



the pain is so severe it makes him nauseous. (R. 137). Plaintiff uses a heating pad to relieve his pain. (R. 127-28, 137, 304-05). Plaintiff lives alone, cooks and performs household chores. (R. 293). He testified that his ability to perform chores, however, is limited by his inability to lift even ten pounds. (R. 293).

Plaintiff sought treatment for his hand problems from Dr. Steven Mandel, a neurologist, in 1987. He initially received treatment for the carpal tunnel syndrome, including surgery on his left hand. By July 1996, however, Dr. Mandel opined that the possibility of complete relief of Plaintiff's symptoms was "nil because of the length of time that he has had this problem." (R. 409). Dr. Mandel concluded that further treatment would not be successful. (R. 407). Thus, Plaintiff suffers from a permanent condition that has reached maximum medical improvement. (R. 407).

Plaintiff initially applied for SSI on April 20, 1988, alleging disability due to carpal tunnel syndrome. In a March 22, 1989 decision, the Administrative Law Judge ("ALJ") found in Plaintiff's favor, and determined that Plaintiff was disabled within the meaning of the Social Security Act. The ALJ further concluded that alcohol abuse was a "material factor in this case." R. 282.

In 1996, Congress amended the Social Security Act to preclude consideration of any drug addiction or alcohol abuse in determining whether a claimant was disabled. 42 U.S.C. §§423(d)(2), 1382(a)(3)(1998). Accordingly, the Commissioner was required to redetermine the eligibility of all SSI recipients whose drug or alcohol addiction was a contributing factor material to the favorable determination of disability. In June 1996, the Commissioner notified Plaintiff that his SSI benefits would be terminated as alcohol addiction was a factor material to his disability determination.

Plaintiff subsequently reapplied for SSI. On November 6, 1996, Plaintiff received a disability hearing before Hearing Officer Dianne Vaccaro. Hearing Officer Vaccaro determined that Plaintiff

was not disabled because he retained the residual function capacity to perform light work. Plaintiff requested and was granted an administrative hearing before an ALJ. On November 17, 1997, Plaintiff testified before the ALJ. In addition, an independent vocational expert, Beth Kelley, testified at the hearing. The ALJ found that Plaintiff could perform unskilled, entry-level, light-duty jobs such as visual inspector and school crossing guard. (R. 32). Accordingly, the ALJ concluded that Plaintiff was not disabled within the meaning of the Social Security Act, and therefore, not entitled to SSI benefits. The ALJ, however, disregarded evidence pre-dating January 1, 1997, as irrelevant to the current redetermination period. (R. 21 n. 3). On May 29, 1998, the Appeal Council denied Plaintiff's request for review. (R. 4-5). The decision of the ALJ thereby became the final decision of the Commissioner.

By Report and Recommendation issued May 6, 1999, Magistrate Judge Rueter concluded that the Administrative Law Judge's ("ALJ") determination regarding Plaintiff's ability to perform light work was not supported by substantial evidence in the record. Magistrate Judge Rueter based this decision on four factors. First, Magistrate Judge Rueter found that the ALJ erred in rejecting the opinion of Plaintiff's treating physician that Plaintiff was disabled, and accepting the contrary opinion of a non-examining physician. (R. 24). Second, Magistrate Judge Rueter found that the record lacked medical evidence supporting the ALJ's assessment of Plaintiff's residual function capacity. (R. 24). Similarly, Magistrate Judge Rueter found that the ALJ failed to evaluate Plaintiff's ability to perform light duty jobs for a 40 hour work week. Finally, Magistrate Judge Rueter concluded that the ALJ failed to take into account Plaintiff's non-exertional impairments in assessing Plaintiff's capacity to perform light work. (R. 27-28). Based on the foregoing, Magistrate Judge Rueter recommends that the Court remand this action to the Commissioner for further consideration.

## **II. STANDARD OF REVIEW**

Under the Social Security Act, a claimant is disabled if he is unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to ... last for a continuous period of not less than twelve (12) months." 42 U.S.C.A. §423(d)(1)(A); 20 C.F.R. §404.1505 (1981). Under the medical-vocational regulations, as promulgated by the Commissioner, the Commissioner uses a five-step sequential evaluation to evaluate disability claims.<sup>1</sup> The burden to prove the existence of a disability rests initially upon the

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<sup>1</sup>The five steps are listed in 20 C.F.R. §404.1520:

- (b) If you are working. If you are working and the work you are doing is substantial gainful activity, we will find that you are not disabled regardless of your medical condition or your age, education, and work experience.
- (c) You must have a severe impairment. If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience. However, it is possible for you to have a period of disability for a time in the past even though you do not now have a severe impairment.
- (d) When your impairment(s) meets or equals a listed impairment in Appendix 1. If you have an impairment(s) which meets the duration requirement and is listed in Appendix 1 or is equal to a listed impairment(s), we will find you disabled without considering your age, education, and work experience.
- (e) Your impairment(s) must prevent you from doing past relevant work. If we cannot make a decision based on your current work activity or on medical facts alone, and you have a severe impairment(s), we then review your residual functional capacity and the physical and mental demands of the work you have done in the past. If you can still do this kind of work, we will find that you are not disabled.
- (f) Your impairment(s) must prevent you from doing any other work. (1) If you cannot do any work you have done in the past because you have a severe impairment(s), we will consider your residual functional capacity and your age, education, and past work experience to see if you can do other work. If you cannot, we will find you disabled. (2) If you have only a marginal education, and long work experience (i.e., 35 years or more) where you only did arduous unskilled physical labor, and you can no longer do this kind of work, we use a different rule (see § 404.1562).

