

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

LINDA M. MACK, : CIVIL ACTION  
 :  
 Plaintiff :  
 :  
 v. :  
 :  
 KENNETH S. APFEL, :  
 COMMISSIONER OF SOCIAL :  
 SECURITY, :  
 :  
 Defendant : NO. 97-2446

M E M O R A N D U M

**Padova, J.** August , 1998

Plaintiff, Linda M. Mack, brought this action under 42 U.S.C.A. § 405(g) (West 1991 & Supp. 1998), seeking judicial review of the final decision of the Commissioner of Social Security, Defendant Kenneth S. Apfel ("Commissioner") denying Plaintiff's claim for disability insurance benefits ("DIB") and supplemental security income benefits ("SSI") pursuant to Title II and Title XVI of the Social Security Act, 42 U.S.C.A. §§ 401-433, 1381-1383(f) (West 1991 and Supp. 1998), respectively. The parties filed cross-motions for summary judgment. Pursuant to Local Rule 72.1(d)(1)(C), the Court referred the case to Magistrate Judge Charles B. Smith for a Report and Recommendation ("Report"). The Commissioner filed timely objections. Because the Court finds that the decision of the Commissioner is not supported by substantial evidence, the Report will be adopted and Plaintiff's Motion for Summary Judgment will be granted.

## **I. BACKGROUND AND PROCEDURAL HISTORY**

Plaintiff was born in 1947. She completed tenth grade and began but did not finish eleventh grade. (R. at 86.) Her past relevant work experience includes work as a punch press operator, a bartender and a cashier. (R. at 86-88, 132, 182.) All three jobs required that Plaintiff stand for the entire work day, and often demanded that Plaintiff turn, lift, bend, and climb stairs. (R. at 92, 96-99.) Plaintiff was injured at her job as punch press operator on August 4, 1989 when she was thrown through the air by the machine on which she was working and landed on her back. (R. at 100, 246.) Plaintiff claims that as of the date of that accident, August 4, 1989, she became disabled based on the pain from a herniated disc and an abnormal heart rhythm. (R. at 145-153, 178.)

Consequently, Plaintiff applied for SSI on March 16, 1992 and for DIB on April 10, 1992. Her applications were denied both initially and upon reconsideration. (R. at 154-160, 163-169.) Plaintiff then timely requested a hearing before an Administrative Law Judge ("ALJ"). (R. at 28.) A hearing was held before ALJ Norman B. Lynch on March 18, 1994. At this hearing, Plaintiff testified, represented by her counsel Norman Weinstein, Esq. (R. at 59-112.) Sixty exhibits, including medical records and records regarding Plaintiff's Workers' Compensation claim, were entered into evidence at the hearing and

eight additional exhibits were admitted subsequently. (R. at 116-117, 122-124, 130.) On July 7, 1994, the ALJ issued a decision finding Plaintiff "not disabled" under the Act and thus ineligible for SSI and DBI. (R. at 26-37.) The Appeals Council granted Plaintiff's request for review of the ALJ's decision. (R. at 522-524.)

On February 10, 1995, the Appeals Council remanded the case to ALJ Lynch to reconsider the opinion of Plaintiff's treating physician, Dr. Stephen Sturtz, to give further consideration to Plaintiff's residual functional capacity, and if necessary, to obtain additional testimony from a vocational expert. (R. at 523.) Supplemental hearings were held on April 18, 1995 and May 16, 1995, at which the ALJ once again elicited the testimony of Plaintiff. At the latter hearing, a Vocational Expert, Dr. Romanoff, testified. (R. at 126-144.) On September 25, 1995, the ALJ issued his second decision denying Plaintiff disability benefits. (R. at 11-19.) The ALJ's findings became the final decision of the Commissioner when the Appeals Council subsequently denied Plaintiff's request for review. (R. at 6-7.) On April 9, 1997, Plaintiff filed this action. Both parties filed motions for summary judgment. Magistrate Judge Smith entertained oral argument on the Motions and then issued his Report.

In the Report, the Magistrate recommends that, based on a review of the record as a whole, the Commissioner's decision is not supported by "substantial evidence." Thus, the Report recommends that Plaintiff's Motion for Summary Judgment be granted, Defendant's Motion for Summary Judgment be denied, and the Commissioner be instructed to award Plaintiff benefits calculated as of August 4, 1989.

