

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

SANDRA ACEVEDO,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO: 01-4952
JO ANNE B. BARNHART,	:	
Commissioner of Social Security,	:	
Defendant.	:	

GREEN, S.J.

AUGUST ____, 2002

MEMORANDUM/ORDER

Presently before the Court are the parties' cross-motions for summary judgment.¹ On April 19, 2002, United States Magistrate Judge Jacob P. Hart filed a Report recommending that this Court grant Defendant's motion for summary and deny Plaintiff's motion for summary judgment. After careful and independent consideration of the matter, and for the reasons set forth below, I will approve and adopt the report and recommendation, Defendant's motion for summary judgment will be granted, and Plaintiff's motion for summary judgment will be denied.

I. Factual and Procedural Background

In an application dated October 26, 1998, Plaintiff filed for Supplemental Security Income ("SSI") under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381 - 1383f. Plaintiff alleged that she was disabled due to degenerative joint disease of the knee and hips, fibromyalgia, mitral valve prolapse, depression and anxiety.² After Plaintiff's application was

¹ Plaintiff's Motion for Summary Judgment also requests, as alternative relief, for the matter to be remanded to the Commissioner if summary judgment on her behalf is inappropriate. Also, Plaintiff filed a Reply to Defendant's motion for summary judgment, and this Reply was considered by the Magistrate Judge and this Court.

² The factual and procedural history set forth in the Report and Recommendation of Magistrate Judge Hart is adopted by this Court.

denied initially and upon reconsideration, she requested a hearing before an Administrative Law Judge (“ALJ”). The hearing was held on December 15, 1999. On March 6, 2000, the ALJ issued his opinion which concluded that Plaintiff was not entitled to SSI benefits, finding that Plaintiff was not disabled because she could do light work with some limitations. The Plaintiff’s request for review was denied by the Appeals Council on August 1, 2001, thereby making the decision of the ALJ the final decision of the Commissioner.

Plaintiff then filed the instant matter seeking review of the Commissioner’s decision, pursuant to 42 U.S.C. § 405(g), which grants federal courts the power to review a final decision of the Commissioner regarding a claimant’s eligibility for disability benefits. Both parties then filed their motions for summary judgment. Pursuant to Local Rule of Civil Procedure 72.1 and 28 U.S.C. § 636(b)(1)(B), this Court then referred the matter to United States Magistrate Judge Jacob P. Hart. After careful consideration and review of the record, Magistrate Judge Hart filed a report recommending that this Court grant Defendant’s motion for summary judgment. Both parties were served with copies of the Magistrate Judge’s report and recommendation. Pursuant to Local Rule of Civil Procedure 72.1 IV (b) and 28 U.S.C. § 636(b)(1)(C), Plaintiff timely filed written objections to the Magistrate Judge’s report and recommendation.³ Defendant then filed a Response to Plaintiff’s objections.

II. Scope of Review

A district court judge may refer an appeal of a decision of the Commissioner to a

³ Though, facially, Plaintiff’s Objections appear untimely, Plaintiff provides a clear and persuasive timetable supporting the timeliness of her filing. (See **Pltf.’s Objections** at 1 n.1.) Defendants do not object to the timeliness of Plaintiff’s Objections, and I conclude that the objections were filed timely.

magistrate judge. See 28 U.S.C. § 636(b)(1). Within ten days after being served a copy of the magistrate judge's report and recommendation, a party may file timely and specific objections thereto. See 28 U.S.C. § 636(b)(1)(C). The district court judge will then make a *de novo* determination of those portions of the report and recommendation to which objection is made. See id. The judge may accept, reject, modify, in whole or in part, the findings or recommendations made by the magistrate, receive further evidence or recommit the matter to the magistrate with instructions. See id.

In reviewing the Commissioner's decision, the Court is bound by the ALJ's findings of fact if they are supported by substantial evidence in the record. See 42 U.S.C. § 405(g). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate." Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999).

III. Discussion

Pursuant to 28 U.S.C. § 636(b)(1)(C), the Plaintiff timely filed five objections to the Magistrate Judge's Report and Recommendation. I will address these objections seriatim.

A. Whether substantial evidence supports the ALJ's finding that Plaintiff does not meet a 1.05 Listing.

Plaintiff's First Objection is to that portion of the Magistrate Judge's report which states that "the medical evidence does not support [Plaintiff's] claims that she meets a 1.05 Listing⁴,

⁴ The Court notes that, as of February 19, 2002, the Listing 1.05 which was in effect at the time this matter was reviewed by the Commissioner and the Magistrate Judge was deleted and replaced by new Listing 1.04. See 66 Fed Reg. 58010, 58017-18 (Nov. 19, 2001); see, also, 20 C.F.R. Pt. 404, Subpt. P., App. 1, Listing 1.04 (2002). New Listing 1.04 reads as follows:

1.04 **Disorders of the spine** (e.g., herniated nucleus pulposus, spinal arachnoiditis, spinal stenosis, osteoarthritis, degenerative disc disease, facet arthritis, vertebral fracture),

which requires her to have significant spinal pain and muscular limitations.” (See Pltf.’s

resulting in compromise of a nerve root (including the cauda equina) or the spinal cord.

