

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

CATHERINE KUHN,	:	
	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
JO ANNE B. BARNHART,	:	NO. 02-6873
Commissioner of Social Security Administration,	:	
	:	
Defendant.	:	

ORDER AND MEMORANDUM

ORDER

AND NOW, this 3rd day of March, 2004, upon consideration of Plaintiff's Motion for Summary Judgment (Document No. 17, filed May 14, 2003), Defendant's Brief in Opposition to Plaintiff's Motion and in Support of Defendant's Motion for Summary Judgment (Document No. 21, filed July 8, 2003), plaintiff's Reply Brief in Support of Plaintiff's Motion for Summary Judgment (Document No. 23, filed July 29, 2003), the Report and Recommendation of United States Magistrate Judge Linda K. Caracappa (Document No. 24, filed July 31, 2003), Plaintiff's Objections to Report and Recommendation of United States Magistrate Judge (Document No. 25, filed August 18, 2003), and Defendant's Response to Plaintiff's Objections to the Report and Recommendation of Magistrate Judge Linda K. Caracappa (Document No. 27, filed September 17, 2003), **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Judge Linda K.

Caracappa dated September 17, 2003 is **REJECTED**;

2. Defendant's Motion for Summary Judgment is **DENIED**;

3. That part of Plaintiff's Motion for Summary Judgment in which plaintiff seeks a remand is **GRANTED**. The case is **REMANDED** to Jo Anne B. Barnhart, Commissioner of the Social Security Administration, in accordance with the fourth sentence of 42 U.S.C. § 405(g) for further proceedings consistent with this Order and Memorandum; and

4. In all other respects, Plaintiff's Motion for Summary Judgment is **DENIED**.

MEMORANDUM

I. INTRODUCTION

Plaintiff, Catherine Kuhn, brought this action, pursuant to 42 U.S.C. § 405(g), appealing the denial of her claim for supplemental security income ("SSI") benefits by defendant, the Commissioner of the Social Security Administration ("Commissioner"). Under 42 U.S.C. § 1383(c)(1)(B)(3), decisions of the Commissioner relating to SSI benefits are subject to judicial review. Maniaci v. Apfel, 27 F. Supp. 2d 554 (E.D. Pa. 1998).

Currently before the Court are the parties' motions for summary judgment. Magistrate Judge Linda K. Caracappa, in a Report and Recommendation dated July 31, 2003, recommended that defendant's Motion for Summary Judgment be granted and plaintiff's Motion for Summary Judgment be denied. For the reasons set forth below, the Court rejects the Report and Recommendation of Magistrate Judge Caracappa, grants plaintiff's Motion for Summary Judgment to the extent it seeks a remand, denies defendant's Motion for Summary Judgment, and remands the case to the Commissioner for further proceedings consistent with this Memorandum.

II. BACKGROUND

Plaintiff, a sixty-one year old woman, worked as a merchandiser before she slipped and fell on her back at work while working at K-Mart on March 30, 1988. (R. at 52, 55) As a result of this accident, plaintiff suffers back and neck pain and has been unable to return to work. (R. at 56, 57) She also experiences pain and numbness in both hands. (R. at 57-58)

Plaintiff filed an application for disability insurance benefits (“DIB”) under Title VII of the Social Security Act on November 4, 1992. (R. at 154) Plaintiff’s application was denied initially and on reconsideration. (R. at 158-60, 164-66). Plaintiff requested an administrative hearing to review these decisions. (R. at 167-68)

The first hearing was held before Administrative Law Judge Hazel C. Strauss (“ALJ”) on June 6, 1994. (R. at 42-104) On June 9, 1995, the ALJ issued a decision finding that plaintiff was not disabled. (R. at 537-48) This decision was based, *inter alia*, on the ALJ’s finding that plaintiff had no severe impairments. (R. at 541) Plaintiff appealed this decision and, on review, the Appeals Council vacated the ALJ’s decision and remanded plaintiff’s claim for a new hearing. (R. at 554-57) The Appeals Council concluded “that the evidence of record is more than sufficient to establish that the claimant had a severe impairment prior to December 31, 1993, and that further consideration under the sequential evaluation process is necessary.” (R. at 556)