## II. LEGAL STANDARD

The role of the Court in reviewing the Commissioner's decision is to determine whether that decision is supported by "substantial evidence." 42 U.S.C.A. § 405(g). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). It consists of more than a mere scintilla of evidence but may be less than a preponderance. Id. The Court may not undertake a de novo review of the Commissioner's decision. Monsour Medical Center v. Heckler, 806 F.2d 1185, 1190-91 (3d Cir. 1986) (holding that the Court must defer to agency inferences from facts if they are supported by substantial evidence, "even [where] this court acting de novo might have reached a different conclusion") (citation omitted). "[T]he evidence must be sufficient to

support the conclusion of a reasonable person after considering the evidentiary record as a whole, not just the evidence that is consistent with the agency's findings." Id. at 1190.

### III. DISCUSSION

#### A. The Process

Title II of the Social Security Act provides for the payment of disability insurance benefits to those who have contributed to the program and who suffer from a physical or mental disability. 42 U.S.C.A. § 423(a)(1)(D). Title XVI of the Act establishes that a person is eligible for SSI benefits if his or her income and financial resources are below a certain level, and if he or she is "disabled." The statutory definition of "disability" under both Titles is as follows:

(1) The term "disability" means--

(A) inability 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

. . .

(2) For purposes of paragraph (1)(A)--

(A) An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.

. . .

(3) For purposes of this subsection, a "physical or mental impairment" is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques.

42 U.S.C.A. § 423(d). The Secretary of Health and Human Services has established a five step sequential evaluation process for determining whether a person is disabled. Williams v. Sullivan, 970 F.2d 1178, 1180 (3d Cir. 1992) (citing 20 C.F.R. § 404.1520). In Sullivan v. Zebley, 493 U.S. 521 (1990), the Supreme Court of the United States explained how this sequential evaluation process operates:

The first two steps involve threshold determinations that the claimant is not presently working, and has an impairment which is of the required duration and which significantly limits his ability to work. In the third step, the medical evidence of the claimant's impairment is compared to a list of impairments presumed severe enough to preclude any gainful work. If the claimant's impairment matches or is "equal" to one of the listed impairments, he qualifies for benefits without further inquiry. If the claimant cannot qualify under the listings, the analysis proceeds to the fourth and fifth steps. At these steps, the inquiry is whether the claimant can do his own past work or any other work that exists in the national economy, in view of his age, education, and work experience. If the claimant cannot do his past work or other work, he qualifies for benefits.

Id. at 525.<sup>1</sup>

---

<sup>1</sup> The regulations implementing the Title XVI standard, 42 U.S.C.A. § 1382c(a)(3), and those implementing the identical Title II standard, 42 U.S.C.A. § 423(d) are the same in all relevant respects. Williams, 970 F.2d at 1181 n.1.

In this case, the Commissioner concedes that Plaintiff satisfies the requirements of the first two steps of the sequential evaluation process, i.e., that Plaintiff has not worked since August 4, 1989 and that her impairments are "severe." Plaintiff's impairments however, do not match and are not equal to one of the listed impairments in the Listing of Impairments in Appendix 1, Subpart P, Regulations No. 4. Thus, the analysis proceeds to step four, where the ALJ concluded that Plaintiff possessed the residual functional capacity for the full range of light work and could resume her previous work as a cashier or bartender. (R. at 19.) It is at this step, that the Court begins its review.

B. The Medical Evidence

In order to determine whether the Commissioner's decision is supported by substantial evidence, it is necessary to begin with a review of the medical evidence of record. It is essential for this Court to consider the "evidentiary record as a whole, not just the evidence that is consistent with the agency's findings." Monsour Medical Center, 806 F.2d at 1190.<sup>2</sup>

On August 4, 1989, Plaintiff had her accident. She was seen that day at the dispensary by Dr. Habib Tonsey, M.D. Dr. Tonsey

---

<sup>2</sup> The Court has reviewed thoroughly the entire administrative record. The medical history as provided herein is derived from that record.

diagnosed Plaintiff with a contusion of the left buttock and back of the head. (R. at 461.) Dr. Tonsey saw Plaintiff again three days later at which time he found a small hematoma over her sacral region and noted that Plaintiff was tender in the coccyx. He prescribed hot packs and Motrin. (R. at 461-463.)

Ultimately, Dr. Tonsey came to believe that Plaintiff had a herniated disc and referred her to Dr. Gene Salkind, M.D. (R. at 458.) On August 11th and 14th, Plaintiff visited her treating physician, Dr. Stephen Sturtz, D.O., complaining of back and leg pain. Dr. Sturtz referred Plaintiff to Dr. Norman Ristin, M.D. for a CAT scan. Dr. Ristin's impression of Plaintiff's condition was a "large herniated disc at L4-L5." (R. at 245.)

