

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

DENINE DIANE GLENN,	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
CAROLYN W. COLVIN, <sup>1</sup>	:	
Commissioner of the Social	:	No. 12-3300
Security Administration,	:	
Defendant.	:	

**REPORT AND RECOMMENDATION**

TIMOTHY R. RICE  
U.S. MAGISTRATE JUDGE

November 26, 2013

Denine Diane Glenn alleges the Administrative Law Judge (“ALJ”) erred in denying her application for Disability Insurance Benefits (“DIB”) by: (1) failing to assess whether her symptoms of fibromyalgia are equivalent in severity to a Listing;<sup>2</sup> (2) using an improper legal standard to assess her credibility; (3) failing to include limitations supported by the evidence in

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<sup>1</sup> Glenn’s complaint was filed against Michael J. Astrue. In February 2013, Carolyn Colvin replaced Astrue as the Acting Commissioner of the Social Security Administration. Colvin, therefore, is now the proper defendant. See Fed. R. Civ. P. 25(d); see also 42 U.S.C. § 405(g).

<sup>2</sup> The Listing of Impairments in Appendix 1, Subpart P, Part 404 of 20 C.F.R. is a regulatory device used to streamline the decision-making process by identifying those claimants whose medical impairments are so severe they would be found disabled regardless of their vocational background. Sullivan v. Zebley, 493 U.S. 521, 532 (1990). The Listing defines impairments that would prevent an adult, regardless of age, education, or work experience, from performing “any” gainful activity, not just “substantial” gainful activity. Id.; 20 C.F.R. § 404.1525(a) (purpose of the Listing is to describe impairments “severe enough to prevent a person from doing any gainful activity”). The Listing was designed to operate as a presumption of disability making further inquiry unnecessary. Sullivan, 493 U.S. at 532.

the hypothetical posed to the vocational expert; and (4) failing to conduct the proper analysis to determine Glenn's Residual Functional Capacity ("RFC").<sup>3</sup> See Pl.'s Br. (doc. 6) at 2-16.

I find the ALJ failed to assess whether Glenn's fibromyalgia symptoms were equivalent to a Listing. Accordingly, I respectfully recommend that Glenn's request for review be granted and the matter be remanded.

### PROCEDURAL HISTORY

Glenn's DIB application was denied on March 31, 2009. R. at 63-67. Applying the five-step sequential analysis,<sup>4</sup> the ALJ found Glenn had not engaged in substantial gainful activity since her alleged onset date, May 30, 2003, and suffered from the following severe impairments: a back impairment, fibromyalgia, irritable bowel syndrome ("IBS"), hypothyroidism, asthma, and obesity.<sup>5</sup> *Id.* at 23. The ALJ also found Glenn had the following non-severe impairments:

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<sup>3</sup> RFC is defined as the most an individual can still do after considering the physical and/or mental limitations affecting her ability to perform work-related tasks. Williams v. Barnhart, 87 F. App'x 267, 267 (3d Cir. 2004).

<sup>4</sup> The sequential analysis requires the ALJ to consider whether a claimant: (1) is engaged in substantial gainful employment; (2) has one or more severe impairments which significantly limit her ability to perform basic work; (3) has impairments that meet or equal the criteria associated with impairments in the Social Security Regulations so as to mandate a disability finding; (4) has a RFC to perform work, and can return to her previous work with that RFC; and (5) can perform any other work existing in the national economy. See 20 C.F.R. § 404.1520(i)-(v).

<sup>5</sup> A back impairment is an abnormality of, partial or complete loss of, or loss of the function of the back. Dorland's Illustrated Medical Dictionary, ("Dorland's") (32nd ed. 2012) at 936. Fibromyalgia is pain and stiffness in the muscles and joints that either is diffusive or has multiple trigger points. *Id.* at 711. IBS is a common disorder that affects your large intestine (colon). IBS, The Mayo Clinic, <http://www.mayoclinic.com/health/irritable-bowel-syndrome/DS00106> (last accessed Nov. 15, 2013). It commonly causes cramping, abdominal pain, bloating, gas, diarrhea, and constipation. *Id.* Hypothyroidism is the deficiency of thyroid activity, characterized by decrease in basal metabolic rate, fatigue, and lethargy; if untreated, it progresses to hypothyroidism. Dorland's at 920. Asthma is recurrent attacks of severe shortness of breath and coughing, with airway inflammation and wheezing due to spasmodic contraction of

hypertension and a non-specific sleep impairment. Id.