The ALJ conducted a second hearing on September 17, 1998. (R. at 105-53) At this hearing, the ALJ heard testimony from plaintiff and her husband; Dr. Stanley Askin, a specialist in orthopedic surgery; and William Slaven, a vocational expert. (R. at 18) The ALJ also considered reports from, *inter alia*, Dr. Murray Glickman, an orthopedist; Dr. Charles Gonzales, a

radiologist and neurosurgeon; Dr. Pushpa Thakarar, a rehabilitation specialist; and Dr. Vincent Baldino, plaintiff's treating physician. (R. at 21-22)

The ALJ again denied plaintiff's claim in a decision dated March 26, 1999. (R. at 15-30) Although the ALJ found that plaintiff had severe back and neck impairments, the ALJ concluded that plaintiff's carpal tunnel syndrome¹ ("CTS") was non-severe. The ALJ's assessment of plaintiff's CTS was based, *inter alia*, on the medical records, plaintiff's statement to Dr. Thakarar that she was independent in her daily activities, the absence of evidence of treatment for her CTS, and the fact that plaintiff never referred to pain in her hands when filing disability reports. (R. at 23, Exhibit 8)

The ALJ concluded that plaintiff's November 10, 1993 electromyogram ("EMG") and nerve conduction study that resulted in findings "consistent with bilateral CTS, moderate to severe in the right, moderate on the left," did not warrant a finding that plaintiff's CTS was a severe impairment under Social Security regulations. (R. at 23, Exhibit 20) In explaining this conclusion, the ALJ relied primarily on Dr. Askin's testimony that these results were not "strong findings indicating nerve damage" and plaintiff's CTS was "easily remediable" by carpal tunnel release surgery. (R. at 23, 120, 122) The ALJ also noted that plaintiff received only "conservative treatment" and "failed to seek the advice of an appropriate expert such as an orthopedist or neurologist, as someone who has such severe, prolonged pain as she described would be expected to do." (R. at 26) As further evidence that plaintiff's CTS was not as severe

¹Carpal tunnel syndrome is defined as "[a] condition resulting from pressure on the median nerve as it traverses the carpal tunnel, usually by fibers of the transverse carpal ligament. The condition is characterized by pain, tingling, burning, and numbness, etc. . . in the areas supplied by the nerve, i.e., in the skin of the palm, fingers, nerve, wrist, etc." Attorney's Dictionary of Medicine (28th ed. 1995).

as she claimed, the ALJ pointed to plaintiff's failure to investigate hand surgery after a 1997 discussion with her treating physician, Dr. Baldino, in which he referred her to a hand surgeon. (R. at 27)

The ALJ also found that plaintiff's back and neck impairments were severe but not as functionally limiting as plaintiff claimed. Although plaintiff testified that she could not even perform sedentary work (R. at 20), the ALJ rejected this testimony on the ground that it conflicted with the testimony of Dr. Askin, the objective medical evidence, and plaintiff's own testimony about her daily activities. Dr. Askin reviewed all the test results in plaintiff's record and concluded that these results did not support the functional limitations described by plaintiff. (R. at 134) The ALJ found that the reports of two specialists consulted by plaintiff conflicted with her testimony and the testimony of her treating physician, Dr. Baldino. Dr. Glickman, one of those specialists, concluded that there "was no orthopedic process that would prevent the claimant from being able to resume her normal activities." (R. at 24, Exhibit 19) This finding was consistent with the finding of the second specialist, Dr. Gonzalez, that a CT examination of plaintiff's spine was "entirely within normal limits." (R. at 24, Exhibit 19) The ALJ credited the testimony of these specialists over the opinion of plaintiff's treating physician, Dr. Baldino, because Dr. Baldino's opinion was based primarily on plaintiff's subjective complaints. (R. at 25) The ALJ also found that plaintiff's subjective complaints were "not wholly credible" based on the conservative treatment she sought. (R. at 26) In addition, plaintiff's testimony concerning her daily activities, including feeding and dressing herself, cooking, sweeping, and shopping, was not consistent with the inability to do any work. (R. at 26)