Plaintiff was admitted to Northeastern Hospital in Philadelphia on August 22, 1989 with complaints of nausea and dull chest pain. An EKG was normal and Plaintiff was discharged the next day with a diagnosis of "paroxysmal supraventricular tachycardia."<sup>3</sup> (R. at 22.) Dr. Gerald Scharf, D.O., examined Plaintiff approximately two weeks later at the request of Dr. Sturtz. He noted that, "probably this is a benign arrhythmia." His final diagnosis was "paroxysmal supraventricular tachycardia -- by history." (R. at 310-312.) On November 9, 1989, in a letter to Dr. Sturtz, Dr. Scharf indicated that the doctors who

---

<sup>3</sup> "Tachycardia -- excessive rapidity in the action of the heart." (Report at 5 n.2 (citing Dorland's Illustrated Medical Dictionary, Twenty-eighth Edition, 1994, p.1665).)

had treated Plaintiff in the emergency room in late August thought that the supraventricular tachycardia was secondary to caffeine. (R. at 315.)

Between her visit with Dr. Tonsey in August of 1989 and her visit with Dr. Salkind on January 9, 1990, Plaintiff was treated by an orthopedic surgeon, Dr. Balesubramanian. Plaintiff told Dr. Balesubramanian that her right leg pain had "subsided significantly," but that she continued to have low back pain. Dr. Balesubramanian reported that Plaintiff had a positive straight leg-raising test. (R. at 512-513.) He treated Plaintiff with epidural steroid injections, with no relief to Plaintiff. (R. at 246-247, 463.) On January 9, 1990, Plaintiff presented to Dr. Salkind with minimal low back pain and severe right leg pain. The pain awakened her at bedtime and numbness in her lower extremities increased with walking, reaching, twisting, sitting, coughing and sneezing. (R. at 246-247.) Dr. Salkind recorded that his impression was that Plaintiff had sustained a herniated disc at L4-L5 and that, based on review of an EMG of the upper extremities, she had nerve root irritation involving C7-8 on the left side. He recommended that Plaintiff be admitted to the hospital for myelography and diskectomy. (Id.)

In a letter dated July 19, 1990, Dr. Salkind wrote to Dr. Tonsey regarding a neurological follow-up visit with Plaintiff. In that letter, he stated that despite his earlier recommendation

of back surgery, Plaintiff was "petrified" of surgery. He explained that Plaintiff still complained of persistent low back pain, but that she did not have radicular pain at that time. Dr. Salkind's impression was that Plaintiff had "markedly improved." He opined that Plaintiff could return to work with a lifting maximum of 25 pounds and bending kept to an occasional basis. (R. at 485.)

Just one month later, Plaintiff was examined by Dr. Parviz Kambin, M.D., an orthopedic surgeon. At that visit, which took place on August 20, 1990, Plaintiff complained of severe back pain radiating to her right lower extremity. The pain escalated with sitting, movement and activity. Pain to her neck persisted, but her shoulder pain had improved. (R. at 264.) A lumbar spinal x-ray revealed no fracture, dislocation or disease. Dr. Kambin confirmed that Plaintiff had signs of root compression of the lower lumbar spine and a disc herniation at L4-L5, with radiculopathy at the same location. (R. at 265.) In Dr. Kambin's opinion, Plaintiff was unable to return to work and activity. He referred her for an MRI and prescribed Motrin and Darvocet N, 100 mg. for pain. (R. at 266.) Dr. Michael Brooks, M.D., performed the MRI on August 23, 1990. His evaluation once again revealed a "disc degeneration at L4-5 with mild central disc herniation." (R. at 248.) On August 27, 1990, Dr. Kambin reviewed the MRI and confirmed that, "[s]he does have a disc

herniation at L4,L5 extending to the right." (R. at 263.) Dr. Kambin recommended surgery.

Plaintiff later related that she was fearful of surgery because she had a history of cardiac problems. Dr. Kambin noted palpitations and referred her for a cardiovascular evaluation. (R. at 262.) Dr. Kambin continued to see Plaintiff throughout the latter part of 1990 into the early part of 1991, during which time he repeatedly reported Plaintiff's complaints of pain in the back and right leg. (R. at 259-266.)

Pursuant to Dr. Kambin's referral, Plaintiff was seen by Dr. Arthur Smith, M.D., on October 23, 1990. An EKG was normal. Dr. Smith summarized that Plaintiff has a "history compatible with a paroxysmal atrial tachycardia. She also has chronic obstructive lung disease with chronic bronchitis." (R. at 249-250.) Dr. Smith also reported that on December 27, 1990, when Plaintiff was reporting for physical therapy, she developed palpitations. An electrocardiogram was taken as an emergency and Plaintiff proved to have atrial flutter. She was given Inderal 20 mg, four times per day. The next day, the palpitations stopped. Dr. Smith instructed Plaintiff to stop taking the Inderal. (R. at 258.)