The ALJ concluded Glenn had the RFC to perform sedentary work,<sup>6</sup> without concentrated exposure to temperature extremes, humidity, fumes, gases, odors, or other pulmonary irritants. Id. at 25. The ALJ then determined Glenn was capable of performing her past relevant work as an administrative assistant and, alternatively, could perform work that exists in significant numbers in the national economy, such as: order/charge account clerk and inspector. Id. at 26-28. The ALJ concluded Glenn was not disabled. Id. at 28. The Appeals Council denied review on April 12, 2012. Id. at 1.

#### FACTUAL HISTORY

Glenn, 34, lives with her husband and two children. Id. at 40. She is a high-school graduate, and has an associate's degree in computer applications and network administration. Id. at 41. Glenn previously worked as an administrative assistant, a procurement analyst purchasing computer products and software, a child care worker, and a part-time assistant in a doctor's office. Id. at 41, 53-54. She stopped working at the doctor's office because it became too much to handle due to childcare and back trouble. Id. at 42.

Glenn testified she has back spasms when she does too much walking, sitting, or standing. Id. She also explained that she is always fatigued, and spends most of her day laying

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the bronchi. Id. at 170. Obesity is an increase in body weight beyond the limitation of skeletal and physical requirement, as a result of an excessive accumulation of bodily fat. Id. at 1329.

<sup>6</sup> “Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools.” 20 C.F.R. § 404.1567. “Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties.” Id. “Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.” Id.

down because she has trouble getting around on her own. Id. at 42-45. Glenn said that during the day she spends a lot of time in the bathroom, laying on the couch, making herself something to eat, and maybe wiping down the table near where she sits. Id. at 44. She does not do any household chores because of her back problems and usually uses the stairs only once a day. Id. at 44-5. She showers twice a week because it is too difficult to stand or bend. Id. at 49. Once a month, Glenn drives her car to go to the market and her children go to the store for her. Id. at 48. She attends religious meetings, on average, twice a month. Id. She goes to pain management every few months and takes daily medications. Id. at 42-43.

Glenn's medical history includes:

Treatment by Spring Garden Chiropractic

- In November 1999, Glenn was seen at Spring Garden Chiropractic and complained of lower back and neck pain. Id. at 181. She attributed her back pain to a 1990 auto accident and her neck pain to looking at a computer screen all day. Id.
- In June 2003, Glenn reported neck, shoulder, and back pain. Id. at 186.
- In 2003, Glenn went to the chiropractor more than 20 times for similar back and neck pain. Id. at 189-98.

Treatment by Orthopedist, Dr. Gregory Tadduni

- In January 2006, Dr. Tadduni evaluated Glenn for pain and difficulty bending her right middle finger. Id. at 205. Dr. Tadduni found Glenn had full motion, no triggering, and only minimal tenderness in her finger. Id. He also found tendon function, neurovascular<sup>7</sup> status intact, and negative X-rays with regard to Glenn's right hand. Id.

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<sup>7</sup> Neurovascular pertains to the nerves that control the caliber of blood. Dorland's at 1290.

Treatment by Internist, Dr. Stephen Feinstein

- Glenn has regularly attended appointments with Dr. Feinstein, her family doctor, at Mercy Medical Associates since 2002. Id. at 126, 209-30, 280-98. She has complained of abdominal pain, flu-symptoms, body aches, a swollen middle finger, numbness in her big toe, back pain, rash, and neck pain. Id. at 209-30, 280-98.
- In January 2007, Dr. Feinstein diagnosed Glenn with fibromyalgia. Id. at 209.
- In January 2009, Dr. Feinstein found Glenn capable of: (a) occasional lifting or carrying of 10 pounds; (b) frequent lifting or carrying of two to three pounds; (c) standing or walking two to three hours in an eight-hour workday; (d) sitting up to eight hours with legs elevated; (e) limited pushing and pulling; (f) occasional bending, kneeling, stooping, crouching, and balancing; (g) no climbing; (h) no limitations on reaching, handling, fingering, feeling, seeing, hearing, speaking, tasting/smelling, or continence; and (i) limited exposure to temperature extremes, dust, fumes, and gases. Id. at 225-26.