Although the ALJ found that plaintiff's impairments were severe enough to prevent her

from returning to work in her former occupation as a merchandiser, she found that plaintiff retained the residual functional capacity to perform a full range of light work activity. (R. at 27) Based on this finding and plaintiff's age, education, and past work experience, the ALJ concluded that plaintiff could have performed all the unskilled, light occupations listed in the Commissioner's Medical Vocational Guidelines. (R. at 27) Notwithstanding this finding, the ALJ asked the vocational expert ("VE") to consider an alternative hypothetical that credited plaintiff's testimony. The ALJ asked the expert to assume that plaintiff's ability to perform light work was subject to the further limitations "that she was able to walk approximately 8 blocks daily, could stand 10 to 15 minutes at a time, could sit for 20 to 30 minutes at a time, could lift and carry 10 pounds for about 12 feet, and could climb stairs slowly holding to a railing." (R. at 27) The ALJ did not include in the hypothetical question asked of the VE any limitations relating to plaintiff's CTS because she determined the condition was "easily remediable and should not preclude her ability to work." (R. at 27) In response to the hypothetical question, the VE found that plaintiff could work as a ticket seller, self service gasoline cashier, and ticket taker and that these jobs were available in significant numbers in the local and national economies. (R. at 28)

Plaintiff appealed the decision of the ALJ to the Appeals Council. This time the Appeals Council denied plaintiff's request for review. As a result, the ALJ's decision became the "final decision" of the Commissioner. (R. at 10-12)

The instant action was filed on August 22, 2002. On May 14, 2003, plaintiff filed a Motion for Summary Judgment. In her Motion for Summary Judgment, plaintiff disputed the ALJ's finding that her CTS was non-severe and argued that the ALJ overestimated her residual

functional capacity. Specifically, plaintiff claimed the ALJ ignored an explicit finding by the Appeals Council that her CTS was severe and applied an incorrect severity standard to this condition. With regard to the ALJ's analysis of her functional capacity, plaintiff argued that the ALJ ignored positive findings from a November 1993 magnetic resonance imaging ("MRI") exam, improperly rejected the opinion of her treating physician, failed to include all of her limitations in the hypothetical question to the VE, failed to properly credit the testimony of plaintiff and her husband, and neglected to consider a finding of disability by the Pennsylvania Department of Labor and Industry.

The Court referred the matter to United States Magistrate Judge Linda K. Caracappa for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). Judge Caracappa issued a Report and Recommendation on July 31, 2003.

Judge Caracappa concluded that the ALJ's assessment of plaintiff's CTS was supported by substantial evidence. That determination was based on plaintiff's conservative treatment regimen, her daily activities, the examination and report of Dr. Thakarar, and the testimony of Dr. Askin. Magistrate Judge's Report at 13. Judge Caracappa did not discuss the Appeals Council's opinion "that the evidence of record is more than sufficient to establish that the claimant had a severe impairment prior to December 31, 1993, and that further consideration under the sequential evaluation process is necessary." (R. at 556) With respect to plaintiff's functional capabilities, Judge Caracappa found "the ALJ correctly gave Dr. Baldino's assessment less weight since it [was] not supported by the objective testing in the record." *Id.* at 14. She also found that plaintiff's complaints of pain were not supported by the objective evidence – "the evidence indicates that plaintiff has a back and/or neck condition that may reasonably cause

some degree of pain, but it does not establish that it is of a severity to prevent her from performing light work.” Id. at 16. Although Judge Caracappa stated that the “hypothetical accurately reflected plaintiff’s limitations that are supported by the evidence,” she did not discuss the failure to include CTS in the hypothetical. Id. at 17. Judge Caracappa also failed to discuss the testimony of plaintiff’s husband that corroborated plaintiff’s statements about her pain and daily activities or the finding by the Pennsylvania Department of Labor that plaintiff was disabled.

Based on the above analysis, Judge Caracappa recommended that the Court grant defendant’s Motion for Summary Judgment and deny plaintiff’s Motion for Summary Judgment. Plaintiff filed Objections to the Magistrate Judge’s Report and Recommendation on August 18, 2003. In the Objections, plaintiff repeated the arguments she made in her Motion for Summary Judgment and presented the additional argument that her CTS should have been included in the hypothetical question to the VE even if this condition was not severe. Pl.’s Objections at 11 n.8, 13.

For the reasons set forth in this Memorandum, the Court rejects the Report and Recommendation of Magistrate Judge Caracappa, grants plaintiff’s Motion for Summary Judgment to the extent it seeks a remand, denies defendant’s Motion for Summary Judgment, and remands the case to the Commissioner for further proceedings consistent with this Memorandum.