With:

- A. Evidence of nerve root compression characterized by neuro-anatomic distribution of pain, limitation of motion of the spine, motor loss (atrophy with associated muscle weakness or muscle weakness) accompanied by sensory or reflex loss and, if there is involvement of the lower back, positive straight- leg raising test (sitting and supine); or
- B. Spinal arachnoiditis, confirmed by an operative note or pathology report of tissue biopsy, or by appropriate medically acceptable imaging, manifested by severe burning or painful dysesthesia, resulting in the need for changes in position or posture more than once every 2 hours; or
- C. Lumbar spinal stenosis resulting in pseudoclaudication, established by findings on appropriate medically acceptable imaging, manifested by chronic nonradicular pain and weakness, and resulting in inability to ambulate effectively, as defined in 1.00B2b.

When the regulations were changed, the Social Security Administration stated that, for claims such as Plaintiff’s in which the Commissioner has made a final decision and the claim was pending judicial review in Federal court, it expected that “the court’s review of the Commissioner’s final decision would be made in accordance with the rules in effect at the time of the final decision.” See 66 Fed. Reg. 58011 (Nov. 19, 2001). Since neither party has objected to the continued use of old Listing 1.05, the Court will apply old Listing 1.05 to the matter *sub judice*. Old Listing 1.05 read as follows:

1.05 Disorders of the spine:

A. Arthritis manifested by ankylosis or fixation of the cervical or dorsolumbar spine at 30° or more of flexion measured from the neutral position, with X-ray evidence of:

- 1. Calcification of the anterior and lateral ligaments; or
- 2. Bilateral ankylosis of the sacroiliac joints with abnormal apophyseal articulations; or

B. Osteoporosis, generalized (established by X-ray) manifested by pain and limitation of back motion and paravertebral muscle spasm with X-ray evidence of either:

- 1. Compression fracture of a vertebral body with loss of at least 50 percent of the estimated height of the vertebral body prior to the compression fracture, with no intervening direct traumatic episode; or
- 2. Multiple fractures of vertebrae with no intervening direct traumatic episode; or

C. Other vertebrogenic disorders (e.g., herniated nucleus pulposus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

- 1. Pain, muscle spasm, and significant limitation of motion in the spine; and
- 2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

Objections at 1.) Plaintiff, apparently, is not challenging the Magistrate Judge's conclusion that she has failed to sustain her burden of proof with regards to Listings 1.05A and 1.05B, said conclusion based on Plaintiff's failure to include any x-ray evidence as required under these subsections. See, e.g., Bowen v. Yuckert, 482 U.S. 137, 145-152 (1987) (placing burden on claimant to produce evidence that impairment meets listing). Plaintiff only challenges the Magistrate Judge's conclusion that Plaintiff does not meet Listing 1.05C, which, among other things, requires a claimant to have significant spinal pain and muscular limitations.

But, as shown by the Magistrate Judge in his Report, the medical evidence provided by Plaintiff does not support her claim. (See Report at 5.) At several points in 1998 and 1999, medical professionals reported that Plaintiff had a normal range of motion in her cervical spine, full range of motion in her neck and back in all directions and without pain, minimal pain in her lumbar spine with normal range of motion in the region, and otherwise normal range of motion in her upper and lower extremities. (See Report at 5; Tr. at 127, 254, 280 and 285.) Therefore, I conclude that there is substantial evidence to support the ALJ's finding that the Plaintiff does not meet a 1.05 Listing, and Plaintiff's objection on this ground will be overruled.

B. Whether substantial evidence supports the ALJ's decision that Plaintiff's testimony was not entirely credible.

Plaintiff's Second Objection is to the Magistrate Judge's conclusion that substantial evidence supports the ALJ's determination that Acevedo's testimony regarding her pain and inability to work was not credible. A claimant's testimony regarding her pain and inability to work is entitled to great weight, but may be rejected if an ALJ specifically addresses the claimant's testimony in his decision, states his reasons for rejecting it, and shows support for his

conclusion in the record. See Matullo v. Bowen, 926 F.2d 240, 245 (3d Cir. 1990); Dobrowolsky v. Califano, 606 F.2d 403, 409 (3d Cir. 1979). A careful review of the record shows there is substantial evidence to support the ALJ's determination on this point.