In late January 1991, Plaintiff was seen for a neurological evaluation by Dr. Moisey Levin, M.D. Dr. Levin's opinion was that Plaintiff suffered from a herniated disc at the L4-L5 level, with lumbar radiculopathy. He recommended physical therapy and

Motrin. Dr. Levin continued to see Plaintiff periodically throughout the spring/summer of 1991. In March, he reported that Plaintiff's back pain increased with bending, lifting, and prolonged sitting. In April, her pain persisted, and was achy in character. In May, Plaintiff reported feeling a little bit better. On a scale of 0 to 10, she stated that her pain was in the range of 5-6. In June however, Plaintiff continued to complain of lower back pain which did not subside with the treatment provided. Dr. Levin suggested a neurosurgical consultation. And then in August, 1991, Plaintiff reported that she felt much better and that "the pain doesn't bother her too much." (R. at 316-322.)

On February 18, 1991, Dr. Kambin was deposed regarding Plaintiff's workers' compensation claim. (R. at 393-421.) During that deposition, Dr. Kambin was asked whether, in his opinion, Plaintiff was capable of resuming her work as a punch press operator. He answered, "No." (R. at 400-405). Specifically, he stated,

I don't believe she can pick up more than 10 pounds, . . . [A]ny kind of job that he gives her, she will not be able to sustain that job at a certain time with all the pain that she has. She may work for a few days, a week, be forced to stay off and rest, take medication, and go back on. So I think the way she is now, she will not be able to continue to sustain any job for any lengthy period of time.

. . .  
I stated that if the weights are about 10 pounds, she could do it, but this would not be -- she would not be able to sustain it. She could do it for a few days, a

week, then she is going to have problems, then she has to take off and be treated.

. . .  
She could work on a part-time basis, maybe four hours a day. She would be able to sit, stand, walk, alternating her position as desired and do it -- the lifting without being more than 10 pounds. She could not twist; she could not bend; she cannot roll; she cannot kneel; she cannot reach above her shoulder level.

(R. at 400-403.)

Pursuant to a referral by Dr. Sturtz, Dr. William Knox, Ph.D. assessed Plaintiff's appropriateness for biofeedback therapy in an initial evaluation on June 13, 1991. Dr. Knox recommended that Plaintiff participate in a Biofeedback Therapy Program to reduce the pain in her lower back, neck and shoulder. He anticipated a reduction in Plaintiff's pain after 10-12 weeks of therapy. (R. at 267-268.)

On June 26 and August 7, 1991, Dr. Steven Masceri, M.D., who practices rehabilitative medicine, examined Plaintiff. After giving her a physical examination which revealed a negative straight leg test and a normal sensory examination, in addition to some tenderness and pain in the paralumbar areas, his impression was as follows: "(1) chronic persistent lumbosacral sprain/strain; (2) lumbar radiculopathy." (R. at 518-519.) On the 7th, Dr. Masceri noted that Plaintiff's right radicular pain had resolved. Although she continued to complain of low back pain, she denied radiating pain into the lower extremities. Dr.

Masceri recommended continuing physical therapy. (R. at 520-521.)

Plaintiff saw a chiropractor, Dr. Larry Segal, on March 27, 1992. Dr. Segal's objective findings were of palpatory tenderness over the right posterior cervical region, the left and right trapezius, the right levator scapulae, the right quadratus lumborum, the right gluteal and right paraspinal muscles in the thoracic and lumbar spine. (R. at 286.) He reported that within the first three treatments, Plaintiff responded well and in fact stated that her low back pain had diminished and there was no tingling in her legs. (R. at 287.)

Dr. Nora Faynberg examined Plaintiff for the Pennsylvania Bureau of Disability Determination on August 13, 1992. Regarding the musculoskeletal examination, Dr. Faynberg reported that it revealed, "[t]he range of motion was limited to the forward bend which the patient could perform to 45 degrees. The patient could not perform tandem gait. She could not come straight up from the squatting position. She could not perform toe-to-heel walk." Her impressions were: (1) lumbosacral radiculopathy; (2) history of central disc herniation at L4-L5 found on MRI Scan . . . ; (3) history of atrial flutter; (4) ischemic heart disease; (5) chronic obstructive pulmonary disease; (6) emphysema. (R. at 288-290.)

Plaintiff also was examined for the Bureau of Disability by Dr. Steven Klinman, M.D. on March 18, 1993. Plaintiff indicated to Dr. Klinman that her neck and back pain were not as severe as they once were, but both did continue to limit her activities. She claimed not to be able to stand for any length of time nor to be able to carry more than ten pounds. She represented that she spent most of her time sitting or lying around her home, which had caused her to gain about 50 pounds since the accident. (R. at 302-305.) Dr. Klinman performed an electrocardiogram that produced results within normal limits. He noted however, that a prior electrocardiogram was quite different, revealing non-specific ST-T wave changes, possibly representing ischemia. Regarding Plaintiff's back, he noted, "she does not really experience any significant symptomatology." (Id.)

