad of limitations that challenged plaintiff’s ability to work on a regular and continuing basis. See 20 C.F.R. § 404.1545(b) (residual functional capacity determined for “work activity on regular and continuing basis”); Owen v. Barnhart, 2002 WL 31217251, at \*1 n1 (9<sup>th</sup> Cir. 2002) (claimant is disabled if unable to work on a “regular and continuing” basis, which means 8 hours a day, 5 days a week); Social Security Ruling 96-8p (requiring ALJ to evaluate claimant’s ability to engage in work for 8 hours a day and 5 days a week).

Plaintiff testified that he last worked in June 1998 as a diesel refrigeration mechanic, prior to the onset of fibromyalgia. (Tr. 372). Since developing fibromyalgia, plaintiff testified that he experienced severe fatigue, causing him to take approximately two naps a day at an hour and a half/two hour intervals. (Tr. 379). This fatigue also affected his legs, occasionally rendering it difficult for plaintiff to walk up stairs. (Tr. 375). To combat this fatigue, plaintiff testified that he tried to walk for at least one-half hour each day, although some days he could

walk for only ten minutes. (Tr. 375-76). In addition to fatigue, plaintiff also experienced pain throughout his body, such as in his chest, arm, back, and spine, cluster headaches, burning sensations, and insomnia. (Tr. 378-380). This pain worsened through physical exertion and stress. (Tr. 383-384). In an attempt to minimize this pain, plaintiff took various medications and received injections, although these remedies provided only temporary relief for a day or two, and, in fact, often worsened the pain after their temporary, ameliorative effect wore off. (Tr. 381, 384). Plaintiff admitted that he was able to perform certain activities, such as cooking and doing laundry, but that it took him days to complete yard work and that he needed frequent rests during the course of all daily activities. (Tr. 385, 388-389).

Three treating doctors verified the severity of plaintiff's symptoms of fibromyalgia. One of plaintiff's treating physicians, Brian Fellechner, D.O., opined that plaintiff suffered from fibromyalgia, anxiety, and depression, documenting a history of multiple tender trigger points in plaintiff's hip, shoulder, chest, diaphragm, rib cage, and intercostal muscles. (Tr. at 262-264, 257-260, 575, 579, 563, 754, 771, 776). On December 13, 2000, Dr. Fellechner found plaintiff to lack physical tolerance for any sustained activities, and considered plaintiff to be "totally and permanently disabled," rendering him unable to return to the work force in any gainful capacity. (Tr. 572). Dr. Fellechner also completed a fibromyalgia questionnaire and listed plaintiff's symptoms, which included multiple tender points, chronic fatigue, irritable bowel syndrome, frequent headaches, depression, and anxiety. (Tr. 755). Dr. Fellechner concluded that the presence of these symptoms required plaintiff to sit, stand, and walk at will, to take unscheduled breaks, to absent himself from work more than four times a month, and to have significant limitations in repetitive reaching, handling, and fingering. (Tr. 757-760). Dr. Fellechner further

concluded that plaintiff was incapable of even “low stress work.” (Tr. 758-759).

Peggy Chatham-Showalter, plaintiff’s psychiatrist, completed a mental impairment questionnaire for purposes of the ALJ hearing. (Tr. 809-812). Dr. Chatham-Showalter opined that plaintiff suffered from chronic pain, insomnia, and fibromyalgia, which included symptoms of poor memory, mood and sleep disturbance, difficulty thinking and concentrating, generalizing persistent anxiety, obsessions/compulsions, decreased energy, and social withdrawal. (Tr. 809). Dr. Chatham-Showalter noted modest success in the effect of plaintiff’s medications, but found that plaintiff suffered from drowsiness during the day, had difficulty concentrating and focusing on tasks, and was easily distracted and frustrated. (Tr. 811). Plaintiff’s psychiatrist predicted that plaintiff would miss more than three days of work a month. (Tr. 810-812).