As the Magistrate Judge noted, Plaintiff's testimony regarding her pain and inability to work not only conflicts with the medical evidence she has submitted, it also conflicts with other portions of her testimony. Specifically, Plaintiff's testimony regarding her ability to do housework, shop, sleep and concentrate undermine the testimony she gives about her disabling pain. Of course, it is not for this Court to pit Plaintiff's testimony against itself or weigh it against her medical reports; the only determination necessary is whether substantial evidence supports the ALJ's findings and conclusions. I conclude, after a careful review of the record, that there is substantial evidence to support the ALJ's decision that Plaintiff's testimony regarding her disabling pain and inability to work was not credible, and, therefore, Plaintiff's objection to the Magistrate Judge's conclusion on this point will be overruled.

C. Whether substantial evidence supports the weight which ALJ gave Dr. Guinn.

Plaintiff's Third Objection is the Magistrate Judge's conclusion that the ALJ properly weighed the opinions of Plaintiff's treating physician, Dr. Guinn. As with Plaintiff's testimony, evidence from a claimant's treating physician is ordinarily given greater weight than evidence from a non-treating physician, though, of course, an ALJ may reject a treating physician's opinion, as long as the decision to do so is supported by an explanation and substantial evidence.

The Magistrate Judge, after reviewing the ALJ's opinion which rejected Dr. Guinn's conclusion that Plaintiff was disabled because Dr. Guinn's opinions were inconsistent with the objective evidence in the record and were not supported by a physical examination, appropriate

tests or diagnostic procedures specifying physical limitations, concluded that the ALJ properly discounted Dr. Guinn's opinions. The Magistrate Judge concluded that Dr. Guinn's opinion was inconsistent, not only with medical evidence provided by Dr. Rodriguez and orthopedic specialist Dr. Petolillo, but also with Plaintiff's own statement of her daily activities.

After carefully reviewing Plaintiff's objection to the Magistrate Judge's conclusion, the ALJ's opinion and the record, I conclude that there is substantial evidence in the record to support the ALJ's decision to discount Dr. Guinn's opinion. Therefore, Plaintiff's objection on this issue will be overruled.

D. Whether ALJ's rejection of the vocational expert's hypothetical was proper.

Plaintiff's Fourth Objection is to the Magistrate Judge's conclusion that the ALJ correctly ignored the vocational expert's opinion that, if Plaintiff's testimony and subjective complaints were accepted, Plaintiff would not be able to do any kind of work. This objection is derivative of Plaintiff's Second Objection, which questioned the Magistrate Judge's conclusion that substantial evidence supported the ALJ's decision to reject Plaintiff's testimony regarding her disabling pain and inability to work. I have already concluded that Plaintiff's Second Objection will be overruled. Therefore, since substantial evidence supports the ALJ's decision to reject Plaintiff's testimony regarding her disabling pain and inability to work, I conclude it was not necessary for the ALJ to explain why she rejected the vocational expert's opinion, which was based on a hypothetical that the ALJ factually rejected. Accordingly, Plaintiff's Fourth objection will be overruled.

E. Whether the Magistrate Judge's recommendation should be adopted.

Plaintiff's Fifth and final Objection is to "that portion of the United State's Magistrate's

Report and Recommendation in which he recommends that Plaintiff's motion for summary judgment be denied and defendant's motion for summary judgment be granted" (See **Pltf.'s Objections** at 14.) This objection does not set forth any independent legal argument, and simply relies on and incorporates Plaintiff's first four objections. Therefore, since all previous objections have been considered and rejected, Plaintiff's Fifth Objection will be overruled.

IV. Conclusion

For the foregoing reasons, I will adopt the Report and Recommendation filed by United States Magistrate Judge Jacob P. Hart. Plaintiff's objections will be overruled, Plaintiff's motion for summary judgment will be denied, and Defendant's motion for summary judgment will be granted. An appropriate order follows.

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

SANDRA ACEVEDO,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	NO: 01-4952
JO ANNE B. BARNHART,	:	
Commissioner of Social Security,	:	
Defendant.	:	

ORDER

AND NOW, this _____ day of August, 2002, upon consideration of the parties' cross-motions for summary judgment, the Report and Recommendation filed by United States Magistrate Judge Jacob P. Hart, Plaintiff's Objections, and Defendant's Response to Plaintiff's Objections, **IT IS HEREBY ORDERED** that:

- 1) Plaintiff's objections are **OVERRULED**;
- 2) The Report and Recommendation is **APPROVED** and **ADOPTED**;
- 3) Defendant's motion for summary judgment is **GRANTED**;
- 4) Plaintiff's motion for summary judgment is **DENIED**;
- 5) The **Clerk of the Court** shall mark this case closed.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.