Treatment by Jefferson Director of Sleep Disorders Center, Dr. Karl Doghramji

- In April 2007, after complaining of insomnia, Glenn underwent a sleep study at Jefferson University Hospital. Id. at 235. Although Dr. Doghramji found very few diagnostic abnormalities in Glenn's sleep patterns, he also noted that Glenn's sleep problems may be due to a mild, sleep apnea syndrome or related sleep issues.<sup>8</sup> Id. at 235-56. Dr. Doghramji recommended that Glenn attempt to lose weight and consider dental services for her mild sleep apnea. Id.

Treatment by Gastroenterologist, Dr. John Draganescu

- Throughout 2007, Glenn was seen by Dr. Draganescu for frequent heartburn and

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<sup>8</sup> Sleep Apnea is transient periods of cessation during sleep. Dorland's at 118.

abdominal discomfort. Id. at 273-79, 319, 365-67. She was reported having a history of chronic constipation, possible IBS, daily heartburn, occasional nausea, and intermittent abdominal cramping a few times a week. Id.

- In September 2007, Dr. Draganescu performed a colon and an upper endoscopy biopsy on Glenn. Id. at 314, 316. The colonic biopsy had no abnormality. Id. at 318. The upper endoscopy biopsy revealed mild chronic inflammation, and features suggestive of reflux esophagitis, but no dysplasia.<sup>9</sup> Id. at 313-14. Dr. Draganescu described Glenn as “clinically stable.” Id. at 311.
- In February 2009, Dr. Draganescu performed a second upper endoscopy with biopsy on Glenn. Id. at 362. After the procedure, Dr. Draganescu found there was no definite cause of the Glenn’s recurring nausea, but Glenn’s gastritis may be contributing. Id.

#### Treatment by Otolaryngologist, Dr. Edmund Pribitkin

- After examining Glenn in May and June 2007, Dr. Pribitkin found she had chronic fatigue. Id. at 258-59.

#### Emergency Room (“ER”) Care

- Glenn was admitted to the ER for back and abdominal pain twice between September 2008 and November 2008. Id. at 327, 344. Her symptoms included: nausea, backache, abdominal pain in the lower left quadrant, asthma, and IBS. Id. at 327-30, 335, 356.
- During the November 2008 visit, the attending physician assessed Glenn as having fibromyalgia pain. Id. at 344-46.

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<sup>9</sup> Esophagitis is inflammation of the esophagus. Dorland’s at 647. Reflux esophagitis is a serious and sometimes life-threatening form of gastro-esophageal reflux disease that involves damage to the esophageal mucosa, often with erosion, ulceration, and infiltration by neutrophils or eosinophils. Id. Dysplasia is abnormality of development in pathology, alteration in size, shape, and organization of adult cells. Id. at 579.

State Consultative Examination Review, Dr. Michael Kennedy

- On February 20, 2009, Dr. Kennedy examined Glenn and found she has: (a) fibromyalgia with low-back pain predominating; (b) IBS with gastroparesis;<sup>10</sup> (c) gastritis; and (d) probable urinary retention. Id. at 374-77. Dr. Kennedy also determined that Glenn “does not appear to have significant disability,” and “her complaints were somewhat diffuse and did not appear to show any actual dysfunction.” Id. at 377-78. Dr. Kennedy found Glenn capable of: (a) occasional lifting or carrying of 20 pounds; (b) frequent lifting or carrying of 10 pounds; (c) standing or walking with normal breaks up to six hours in an eight-hour workday; (d) sitting up to six hours in an eight-hour workday; (e) unlimited pushing and pulling; and (f) no postural, manipulative, visual, communicative or environmental limitations. Id. at 406-09.

Treatment by Endocrinologist, Dr. Stephanie Fish

- Following a visit in March 2009, Dr. Fish noted Glenn’s complaints of intermittent diarrhea/constipation, frequent nausea, IBS, and chronic fatigue. Id. at 392-95. Dr. Fish also stated Glenn has mild hypothyroidism and vitamin D deficiency, but it was unlikely that either of these conditions were contributing to her symptoms. Id.