Plaintiff's treating physician, Dr. Sturtz, completed a "Medical Assessment of Ability to Do Work-Related Activities" on January 24, 1994. (R. at 447-448.) In the Report, he indicated that Plaintiff "occasionally" (from very little up to 1/3 of an 8 hour day) would be able to carry up to 12 pounds. The maximum that she "frequently" (from 1/3 to 2/3 of an 8 hour day) would be able to carry was 8-10 pounds. He also reported that Plaintiff would be able to stand or walk a total of 2 hours in an 8 hour work day, only one-half hour at a time. She would be able to sit, according to Dr. Sturtz, for a total of one hour during an 8

hour work day, for only 10-15 minutes uninterrupted. Plaintiff's ability to reach, kneel, push, and pull were affected by her injury, and Dr. Sturtz noted that Plaintiff should never climb, kneel or crawl and only occasionally balance, stoop, and crouch. All of Dr. Sturtz's medical findings were supported by a determination that Plaintiff suffered from a "herniated disc at L4-L5." (R. at 445-448.)

Plaintiff was admitted on an emergency basis to Frankford Hospital on February 3, 1994, with complaints of tachycardia. An EKG was "essentially normal." She did well and was discharged the following day in stable condition. (R. at 487-488.)<sup>4</sup>

Dr. Kambin once again evaluated Plaintiff on July 13, 1994. She continued to complain of severe pain in her back. Dr. Kambin noted in his report that the appearance of a more recent MRI remained unchanged -- "[t]he L4-5 disc is dehydrated, and there is evidence of degeneration of the disc bulging at this level." His prognosis remained guarded. (R. at 530.) Plaintiff also presented to Dr. Kambin with complaints of severe back pain on January 16, 1995. She reported that at times she had pain going down her legs that became more intense when she was active. Dr.

---

<sup>4</sup> This is the last reported incident of any sort of heart problem. And in fact, on April 18, 1995, at the supplemental hearing before the ALJ, Plaintiff's attorney represented that Plaintiff's "heart condition" was stable. (R. at 117.) Because the record lacks sufficient evidence to support a finding that Plaintiff's heart condition is of a disabling severity, the Court need not discuss it further.

Kambin again noted that Plaintiff had "signs and symptoms of disc herniation at L4-5." Because of the persistence of these "signs and symptoms," Dr. Kambin arranged for further testing to see if Plaintiff required surgical decompression. (R. at 531.)<sup>5</sup>

C. Step Four

The Social Security regulations discussing exertion requirements define light work as follows:

(b) Light work. Light work involves lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds. Even though the weight lifted may be very little, a job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls. To be considered capable of performing a full or wide range of light work, you must have the ability to do substantially all of these activities. If someone can do light work, we determine that he or she can also do sedentary work, unless there are additional limiting factors such as loss of fine dexterity or inability to sit for long periods of time.

20 C.F.R. § 404.1567(b) (1997). Both Dr. Sturtz and Dr. Kambin concluded that Plaintiff could not perform "light work" as defined by the Act. Dr. Sturtz confined Plaintiff to standing for at most two hours of an eight-hour work day and to sitting a

---

<sup>5</sup> A number of the reports submitted by Plaintiff as exhibits to her summary judgment motion were never considered by the ALJ nor the Appeals Council. As the Magistrate Judge indicated in his Report, this evidence may not be considered by the Court upon review because Plaintiff has not demonstrated "good cause" for her failure to incorporate the "new" evidence into the record at the prior proceeding. See Szubak v. Secretary of Health & Human Services, 745 F.2d 831, 833 (3d Cir. 1984).

total of one hour during the same day. Dr. Kambin limited Plaintiff to working approximately four hours per day, alternating among sitting, standing and walking positions, and lifting no more than ten pounds. Plaintiff's own complaints are consistent with these reports. On a "good" day, she represented to the ALJ that perhaps she could stand for an hour at a time, and sit for an hour and a half. On a "bad" day, she could stand for about 20 minutes and sit for 20 to 30 minutes at a time. (R. at 108.)

Clearly, these opinions support a finding that Plaintiff is unable to engage in "light work." However, the ALJ chose to discredit these opinions because he determined that their foundation, the presence of a disc herniation at L4-L5, was not supported by the record. Based on a review of the record as a whole, the Court finds that the ALJ's determination is not supported by "substantial evidence."