Finally, Kenneth Choquette, a doctor of osteopathy at Good Shepherd Rehabilitation Hospital, reported that plaintiff suffered from fibromyalgia based upon trigger point evaluations. (Tr. 728-729, 751, 818, 828). These corporeal points of tenderness and pain were often treated with injections. (Tr. 722-724, 808, 813, 814-816, 819, 820). In April 2001, Dr. Choquette stated that plaintiff’s pain would result in distractions that would impair plaintiff’s ability to adequately perform work and daily activities; that physical activities, such as walking, standing, and moving extremities, would increase his pain to the point of abandoning the original task; and that pain would remain a significant element of his life. (Tr. 721). In other words, Dr. Choquette reported that plaintiffs’ physical impairments would inhibit plaintiff from adequately performing work-related activities on a regular and continuing basis. (Tr. 720-721).

**2. The ALJ improperly chose not to credit fully plaintiff’s testimony and the assessments of his three treating sources.**

The ALJ chose not to credit fully plaintiff's testimony and the reports of his three treating sources in determining plaintiff's residual functional capacity. (Tr. 361-362).<sup>2</sup> The ALJ made this determination on the basis of: (i) the testimony of Dr. Stanley Askin, the Medical Expert; (ii) evidence concerning plaintiff's range of daily activities; (iii) and evidence concerning plaintiff's tolerance for medications without significant side-effects. The ALJ's decision to discount, however partially, plaintiff's testimony and the reports of his treating sources based upon these three reasons was not supported by substantial evidence. See, e.g., Green-Younger, 335 F.3d at 106 (finding reversible error when ALJ failed to give controlling weight to treating physician's opinion and required objective evidence beyond clinical findings for diagnosis of fibromyalgia).

The ALJ's first reason for devaluing plaintiff's testimony and the assessments of his treating sources was the testimony of Dr. Askin. (Tr. 361-362). The ALJ's decision to "fully credit" the testimony of Dr. Askin, a medical advisor, who concluded that plaintiff did not have any combination of impairments that would meet the impairments listed in applicable federal regulations and that the "objective evidence" failed to support Dr. Fellechner's assessment of plaintiff's residual functional capacity, was erroneous as a matter of law. (Tr. 360, 362). First, Dr. Askin never treated or saw plaintiff. As such, the ALJ was required to give Dr. Askin's testimony less weight than the reports of plaintiff's treating physicians. See 20 C.F.R. §

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<sup>2</sup>The Court notes that the ALJ never discussed with adequacy the medical assessments of Dr. Choquette. This failure violated the ALJ's duty to weigh a treating physician's medical assessments in his decision, and, if supported by evidence, to give these assessments dispositive weight. See 20 C.F.R. § 404.1527(d) (requiring ALJ to evaluate every medical opinion, regardless of source); Id. § 404.1527(d)(2) (requiring ALJ to give treating source's opinion on nature and severity of impairments dispositive weight if well-supported by medically acceptable clinical and laboratory diagnostic techniques and if not inconsistent with other substantial evidence in case record).

404.1527(d)(2) (“we give more weight to opinions from your treating sources since these sources are likely to be the medical professionals most able to provide a detailed, longitudinal picture of your medical impairments”). Second, Dr. Askin’s testimony expressed a disbelief in the viability of a fibromyalgia diagnosis, calling fibromyalgia a “label” that “only exists because some people believe it exists,” perhaps as a way for doctors to “basically, create their own patients.” (Tr. at 398-399). See, e.g., Green-Younger, 335 F.3d at 106-107 (noting legitimacy of fibromyalgia diagnosis, despite lack of objective tests to conclusively confirm the disease); SSA Fibromyalgia Memorandum (“SSA has taken a definitive position that fibromyalgia and CFS [chronic fatigue syndrome] can constitute medically determinable impairments within the meaning of the statute”). Third, although admitting that plaintiff’s treating physicians both identified trigger points of tenderness indicative of fibromyalgia and documented plaintiff’s fibromyalgia-related symptoms, Dr. Askin relied on the absence of “objective” laboratory tests confirming plaintiff’s disease to support his determination of the plaintiff’s residual functional capacity. (Tr 392-396). This methodology ignored the reality of fibromyalgia, and the well-recognized principle that, rather than physiological medical testing, the appropriate diagnostic technique for “objectively” determining the existence and severity of fibromyalgia involves tender point evaluations and clinical documentation of a patient’s symptoms by treating physicians. See, e.g., Preston, 854 F.2d at 817-818; Sarchet, 78 F.3d at 306; Social Security Ruling (“SSR”) 96-4p n. 2 (July 2, 1996) (claimant’s subjective complaints of pain represent objective “medical signs” within meaning of 20 C.F.R. § 404.1528(b) when manifestations of these symptoms can be “shown by medically acceptable clinical or diagnostic techniques”); SSA Fibromyalgia Memorandum (findings from trigger point evaluations constitute “objective” medical signs of fibromyalgia).