Treatment by Interventional Pain Management Physician, Dr. Kevin Campbell

- Throughout 2009, Dr. Campbell treated Glenn for her bilateral back and thigh pain with a series of facet injections. Id. at 412-57.
- Dr. Campbell noted his physical examination findings of Glenn, such as back and neck tenderness and normal motor and sensory function in her arms and legs and negative straight leg raising. Id. at 412.

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<sup>10</sup> Gastroparesis is paralysis of the stomach, usually from damage to its nerve supply, so that the food empties out much more slowly, if at all. Dorland’s at 765.

Treatment by Rheumatologist, Dr. Lan Chen

- During a May 2010 visit, Dr. Chen noted Glenn had: (a) signs of tenderness; (b) a clinical presentation consistent with secondary fibromyalgia; low vitamin D; elevated Thyroid Stimulating Hormone levels; and hypothyroidism. Id. at 475-76.

DISCUSSION

A claimant is disabled if she is unable to engage in “any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 20 C.F.R. § 404.905; see also Diaz v. Comm’r of Soc. Sec., 577 F.3d 500, 503 (3d Cir. 2009). In reviewing an ALJ’s disability determination, I must accept all the ALJ’s fact findings if supported by substantial evidence or “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 390 (1971); see also 42 U.S.C. § 405(g). I may not weigh the evidence or substitute my own conclusions for those of the ALJ. Chandler v. Comm’r of Soc. Sec., 667 F.3d 356, 359 (3d Cir. 2011). However, with respect to the ALJ’s legal conclusions and application of legal principles, I must conduct a “plenary review.” Payton v. Barnhart, 416 F. Supp. 2d 385, 387 (E.D. Pa. 2006). Thus, I can overturn an ALJ’s decision for a legal error even if I find it was supported by substantial evidence. Id.

I. Whether Glenn’s Fibromyalgia Symptoms were Equivalent to a Listing

Glenn contends the ALJ erred by failing to assess whether her fibromyalgia symptoms were equivalent to a Listing. Pl.’s Br. at 2-7.

In step three of the sequential analysis, the ALJ must determine whether the claimant’s impairments meets or medically equal the criteria of one of the Listings. See 20 C.F.R. §

404.1520(iii). A claimant bears the burden of presenting medical evidence to show that a Listing is met by establishing that it satisfies all of the specified medical criteria. Burnett v. Comm’r of Soc. Sec. Admin., 220 F.3d 112, 120 n.2 (3d Cir. 2000); Poulos v. Comm’r of Soc. Sec., 474 F.3d 88, 92 (3d Cir. 2007) (claimant bears burden of establishing steps one through four). It is the ALJ’s burden to identify the relevant listed impairment in the regulations that compare with the claimant’s impairment. Burnett, 220 F.3d at 120. “An impairment that manifests only some of the medical criteria, no matter how severely, does not qualify.” Sullivan, 493 U.S. at 530.

Although there is no medical Listing for fibromyalgia, it may constitute a medically determinable impairment (“M.D.I.”) under the Social Security Act. See Memo. from the Deputy Comm’r for Disability & Income Sec. Programs to Verrell L. Dethloff, ALJ (May 11, 1998) (“May Memo.”) (on file with Disability Benefits Information Website). An ALJ, however, must also “determine whether [fibromyalgia] medically equals a Listing (for example, Listing 14.09D in the Listing for inflammatory arthritis), or whether it medically equals a Listing in combination with at least one other medically determinable impairment.” Titles II & XVI: Evaluation of Fibromyalgia, (“Eval. of Fibro.”) SSR 12-2P, 2012 WL 3104869, at \*6; 1. (providing “guidance on how [the Social Security Administration] develops evidence to establish that a person has an M.D.I. of fibromyalgia, and how to evaluate fibromyalgia in disability claims and continuing disability reviews.”)