III. STANDARD OF REVIEW

The role of the Court on judicial review of the Commissioner’s decision is to determine whether it is supported by substantial evidence. Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986); Newhouse v. Heckler, 753 F.2d 283, 1285 (3d Cir. 1985). Substantial evidence is defined as the

relevant evidence which a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Kangas v. Bowen, 823 F.2d 775, 777 (3d Cir. 1987); Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981); Dobrowolsky v. Califano, 606 F.2d 403, 406 (3d Cir. 1979). It consists of more than a mere scintilla of evidence but may be somewhat less than a preponderance of the evidence. Ginsburg v. Richardson, 436 F.2d 1146, 1148 (3d Cir. 1971), cert. denied, 402 U.S. 976 (1971); Jones v. Harris, 497 F. Supp. 161, 167 (E.D. Pa. 1980). “[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.” Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951). “[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 finding.” Id. at 1190.

IV. ANALYSIS

A. DETERMINATION OF DISABILITY

To establish a disability under the Social Security Act, 42 U.S.C. §§ 401 – 433, a claimant must demonstrate that there is some “medically determinable basis for an impairment that prevents him from engaging in any ‘substantial gainful activity’ for a statutory twelve-month period.” Fagnoli v. Halter, 247 F.3d 34, 38-39 (3d Cir. 2001) (quoting Plummer v. Apfel, 186 F.3d 422, 427 (3d Cir. 1999)); see also 20 C.F.R. § 404.1505(a). “A claimant is considered unable to engage in any substantial gainful activity ‘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.’” Fagnoli, 247 F.3d at 39 (quoting 42

U.S.C. § 423(d)(2)(A)).

The Commissioner's regulations provide a five step sequential evaluation process for determining whether a claimant is disabled and entitled to benefits. 20 C.F.R. § 404.1520. Step one states that an individual who is working will not be found disabled regardless of medical findings. 20 C.F.R. § 404.1520(b). Step two requires the Commissioner to decide if the claimant is suffering from a "severe impairment." Only claimants with severe impairments are eligible for benefits. 20 C.F.R. § 404.1520(c). In step three, a claimant's impairment or combination of impairments is compared with a list of impairments "presumed severe enough to preclude any gainful work." Fagnoli, 247 F.3d at 39 (quoting Plummer, 186 F.3d at 428), 20 C.F.R. § 404.1520(d). If the claimant does not suffer from a listed impairment, analysis proceeds to steps four and five. Step four provides that if an individual is capable of performing past relevant work, she will not be found disabled. 20 C.F.R. § 404.1520(f). If an individual cannot perform past relevant work, step five requires the Commissioner to demonstrate that the claimant can perform other work available in the national economy consistent with her medical impairments, age, education, past work experience, and residual functional capacity. 20 C.F.R. § 404.1520(g); see also Fagnoli, 247 F.3d at 39 (quoting Plummer, 186 F.3d at 428).

"A claimant must demonstrate that he was disabled before his date last insured in order to be entitled to DIB." 42 U.S.C. §§ 423(a)(1)(A), (c)(1)(B); 20 C.F.R. § 404.131(a) (2002); Fitch v. Barnhart, No. 03-1596, 2003 U.S. Dist. LEXIS 24316, at *11 n.12 (E.D. Pa. Sep. 22, 2003). According to the ALJ, "[a] review of the [plaintiff's] earnings record establishes that the insured status requirements of the Act were last met on December 31, 1993." (R. at 19) Plaintiff agrees that this was her date last insured. Pl.'s Mot. for Summ. J. at 4 n.1.

B. PLAINTIFF'S CARPAL TUNNEL SYNDROME

1. There is substantial evidence to support the ALJ's decision that plaintiff's carpal tunnel syndrome was not severe.

At step one of the sequential evaluation process, the ALJ found that plaintiff has not engaged in substantial gainful activity since her accident. (R. at 19) Therefore, the ALJ proceeded to step two – an evaluation of whether plaintiff suffered from any severe impairments. At that step, the ALJ found that, prior to her date last insured, plaintiff had severe back and neck impairments but that her CTS was not a severe impairment. (R. at 26)

Plaintiff argues that the ALJ used the incorrect legal standard when determining that her carpal tunnel syndrome (“CTS”) was not severe. Under regulations promulgated by the Commissioner, an impairment is non-severe “if it does not significantly limit your physical or mental ability to do basic work activities.” 20 C.F.R. § 404.1521. Basic work activities include, *inter alia*, “the abilities and aptitudes necessary to do most jobs. Examples of these include-- walking, standing, sitting, lifting, pushing, pulling, reaching, carrying or handling.” 20 C.F.R. § 404.1521(b). “The Act defines ‘disability’ in terms of the effect a physical or mental impairment has on a person's ability to function in the workplace. The regulation adopts precisely this functional approach to determining the effects of medical impairments. If the impairments are not severe enough to limit significantly the claimant's ability to perform most jobs, by definition the impairment does not prevent the claimant from engaging in any substantial gainful activity.” Bowen v. Yuckert, 482 U.S. 137, 146 (1987) (citations omitted).