Consequently, by fully crediting the testimony of Dr Askin, against that of plaintiff's treating doctors, particularly Dr. Fellechner, the ALJ effectively required what amounted to "objective" evidence of the severity of plaintiff's fibromyalgia beyond the constellation of signs and symptoms required for a diagnosis;<sup>3</sup> and, in the process, formulated a residual functional capacity not supported by substantial evidence. See, e.g., Jusino v. Barnhart, 2002 WL 31371988, at \*7 (E.D. Pa. Oct. 21, 2002) (reversible error when plaintiff suffers from fibromyalgia and ALJ rejects plaintiffs' allegations of pain because no support from objective medical testing); Alvarado v. Chater, 1997 WL 43008, at \*3 (E.D. Pa. Jan. 24, 1997) (reversible error when ALJ discounts plaintiff's complaints of pain from fibromyalgia because "fibromyalgia cannot be verified on an objective basis and to find the claimant not credible for that shortcoming, on the part of her treating physician, is not fair or proper").<sup>4</sup>

The ALJ also found that plaintiff's testimony and that of his treating physicians lacked full credibility because plaintiff retained the ability to perform certain daily activities. (Tr. at 361). Specifically, the ALJ noted that plaintiff does some household chores, such as laundry,

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<sup>3</sup>The ALJ's opinion makes this reliance on objective clinical testing palpable: "claimant's statements concerning his ability to work and the severity of his limitations are not credible to the extent those statements allege a level of disability symptoms which exceed what the *objective evidence and clinical findings* could reasonably be expected to produce . . . ." (Tr. 361) (emphasis added).

<sup>4</sup>Although the ALJ did not accept without scrutiny Dr. Askin's testimony in determining plaintiff's residual functional capacity, as Dr. Askin testified that claimant could perform medium exertional work, the ALJ certainly used this testimony to discredit the medical assessments of Dr. Fellechner. (Tr. 262). Indeed, the ALJ articulated that he was "not fully crediting" Dr. Fellechner's residual functional capacity assessment because it was "inconsistent" with the testimony of Dr. Askin. (*Id.*). The failure to credit Dr. Fellechner's opinion, and the corresponding refusal to follow Dr. Askin's testimony on this issue, highlights the arbitrariness of the ALJ's residual functional capacity determination.

preparing meals, and yard-work, that plaintiff saw between four and five movies in 2001, and that plaintiff went on a vacation for three days in Las Vegas in 2001. (Id.). The ALJ also noted that plaintiff represented to Dr. Fellechner on April 25, 2000 that he was “doing a lot of household chores and yard-work.”<sup>5</sup> (Id.). The performance of minor household chores, infrequently attending movies, and participating in one three-day vacation over a period of several years, coupled with a single statement from 2000 regarding plaintiff’s capacity to “do” a “lot” of yard-work, do not undermine the credibility of plaintiff’s testimony and of his doctor’s assessments concerning the impact and intensity of his fibromyalgia. Frankenfield v. Bowen, 861 F.2d 405, 408 (3d Cir. 1988) (reversible error when ALJ rejects medically credited symptomatology based upon claimant’s testimony that he “took care of his personal needs, performed household chores, and occasionally went to church”); Jusino, 2002 WL 31371988, at \*8 (reversible error when ALJ fails to support opinion with medical evidence and rejects opinions of treating physicians by reference to claimant’s activities of daily living, which include doing a “little” cooking, shopping, laundry, and sweeping). In fact, plaintiff testified that he needed to lie down for several hours after performing routine household activities and that, due to fatigue and pain, it took four days to complete simple yard-work. (Tr. 388). Consequently, plaintiff’s range of daily activities neither undermines the credibility of plaintiff’s testimony or of his physician’s reports, nor supports a residual functional capacity of light or sedentary exertional work on a regular and continuing basis. See Smith v. Califano, 637 F.2d at 971 (3d Cir. 1985)