1. Finding of No L4-L5 Herniation

The ALJ found specifically that neither the Medical Assessment Form completed by Dr. Sturtz, nor the opinion given by Dr. Kambin, as Plaintiff's treating physicians, were deserving of controlling evidentiary weight because they were based on the faulty assumption that Plaintiff had a herniated disc at L4-L5.

Pursuant to the regulations, the ALJ must give a treating physician's opinion controlling weight if (1) it is well-supported by medically acceptable clinical and laboratory diagnostic techniques, and (2) it is not inconsistent with the other substantial evidence of record. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2) (1997).<sup>6</sup> In this case, both components of this equation are present. The record reveals the following: Just after the accident in August of 1989, Dr. Sturtz referred Plaintiff to Dr. Ristin for a CT scan. Based on that scan, Dr. Ristin's impression was a "large herniated disc at L4-L5." (R. at 245.) In November of that year, Dr. Salkind, a neurosurgeon, recorded that Plaintiff "did, in fact, sustain a herniated disc at L4-5." (R. at 247.) Dr. Michael Brooks, who performed an MRI on Plaintiff on August 23, 1990, reported that the MRI revealed that Plaintiff suffered from "disc degeneration at L4-L5 with mild central disc herniation." (R. at 248.) Dr. Kambin then reviewed the MRI and confirmed that "[s]he does have a disc herniation at L4, L5 extending to the right." (R. at 263.) In January 1991, another doctor, Dr. Moisey Levin, opined that Plaintiff suffered from a herniated disc at L4-L5. (R. At 316-322.) In August of 1992, the doctor for the Pa. Bureau of

---

<sup>6</sup> As the Commissioner points out, the regulations are the authoritative standard for evaluating medical source opinions. See Santise v. Schweiker, 676 F.2d 925, 932-933 (3d Cir. 1982) (stating that Congress has vested in the Commissioner the power to promulgate legislative regulations to implement the Act).

Disability Determination, Dr. Faynberg, again concluded that Plaintiff had a history of central disc herniation at L4-L5. (R. at 289-290.)

The Court is mindful of the fact that it is in the province of the ALJ to make determinations as to the weight of the evidence. However, the ALJ "cannot reject evidence for no reason or the wrong reason." Mason v. Shalala, 994 F.2d 1058, 1066 (3d Cir. 1993) (citing Cotter v. Harris, 642 F.2d 700, 707 (3d Cir. 1981)). Certainly, the conclusion that Plaintiff suffered from a herniated disc at L4-L5 is consistent with the other substantial evidence of record and is supported by "medically acceptable clinical and laboratory diagnostic techniques." And once the presence of a herniated disc had been established, there remained no appropriate basis for the ALJ to disregard the opinions expressed by treating physicians Dr. Sturtz and Dr. Kambin.

## 2. Plaintiff's Complaints

Under the regulations, the ALJ evaluates symptoms, such as low back pain, on the basis of medical signs and findings that could reasonably be expected to produce the symptoms alleged. 20 C.F.R. §§ 404.1529, 416.929 (1997). Subjective complaints must be substantiated by medical evidence and the Plaintiff "must show that he has a condition which reasonably could be expected to produce the alleged symptoms that are the cause of his inability

to work.” Williams, 970 F.2d at 1186 (citing 20 C.F.R. § 404.1529 (1991)). When the medical evidence establishes the existence of a medically determinable impairment that could reasonably be expected to produce a claimant’s alleged symptoms, the regulations then require the ALJ to evaluate their intensity and persistence and their affect on the claimant’s ability to work in light of the entire record. 20 C.F.R. §§ 404.1529(c), 416.929(c) (1997). At that point, the ALJ must assess the credibility of the claimant’s subjective symptoms. In doing so, the ALJ considers the available objective medical evidence, a claimant’s own statements about his or her symptoms, statements and other information provided by treating or examining physicians or other persons about the symptoms and how they affect the individual, and any other relevant evidence in the record. 20 C.F.R. §§ 404.1529(c)(2) & (3), 416.929(c)(2) & (3) (1997).

The Court does not quarrel with the ALJ’s entitlement to draw an inference adverse to Plaintiff from the fact that she gave conflicting testimony regarding the times and the frequency of her visits to certain doctors. However, the ALJ’s treatment of Plaintiff’s complaints of pain and physical limitations cannot stand in light of the Court’s holding that the ALJ was not on sound ground in rejecting the reports of Drs. Sturtz and Kambin.

Had the ALJ given due consideration to those reports, the ALJ's analysis of Plaintiff's complaints might have been different.