Fibromyalgia may be shown where a physician finds a claimant has at least 11 positive tender points on the left and right side of her body during a physical examination. Alternatively, fibromyalgia may be present where the claimant has other typical symptoms, if clinically documented over time, including “IBS, chronic headaches, temporomandibular joint

dysfunction<sup>11</sup>, sleep disorder, severe fatigue, and cognitive dysfunction.”<sup>12</sup> Eval. of Fibro., SSR 12-2P, 2012 WL 3104869, at \*3; May Memo. “Other symptoms often associated with [fibromyalgia] pain include the following: sleep disturbance, depression, daytime tiredness, headaches, alternating diarrhea and constipation, numbness and tingling in the hands and feet, feeling of weakness, memory difficulties and dizziness.” Foley v. Barnhart, 432 F. Supp. 2d 465 (M.D. Pa. 2005).

The ALJ found Glenn’s fibromyalgia was a severe impairment, thus recognizing her fibromyalgia was medically determinable. See May Memo; R. at 23. The ALJ also acknowledged that Glenn: (a) “complains of diffuse pain”; (b) “has been diagnosed with fibromyalgia based on her symptoms”; (c) had a “physical examination showing 12/18 tender points”; and (d) had “low vitamin D and elevated [Thyroid Stimulating Hormone].” R. at 24. The ALJ’s analysis then ends. The ALJ failed to analyze whether Glenn’s fibromyalgia is equivalent to any Listing, as required by the Social Security Ruling. Id.

Similarly, the ALJ failed to consider Glenn’s fibromyalgia in combination with any of her other impairments. Id. Rather, the ALJ merely stated that Glenn did not have an impairment or combination of impairments that met or medically equaled one of the Listed impairments in 20 C.F.R. Part 404, Subpart P, Appendix 1. Id. at 23. This conclusory statement, however, did not satisfy the ALJ’s burden of actually engaging in such analysis. See Barnett v. Barnhart, 381

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<sup>11</sup> The temporomandibular joint (“TMJ”) connects the jawbone to the skull. IBS, The Mayo Clinic, <http://www.mayoclinic.com/health/tmj-disorders/DS00355> (last accessed Nov. 15, 2013). TMJ disorders can cause pain in the jaw joint and in the muscles that control jaw movement. Id.

<sup>12</sup> There are 18 tender point sites located on each side of the body at the: base of the skull; back and side of the neck; shoulder; near the shoulder blade; top of the rib cage near the sternum or breast bone; outer aspect of the elbow; top of the buttock; below the hip; and inner aspect of the knee. Eval. of Fibro., SSR 12-2P, 2012 WL 3104869, at \*3. A point is tender when a person experiences pain when applying pressure to the site. Id.

F.3d 664, 671 (7th Cir. 2004) (ALJ erred where he “simply assumed the absence of equivalency without any relevant discussion.”)

The ALJ was obligated to consider whether Glenn’s impairments met or equaled Listing 14.09, inflammatory arthritis, which requires: (1) involvement of two or more organs/body systems with one of the organs/body systems involved to at least a moderate level of severity; and (2) at least two of the constitutional symptoms or signs (severe fatigue, fever, malaise, or involuntary weight loss). 20 C.F.R. part 404, subpart P, appendix 1, §14.09B.

Glenn was diagnosed with fibromyalgia, pain and stiffness in the muscles and joints that either is diffusive or has multiple trigger points. R. at 209, 374-77. Glenn additionally was diagnosed with IBS on multiple occasions, has severe and chronic fatigue, and has malaise. R. at 23, 258-59, 374, 475, 392-95. She also was diagnosed with IBS with gastroparesis, which is paralysis of the stomach. *Id.* at 374. Glenn further testified that she had fatigue. *Id.* at 42-45, 49. Such evidence is sufficient for the ALJ to consider whether Glenn’s fibromyalgia met Listing 14.09, and the ALJ’s summary rejection was legally insufficient. *See Sherman v. Astrue*, 617 F. Supp. 2d 384, 396 (W.D. Pa. 2008) (remand was appropriate because ALJ’s analysis merely stated that “[t]he combined effect of obesity with the claimant’s other impairments was determined not to be of Listing level severity” and the ALJ gives no reasoning for this finding); *Burnett*, 220 F.3d at 121 (ALJ’s step three analysis was conclusory and, thus, beyond meaningful judicial review).