This functional approach should only be used to screen *de minimus* claims. “Step two is a threshold inquiry and only allows claims that are based upon the most trivial claims to be

rejected. An impairment is found not severe when the medical evidence establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work." Diaz v. Barnhart, No. 01-0525, 2002 U.S. Dist. LEXIS 12147, at *15 (E.D. Pa. Mar. 6, 2002) (quoting Social Security Ruling 85-28, Harper v. Sullivan, No. 89-4272, 1991 U.S. Dist. LEXIS 2168, at *11 (E.D. Pa. Feb. 22, 1991)).

When assessing the functional limitations imposed by an impairment, “[a]n ALJ must give serious consideration to a claimant's subjective complaints of pain, even where those complaints are not supported by objective evidence.” Mason v. Shalala, 994 F.2d 1058, 1067 (3d Cir. 1993). However, “[a] claimant’s allegations of disabling pain may be discredited by evidence that the claimant has received minimal medical treatment.” Webb v. Apfel, No. 99-291, 2000 U.S. Dist. LEXIS 14455, at *31 (D. Neb. Sep. 28, 2000) (quoting Singh v. Apfel, 222 F.3d 448, 453 (8th Cir. 2000)); see also Smallwood v. Comm. of Soc. Sec., No. 02-7222, 2003 U.S. Dist. LEXIS 15668, at *30 (E. D. Pa. Aug. 18, 2003) (agreeing with finding that “given the severity of the symptoms [plaintiff] was alleging, the ALJ found that [plaintiff’s] reluctance to change his lifestyle and treat his conditions more aggressively negatively impacted his credibility as to the actual severity of pain, fatigue and limitations experienced.”).

Plaintiff cites evidence from the record and her own testimony to establish that her CTS had more than a minimal effect on her ability to work. Plaintiff primarily relies on a November 10, 1993 nerve conduction study and electromyogram (“EMG”) conducted by Dr. Stephen J. Masceri. After this examination, Dr. Masceri diagnosed plaintiff with “bilateral carpal tunnel syndrome, moderate to severe on the right, moderate on the left.” Pl.’s Mot. for Summ. J. at 8. Plaintiff also points to repeated diagnoses of CTS and its symptoms by her treating physician, Dr.

Baldino. Id. at 12. Finally, plaintiff argues that her own testimony about “dropping things such as glasses and dishes” is consistent with CTS.

Although the ALJ considered plaintiff’s evidence of CTS, she determined that it conflicted with other evidence in the record. Id. at 10. Specifically, the ALJ found that plaintiff had bilateral carpal tunnel syndrome, but it was not a severe impairment prior to her date last insured. (R. at 26) In reaching this conclusion, the ALJ pointed to plaintiff’s statements concerning her daily activities including statements made to Dr. Thakarar during an evaluation that she was “independent in activities of daily living,” and could do “light housework.” (R. at 20, 510) The ALJ also relied upon Dr. Thakarar’s conclusion that an examination of plaintiff’s upper extremities was “unremarkable” and his findings that her muscle strength was five on a scale of zero to five² (R. at 22, 510), that plaintiff was not limited in her ability to reach or handle, and that her impairment did not limit her dexterity. (R. at 514) With respect to the CTS, the ALJ also relied upon the testimony of the orthopedist, Dr. Askin, that a person with carpal tunnel complaints is not necessarily precluded from work (R. at 23), that the results of Dr. Masceri’s EMG examination were not “strong findings indicating nerve damage,” and that plaintiff’s CTS was “easily remediable” by carpal tunnel release surgery. (R. at 23, 120, 122)

In addition, the ALJ expressed concern about plaintiff’s conservative treatment record. Specifically, the ALJ stated that if the CTS was severe, plaintiff should have consulted with a specialist and sought more treatment than the splints she wore at night. (R. at 27) On the same