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<sup>5</sup>Dr. Fellechner’s April 25, 2000 report also stated that plaintiff required “rest breaks” during his performance of household chores, thereby rendering this report consistent with plaintiff’s testimony and with Dr. Fellechner’s assessment of the severity of plaintiff’s fibromyalgia. (Tr. at 589).

(“disability does not mean that a claimant must vegetate in a dark room excluded from all forms of human and social activity”); Liscano v. Barnhart, 230 F. Supp. 2d 871, 886 (N.D. Ill. 2002) (noting that it is “difficult to imagine” a claimant who suffers from fibromyalgia and who experiences fatigue from basic household chores “perform[ing] light work on a sustained basis for 8 hours a day”).

Finally, the ALJ refused to fully credit plaintiff’s testimony and that of his treating sources because plaintiff was capable of tolerating certain medications. Specifically, the ALJ found Dr. Fellechner’s conclusion that claimant would not be able to tolerate low stress work “inconsistent with the fact that claimant tolerates all of his medications without any significant side effects.” (Tr. 361). Although it is true that Dr. Fellechner and Dr. Choquette found at certain times that plaintiff was “tolerating” the effects of his medication and other treatments, the record is littered with negative side-effects from plaintiff’s various medications. (Tr. 579, 721, 725, 770, 787, 810). Furthermore, the ability to tolerate medication does not establish the success of such medication in alleviating symptoms. Nor does it correlate to an ability to perform work-related activities, such as light or sedentary exertional work as an assembler, attendant, or packer. In fact, a reading of plaintiff’s medical history reveals that treatment through injection provided temporary relief, and only on occasion, often times leaving claimant with more pain than before the treatment; that rehabilitation aggravated plaintiff’s pain; and that plaintiff underwent numerous emergency room visits due to severe pain between 2000 and 2002. (Tr. 683-684, 685-694, 695-701, 702-709, 838-845). Accordingly, the ALJ’s decision to discredit plaintiff’s testimony and the assessments of his treating doctors based both upon an ability to tolerate medication, and upon a presumed link between treatment toleration and a

capacity to work, lacked substantial evidence in the record.

This Court concludes that the ALJ erred in his determination of claimant's residual functional capacity by not fully crediting plaintiff's testimony and the reports of his treating physicians. This Court therefore remands the case to the ALJ to calculate the plaintiff's residual functional capacity in a manner fully consistent with plaintiff's testimony and with the opinions of Dr. Fellechner, Dr. Choquette, and Dr. Peggy Chatham-Showalter, including Dr. Fellechner's findings that plaintiff was incapable of tolerating low stress work, that plaintiff would miss work at least four days per month, and that plaintiff would need a job that permits him to sit, stand, or work at will.

**B. New evidence**

This Court also notes that plaintiff has supplied new evidence to support a finding of disability. Specifically, plaintiff has provided: (i) a positive test for lyme disease dated November 7, 2002;<sup>6</sup> (ii) an opinion from James Ross, M.D., who confirmed plaintiff's fibromyalgia diagnosis, stressed the severity of plaintiff's disease in relation to other fibromyalgia patients, and concluded that plaintiff's disease rendered him unable to work on a consistent basis;<sup>7</sup> and (iii) letters dated October 31, 2002 and February 5, 2003 from the Office of

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<sup>6</sup>This evidence is attached as Exhibit A to Plaintiff's brief in support of his motion for summary judgment.