The Commissioner nevertheless maintains that substantial evidence supported the ALJ’s finding that Glenn’s fibromyalgia did not meet a Listing because no treating or examining physician suggested that Glenn’s impairments satisfied a Listing. *See* Def.’s Br. (doc. 7) at 6-7. The Commissioner further argues that the record contained minimal evidence relating to Glenn’s fibromyalgia. *Id.* at 6. I disagree. Glenn had 12 tender points, as well as numerous other

fibromyalgia symptoms. Id. at 24, 476. For example, the evidence shows Glenn had a history of chronic constipation, IBS, heartburn, nausea, fatigue, gastritis, intermittent abdominal cramping, and sleep apnea. Id. at 319, 344-46, 374-77, 392-95, 235, 258-59. Such evidence justifies an analysis as to whether Glenn’s fibromyalgia and other impairments met any Listing.

The Commissioner also contends that Glenn’s fibromyalgia is based on her own subjective complaints and she lacks medical evidence that she required or received specific ongoing treatment for fibromyalgia during the relevant period. Def.’s Br. at 6, 9. This contention, however, fails to acknowledge that the cause or causes of fibromyalgia are unknown, there is no cure, and its symptoms are entirely subjective. Sarchet v. Chater, 78 F.3d 305, 306-307 (7th Cir. 1996); see Preston v. Sec’y of Health & Human Serv., 854 F.2d 815, 817 (6th Cir. 1988) (“There are no objective tests which can conclusively confirm [fibromyalgia]”). In addition, Glenn regularly saw Dr. Feinstein and Dr. Draganescu for her fibromyalgia symptoms.<sup>13</sup> R. at 209-30, 280-98, 273-79, 319, 365-67.

Finally, the Commissioner maintains an “ALJ is not required to use ‘particular language’ or a ‘particular format’ at step three.” Def.’s Br. at 8. This uncontested proposition, however, does not license the ALJ to undertake a conclusory determination that precludes appellate review. See Sherman, 617 F. Supp. 2d at 396; Burnett, 220 F.3d at 121. The ALJ must provide sufficient reasons for finding Glenn’s symptoms, in combination, did not meet any Listing.<sup>14</sup>

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<sup>13</sup> The Commissioner also asserts Glenn’s treatment occurred after the relevant time period. However, this assertion is not supported by the record. The relevant time period spans May 30, 2003 through July 1, 2010, during which all of Glenn’s relevant treatment took place.

<sup>14</sup> The Commissioner also opposes Glenn’s argument that the ALJ should have enlisted a medical expert to testify about whether her fibromyalgia medically equaled a listed impairment. Def.’s Br. at 10. Because I recommend the case be remanded, I do not address the circumstances that may have required medical expert testimony. See SSR 96-6P, 2012 WL 374180, at \*4 (an ALJ must obtain medical expert testimony in cases where “the symptoms, signs and laboratory

## II. Glenn's Additional Claims

Glenn also alleges the ALJ used an improper legal standard to assess credibility, failed to include limitations supported by the evidence in her hypothetical posed to the vocational expert, and failed to conduct the proper analysis to determine Glenn's RFC. See Pl.'s Br. at 7-15. Because I recommend Glenn's case be remanded for the ALJ's failure to assess whether symptoms of fibromyalgia, in combination with her other impairments, are equivalent to a Listing, it is unnecessary to examine Glenn's additional claims. A remand may produce different results on this claim, making discussion of it moot. See Steinberger v. Barnhart, No. 04-383, 2005 WL 2077375, at \*4 (E.D. Pa. Aug. 24, 2005).

Accordingly, I make the following:

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findings reported in the case record suggest that a judgment of equivalence may be reasonable"). The ALJ should address that issue, not a reviewing court.

## R E C O M M E N D A T I O N

AND NOW, this 26th day of November 2013, it is respectfully recommended that Glenn's request for review be GRANTED and the matter be REMANDED to the Commissioner for further review consistent with this Report and Recommendation. The Commissioner may file objections to this Report and Recommendation within 14 days after being served with a copy thereof. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights. See *Leyva v. Williams*, 504 F.3d 357, 364 (3d Cir. 2007).

BY THE COURT:

/s/ Timothy R. Rice \_\_\_\_\_  
TIMOTHY R. RICE  
US MAGISTRATE JUDGE