²Plaintiff claims that this examination by Dr. Thakarar should be disregarded because it was made ten months before plaintiff’s CTS was confirmed by objective testing. Pl.’s Objections to Rep. and Recommendations at 10. This argument conflicts with plaintiff’s statements that her CTS was diagnosed as early as 1988. Thus, the ALJ properly considered Dr. Thakarar’s examination. Pl.’s Rep. Brief in Supp. of Mot. for Summ. J. at 7.

subject, the ALJ noted that plaintiff's treating physician, Dr. Baldino, discussed hand surgery with her and referred her to a hand surgeon in 1997, an option that plaintiff did not pursue. (R. at 27) Lastly, on the issue of CTS, the ALJ pointed to the fact that plaintiff did not mention that claimed disability in reports she submitted to the Social Security Administration in October of 1992 and February 1993. (R. at 23, 178, 184-185)

The determination of severity is made with reference to a claimant's functional capabilities. See Bowen, 482 U.S. at 146. When plaintiff's testimony about her activities and the conservative treatment she received for CTS is considered with the opinion of Dr. Askin, there is substantial evidence to support the ALJ's conclusion that plaintiff's CTS did not significantly limit her physical ability to do basic work activities. Plaintiff's failure to investigate hand surgery or consult a specialist for her CTS undermines the credibility of her assertions that CTS limited her ability to function. See, e.g. Goodale v. Halter, 257 F.3d 771, 774 (8th Cir. 2001), Webb, 2000 U.S. Dist. LEXIS 14455, at *32. With the exception of plaintiff's testimony, there is no evidence that plaintiff's CTS limited her range of motion or muscle strength on her date last insured. See Connor v. Barnhart, No. 02-009, 2003 U.S. Dist. LEXIS 143 (E.D. Pa. 2003) (affirming finding that CTS was non-severe when complaints of pain and numbness were not supported by evidence of reduced range of motion or muscle strength). In fact, the only physician to examine plaintiff's muscle strength, Dr. Thakarar, found that her muscle strength measured a five out of a possible five. (R. at 510)

The Court does not agree with plaintiff's claim that Dr. Masceri's opinion that plaintiff's CTS was moderate to severe is, in and of itself, sufficient to establish the severity of plaintiff's CTS. Rep. Brief in Supp. of Pl.'s Mot. for Summ. J. at 5. The record does not reveal that Dr.

Masceri made this statement with reference to the definition of a severe impairment in the Social Security regulations. It is impossible to determine what Dr. Masceri meant by his reference to “severe” because his diagnosis does not address functional limitations. On this issue, Dr. Askin stated that the EMG was not a “strong finding for nerve damage” and that “[b]ased on that particular finding, you would not recommend any specific treatment to a patient.” According to Dr. Askin, the results of the EMG were “not an actual proscription to activity.” (R. at 118) Dr. Askin’s evaluation of the severity of the CTS provided sufficient evidence to support the ALJ’s opinion that the CTS was not severe.

2. The law of the case did not require the ALJ to find that plaintiff’s CTS was severe.

Plaintiff argues that the Appeals Council reached the conclusion that plaintiff’s CTS constituted a severe impairment, and the ALJ’s refusal to follow this precedent violated the law of the case. Pl.’s Mot. for Summ. J. at 9. It is not necessary for this Court to determine if the law of the case doctrine applies in this procedural setting because the Appeals Council did not make a finding that plaintiff’s CTS was severe. To the contrary, the Appeals Council stated only that “that the evidence of record is more than sufficient to establish that the claimant had a severe impairment prior to December 31, 1993, and that further consideration under the sequential evaluation process is necessary.” (R. at 556)

This Court disagrees with plaintiff’s reading of the passage in question and concludes that the statement cited by plaintiff does not mandate a finding that her CTS was severe. In the paragraph cited by plaintiff, the Appeals Council discusses evidence concerning a June 1988 CT scan of the lumbar spine, a November 1993 MRI of the cervical spine, and the November 1993

EMG relating to plaintiff's CTS. At the end of this paragraph, the Council stated that "the evidence of record is more than sufficient to establish that claimant had a severe impairment prior to December 31, 1993. . . ." (R. at 556) (emphasis added). The severe impairment found by the Appeals Council obviously referred to all of the evidence of plaintiff's ailments in combination – the CTS, the cervical spine injury, and the lumbar spine injury.