Aside from the opinions of Dr. Sturtz and Kambin, the only other medical opinion in the record that pertains to Plaintiff's physical capabilities and limitations is the opinion of Dr. Salkind. In a follow-up visit with Dr. Salkind, after he suggested surgical intervention, Plaintiff's complaints to him of radicular pain were muted. Based on this visit, Dr. Salkind opined that Plaintiff could return to work with a lifting maximum of 25 pounds.<sup>7</sup> Although Dr. Salkind's assessment of Plaintiff's lifting capacity certainly indicates that in his opinion she satisfied the lifting threshold for "light work," Dr. Salkind does not give his opinion regarding Plaintiff's ability to sit and to stand for extended periods of time. The opinion in its entirety, reads, "My impression is that this patient is markedly improved as a result of her lumbar disc herniation. I do feel that she could return to work with a lifting maximum of 25 pounds and bending kept to an occasional basis." (R. at 485.) In light

---

<sup>7</sup> Although it is not part of the Court's analysis in this case, the Court notes that the context of Plaintiff's reports of subsiding pain are revealing. There appears to be a pattern in which, once surgery is suggested to Plaintiff, she reports an improvement in her condition. For example, once Dr. Salkind recommended surgery, he reported that Plaintiff's complaints of radicular pain ceased, causing him to opine that Plaintiff had "markedly improved." On June 16, 1991, Dr. Levin suggested to Plaintiff that she attend a neurosurgical consultation. Three weeks later, at her next visit, Plaintiff reported that she felt "much better and the pain doesn't bother her too much."

of the opinions of Plaintiff's two treating physicians and her corroborating subjective complaints, the record as a whole simply does not support the ALJ's finding that Plaintiff has the ability to perform "substantially all of the activities" required under the definition in the regulations of "light work." Furthermore, because Plaintiff's previous two jobs as cashier and bartender are generally performed in the light work range, Plaintiff is not able to return to her former work.<sup>8</sup>

#### D. Step Five

Since the ALJ's decision at step four of the sequential evaluation is not supported by substantial evidence, it is necessary to move to step five. At step five, it is determined "on the basis of the claimant's age, education, work experience, and residual functional capacity, whether the applicant can perform any other gainful and substantial work within the economy." Santise, 676 F.2d at 927. "An individual shall be determined to be under a disability only if his physical or

---

<sup>8</sup> At the second supplemental hearing, the Vocational Expert, whom the ALJ found credible on this point, testified as follows: "As a bartender, that work is generally unskilled and is performed in the general economy in the light category. As a cashier at K-Mart . . . that job was also unskilled and normally or generally it's performed in the light range, although at times, like she's mentioned around Christmas time, it could become medium." (R. at 140-141.)

Plaintiff's former work as a punch press operator is considered "medium" work. (R. at 140.)

mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C.A. § 423(d).

The Commissioner argues that the record does not support a finding of "disabled" at step five. However, the basis of that conclusion is the ALJ's finding that Plaintiff had the residual functional capacity to engage in "light work," or at least, "sedentary work." The Court has already found that the ALJ's determination regarding Plaintiff's ability to do "light work" is not supported by substantial evidence. As to "sedentary work," the regulations provide as follows:

(a) Sedentary work. 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. 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. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 404.1567(a) (1997).

Based on the opinions of Dr. Sturtz and Dr. Kambin, Plaintiff's exertional limitations are so severe so as to prevent her from being able to perform sedentary work. Even part-time sedentary work assumes that Plaintiff could work each day for an assigned four hours. It is clear from the record that the

intensity of Plaintiff's pain varies from day to day. There is no indication, in fact, based on Dr. Kambin's testimony, it is highly doubtful, that Plaintiff could sit for four hours without alternating positions. The significance of these limitations for Plaintiff's disability determination was discussed by the Vocational Expert at the second supplemental hearing.

ATTY: And in that [Dr. Sturtz's "Medical Assessment"], he indicates that in an eight hour day, she can only stand or walk two hours, and sit for an hour a day, would you agree that that would preclude substantial gainful employment?

VE: Yes, it would,

ATTY: And did you have an opportunity to review the testimony of Dr. Kambin?

VE: The deposition you're talking about?

ATTY: Yes.

VE: Yes. Uh-huh.

ATTY: And Dr. Kambin's opinion was that the claimant could only work on a part-time basis of four hours a day, could not lift more than ten pounds, could not twist, bend, roll, kneel, or reach over her shoulder. Would you acknowledge that that would preclude substantial gainful employment as well?

VE: Well, it would provide for sedentary, unskilled work on a part-time basis. It's four to five hours a day, I thought he said. Four to five hours a day.

ATTY: Yeah. But at four hours it would be part-time work?

VE: Yes, it would be part-time work.

ALJ: Can part-time work -- are there any unskilled jobs which would pay \$500 a month to an employee that would

only work 20 to 25 hours a week? That's about \$125 a week.