<sup>7</sup>Specifically, the report of Dr. Ross stated in pertinent part:

One final issue is in regards to disability which he apparently has been denied in the past. I have see over 3000 fibromyalgia patents in the past 10 years. Out of this, Mr. Perl is in the top one percent of those in severity . . . I feel that Mr. Perl is permanently and totally disabled by pain and fatigue due to fibromyalgia.

See May 5, 2003 Consultation Report, attached as Ex. C to Pl. Mot. For SJ.

Vocational Rehabilitation (“OVR”) indicating that they were unable to help plaintiff find employment based upon the gravity of his physical and mental ailments.<sup>8</sup>

Evidence outside the record may be evaluated to determine whether to remand the decision under sentence six of 42 U.S.C. § 405(g). The applicable portion of this statutory provision provides:

The court may . . . at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding . . . .

42 U.S.C. § 405(g); Szubak v. Sec’y of Health and Human Servs., 745 F.2d 831, 833 (3d Cir. 1984) (remand under § 405(g) requires evidence to be “new” and “material,” and requires good cause for not submitting evidence at prior proceeding).

This Court finds that the extra-record evidence of plaintiff’s positive test for lyme disease meets this three-prong standard. The Court also finds that the opinion of Dr. Ross sheds additional light on the reports submitted by plaintiff’s previous doctors, including an analysis of the severity of plaintiff’s symptoms in relation to other patients suffering from fibromyalgia. See Szubak, 745 F.2d at 833 (remanding case for consideration of few new medical reports in part because they corroborate plaintiff’s subjective complaints). However, the Court finds that the letters from the OVR do not meet this standard because they were authored by a vocational counselor, who is not an acceptable medical source under applicable regulations, thereby making such evidence “immaterial” within the meaning of § 405(g). See 20 C.F.R. §§ 404.1513(a) (listing appropriate medical sources to provide evidence of medically determinable impairment);

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<sup>8</sup>This evidence is attached as Exhibit B to Plaintiff’s brief in support of his motion for summary judgment.

Szubak, 745 F.2d at 833 (materiality requires possibility that new evidence would have changed outcome of ALJ's determination). Consequently, on remand, the ALJ must also consider plaintiff's positive lyme disease test and the opinion of Dr. Ross in determining whether plaintiff is disabled.

**C. Conclusion**

For the preceding reasons, this Court grants plaintiff's motion for summary judgment (Doc. No. 15). As such, the Court vacates the decision of the ALJ and remands for a decision consistent with this opinion. On remand, the ALJ is instructed to fully credit the testimony of the plaintiff and the reports of plaintiff's treating sources. Furthermore, the ALJ must also consider plaintiff's positive test for lyme disease and the opinion of Dr. Ross in determining whether plaintiff is disabled within the meaning of the Act.

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

<b>OTTO PERL</b>	:	<b>CIVIL ACTION</b>
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v.	:	
	:	
<b>JO ANNE BARNHART</b>	:	<b>NO. 03-4580</b>

**ORDER**

AND NOW, this 10th day of March 2005, upon consideration of both parties cross-motions for summary judgment (Doc. No. 13, 15), it is hereby ORDERED as follows:

1. Plaintiff's Motion for Summary Judgment (Doc. No. 15) is GRANTED. The decision of the ALJ is vacated and the case is remanded for the ALJ to fully credit plaintiff's testimony, to fully credit the medical assessments of Dr. Peggy Chatham-Showalter, Dr. Fellechner, and Dr. Choquette, to consider plaintiff's new diagnosis of lyme disease, and to consider the medical opinion of Dr. Ross.
2. Defendant's Motion for Summary Judgment (Doc. No. 13) is DENIED as moot.
3. The Clerk of Court is directed to mark this action CLOSED for statistical purposes.

BY THE COURT:

\_\_\_\_\_/s/\_\_\_\_\_  
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