claimant. 42 U.S.C. §423(d)(5). To satisfy this burden, the claimant must show an inability to return to his former work. Once the claimant makes this showing, the burden of proof then shifts to the Commissioner to show that the claimant, given his age, education and work experience, has the ability to perform specific jobs that exist in the economy. Rossi v. Califano, 602 F.2d 55, 57 (3d Cir.1979). Judicial review of the Commissioner's final decision is limited, and this Court is bound by the factual findings of the Commissioner if they are supported by substantial evidence and decided according to correct legal standards. Allen v. Brown, 881 F.2d 37, 39 (3d Cir.1989); Coria v. Heckler, 750 F.2d 245, 247 (3d Cir.1984). "Substantial evidence" is deemed to be such relevant evidence as a reasonable mind might accept as adequate to support a decision. Richardson v. Perales, 402 U.S. 389, 407 (1971). It consists of more than a scintilla of evidence but may be somewhat less than a preponderance of the evidence. See Cotter v. Harris, 642 F.2d 700 (3d Cir.1981).

Despite the deference to administrative decisions implied by this standard, this Court retains the responsibility to scrutinize the entire record and to reverse or remand if the Commissioner's decision is not supported by substantial evidence. Smith v. Califano, 637 F.2d 968, 970 (3d Cir. 1981). Substantial evidence can only be considered as supporting evidence in relationship to all other evidence in the record. Kent v. Schweiker, 701 F.2d 110, 114 (3d Cir.1983).

### **III. ANALYSIS**

The Court's review focuses on whether substantial evidence in the record supports the ALJ's determination that Plaintiff is not disabled. The ALJ determined that Plaintiff was not "disabled" within the meaning of the Social Security Act primarily based on Dr. Shah's report. With respect to

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20 C.F.R. §§ 404.1520(b)-(f).

the period under review, the only medical evidence in the record is a report from Dr. Shah, a non-examining consultant, (R. 327-34), and reports from Plaintiff's treating physician, Dr. Mandel. (R. 406-07, 437-38, 459).

Dr. Mandel opined that Plaintiff had "lost the use of his hands sufficiently to preclude him from any gainful employment at present and permanently." (R. 438). Dr. Mandel based his opinion on "medical evidence, including signs, symptoms, and laboratory findings. (R. 438). In contrast, Dr. Shah merely reviewed Plaintiff's medical file, and checked off boxes on a Physical Residual Functional Capacity Form. (R. 327-34). On this form, Dr. Shah indicated that Plaintiff could occasionally lift and/or carry 20 pounds, frequently lift and/or carry ten pounds, stand and/or walk a total of six hours, and sit for a total of six hours. (R. 328). Dr. Shah further indicated that he did not review Plaintiff's complete medical record. (R. 333-34).

A residual capacity assessment form, unaccompanied by the doctor's thorough written report, is not substantial evidence of plaintiff's residual functional capacity. See Mason v. Shalala, 994 F.2d 1058, 1065 (3d Cir. 1993)(stating that the reliability of residual functional capacity reports "unaccompanied by thorough written reports" is "suspect"). Indeed, "it is improper for an ALJ to credit the testimony of a consulting physician who has not examined the claimant when such testimony conflicts with testimony of the claimant's's treating physician." Dorf v. Bowen, 794 F.2d 896, 901 (3d Cir. 1986). There is no evidence on the record, other than the discredited functional capacity report, that Plaintiff is capable of prolonged walking or standing, or frequently lifting ten pounds. Furthermore, Plaintiff reported that he was unable to lift objects weighing more than five to ten pounds. (R. 406).

In attempting to explain why he rejected Dr. Mandel's assessment, the ALJ stated that Dr.

Mandel's opinion did not fully explain "the degree to which the claimant is limited in terms of lifting, carrying or performing manipulative activities with his hands." (R. 23-24). In addition, the ALJ discounted Dr. Mandel's opinion because the assessment was based on the "claimant's complaints and the claimant's own description of limitations." (R. 24). The record, however, reflects that Dr. Mandel's opinion was not solely based on the Plaintiff's subjective complaints, but rather took into account Dr. Mandel's clinical and laboratory diagnostic findings. (R. 438).

The Court agrees with Magistrate Judge Rueter's recommendation that the ALJ's decision is not supported by substantial evidence. The ALJ did not resolve the inconsistencies between Dr. Shah, and Dr. Mandel. Furthermore, the record lacks any medical evidence concerning Plaintiff's ability to perform light work<sup>2</sup>. The Court will remand this case for further consideration consistent with this Memorandum, and the Report and Recommendation<sup>3</sup>, filed May 6, 1999.

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<sup>2</sup>"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 or pulling of arm or leg controls." 20 C.F.R. § 404.1567(b) (1993).

<sup>3</sup>The Commissioner objects to Magistrate Judge Rueter's recommendation that, upon remand, the Commissioner contact Plaintiff's treating physician, Dr. Mandel, and ascertain Dr. Mandel's opinion concerning Plaintiff's degree of impairment in terms of lifting, carrying or performing manipulative activities with his hands, on the ground that the production of this information was plaintiff's burden. This objection is without merit. The Commissioner has the duty to ensure that the record is fully developed. 20 C.F.R. §416.912(d). Indeed, the burden of establishing Plaintiff's residual function capacity rests on the Commissioner. See Podedworny v. Harris, 745 F.2d 210, 217 (3d Cir. 1984)(stating that where claimant shows that he or she cannot return to his or her customary occupation, the burden shifts to the Secretary to prove that the claimant can still engage in substantial gainful activity.). Similarly, the ALJ has a "duty to develop a full and fair record . . . [and] must secure relevant information regarding a claimant's entitlement to social security benefits." Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995). Accordingly, the Court overrules this objection.

An appropriate Order follows.

BY THE COURT:

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JOHN R. PADOVA, J.