VE: Yes. If you work every day, for four or five hours.

ALJ: So if an individual did work four to five hours, five days a week, would that provide for income at the level of --

VE: \$125?

ATTY: \$125 a week?

VE: Not too many jobs would permit that.

ALJ: Mr. Weinstein?

ATTY: I have no further questions.

ALJ: Now, \$7 an hour would produce \$140 a week.

VE: Unskilled work, it's not likely you're going to start at \$7 an hour.

ALJ: Okay. What do -- do you know what cashiers at -- well, you're talking about limited to sedentary work --

VE: That's correct.

ALJ: How about cashiers? Self-service cashiers at gas stations, what do they generally start at?

VE: \$5, some even less, minimal wage.

(R. at 142-143.)

The ALJ discredited the conclusions given by the Vocational Expert because they assumed the accuracy of the opinions of Dr. Sturtz and Dr. Kambin, opinions which the ALJ found to be deserving of little evidentiary weight based on the reasons discussed above. However, the Court has found that the record as a whole supports the existence of a herniated disc at L4-L5 and

thus the basis for the treating physicians' opinions. Therefore, the ALJ's finding that the testimony of the Vocational Expert was not valid is not supported by substantial evidence.

As the ALJ pointed out in his Opinion, an income of \$500.00 per month is "income which is presumptive of the performance of substantial gainful activity." (Sep. 25, 1995 ALJ Op. at 5 (citing 20 C.F.R. § 404.1574.) It is apparent from the above dialogue that even if Plaintiff were able to perform sedentary work for four hours a day five days a week, which appears questionable, she would not be able to engage in "substantial gainful employment" as defined by the Act. According to the Vocational Expert, unskilled, sedentary jobs pay \$5 an hour or less. Twenty hours a week at five dollars an hour does not add up to the requisite \$500 per month.<sup>9</sup>

E. Award

The only remaining question is whether this case should be remanded to the Commissioner for further proceedings or reversed with a direction that benefits be awarded. "A district court,

---

<sup>9</sup> At the time of the ALJ's decision, Plaintiff was forty-eight years old and thus at the high end of "younger" individual. 20 C.F.R. §§ 404.1563, 416.963 (1997). She has a "limited" education. 20 C.F.R. §§ 404.1564, 416.964 (1997). Her past relevant work was "unskilled." (R. 140-141.) However, none of these factors works to mitigate the conclusion that Plaintiff's maximum sustained work capacity is not even in the "sedentary" range, thereby preventing her from engaging in "substantial gainful employment."

after reviewing the decision of the [Commissioner] may, under 42 U.S.C.A. 405(g) affirm, modify, or reverse the [Commissioner]'s position with or without a remand to the [Commissioner] for a rehearing." Podedworny v. Harris, 745 F.2d 210, 221 (3d Cir. 1984). The decision to award benefits should be made only when the administrative record of the case has been fully developed and when substantial evidence on the record as a whole indicates that the claimant is disabled and entitled to benefits. Gilliland v Heckler, 786 F.2d 178, 184 (3d Cir. 1986). When faced with such a case, it is unreasonable for the court to give the ALJ another opportunity to consider new evidence concerning the disability because the administrative proceeding would only result in further delay in the receipt of benefits. Id. at 185. In this case, a comprehensive administrative record makes remand unnecessary. The decision of the Commissioner will be reversed with directions that benefits be awarded beginning August 4, 1989.

An appropriate Order follows.

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

LINDA M. MACK, : CIVIL ACTION  
: :  
Plaintiff : :  
: :  
v. : :  
: :  
KENNETH S. APFEL, : :  
COMMISSIONER OF SOCIAL : :  
SECURITY, : :  
: :  
Defendant : NO. 97-2446

O R D E R

**AND NOW**, this day of August, 1998, upon consideration of Plaintiff's and Defendant's Cross Motions for Summary Judgment (Doc. Nos. 12 & 13), and after review of the Report and Recommendation of Magistrate Judge Charles B. Smith (Doc. No. 16) and Defendant's Objections thereto (Doc. No. 18), it is **HEREBY ORDERED** that:

- (1) The Report and Recommendation is **APPROVED and ADOPTED**.
- (2) Plaintiff's Motion for Summary Judgment is **GRANTED**.
- (3) Defendant's Motion for Summary Judgment is **DENIED**.
- (4) The final decision of the Commissioner denying Plaintiff's claim for disability insurance benefits and supplemental security income under Title II and Title XVI of the Social Security Act is **REVERSED**.
- (5) The Commissioner is instructed to award benefits calculated as of August 4, 1989.

BY THE COURT:

---

JOHN R. PADOVA, J.