The Court also notes that plaintiff appealed the ALJ's decision to the Appeals Council. When the case returned to the Appeals Council after the second hearing before the ALJ, the Appeals Council denied review. (R. at 10-11) This Court's conclusion that the Appeals Council did not find that plaintiff's CTS, standing alone, was severe is supported by fact that the Appeals Council did not overturn the ALJ's decision with respect to the severity of plaintiff's CTS. If the ALJ ignored a mandate from the Appeals Council, the Appeals Council was in the best position to make this determination, and it did not do so.

3. The ALJ was required to include CTS in the hypothetical presented to the vocational expert.

Even though the ALJ found that plaintiff's CTS was non-severe, her finding that plaintiff's back and neck impairments were severe mandated further analysis under the sequential evaluation process. Plaintiff does not dispute the ALJ's finding at step three that her impairments did not match any of the impairments "presumed severe enough to preclude any gainful work" by Social Security regulations. (R. at 29) At step four, the ALJ found that plaintiff's impairments prevented her from performing her past relevant work. At step five, the Commissioner is required to demonstrate that plaintiff can perform other work in the economy consistent with her medical impairments, age, education, past work experience, and residual

functional capabilities.

“At the fourth and fifth steps, the ALJ often seeks advisory testimony from a vocational expert.” Burns v. Barnhart, 312 F.3d 113, 119 (3d Cir. 2002). Testimony of vocational experts “typically includes, and often centers upon, one or more hypothetical questions posed by the ALJ. . . . The ALJ will normally ask the expert whether, given certain assumptions about the claimant's physical capability, the claimant can perform certain types of jobs, and the extent to which such jobs exist in the national economy.” Id. at 120. “[T]he vocational expert's testimony concerning a claimant's ability to perform alternative employment may only be considered for purposes of determining disability if the question accurately portrays the claimant's individual physical and mental impairments.” Id. at 123. “Where there exists in the record medically undisputed evidence of specific impairments not included in a hypothetical question to a vocational expert, the expert's response is not considered substantial evidence.” Id.

Plaintiff claims that the hypothetical question asked of the VE was inappropriate because it did not include any reference to her CTS. According to plaintiff, her CTS should have been included in the hypothetical even if the impairment was considered non-severe. Reply Br. in Supp. of Pl.'s Mot. for Summ. J. at 4, n.2. On this issue, the Third Circuit has held that “the ALJ must consider the combined effect of multiple impairments, regardless of their severity.” Burnett v. Commissioner of SSA, 220 F.3d 112, 122 (3d Cir. 2000).

In Connor v. Barnhart, No. 02-009, 2003 U.S. Dist. LEXIS 143 (E.D. Pa. 2003), with facts similar to those presented in this case, the court remanded the case to the Commissioner because the ALJ failed to include functional limitations posed by non-severe carpal tunnel syndrome in his hypothetical to the vocational expert. Id. at *19-21. Plaintiff in Connor

complained of numbness and tingling her left hand. Nevertheless, the ALJ concluded the CTS was non-severe because it “did not appear to reduce Connor’s range of motion or strength” or limit her ability to do basic work activities. Id. at *19. The court determined that this assessment of severity was supported by substantial evidence, but nevertheless ruled that “the ALJ committed reversible error by failing to consider the vocational effects of this non-severe impairment.” Id. at *20. According to the court, “[c]arpal tunnel syndrome of one’s non-dominant hand may ordinarily not be disabling, but when considered in combination with a severe impairment of the other hand, it may very well be.” Id. In Connor, it was “unclear” how the plaintiff could perform any of the jobs recommended by the vocational expert because they all required use of her left hand. Id. at *22.

Like the ALJ in Connor, the ALJ in this case found plaintiff “had bilateral carpal tunnel syndrome since late 1993, but [that] this was not a severe impairment at any time prior to December 31, 1993.” (R. at 26) As in Connor, the plaintiff in this case described pain and tingling in her hands but failed to produce any objective evidence of reduced motion or strength caused by the CTS. Although the ALJ’s finding in this case that plaintiff’s CTS was non-severe was supported by substantial evidence, the Court agrees with the court in Connor that the failure to include this impairment in the hypothetical to the vocational expert is reversible error. This omission on the part of the ALJ was particularly significant in this case because all of the jobs suggested by the vocational expert – ticket seller, self service gasoline station cashier, and ticket taker – require manual dexterity. (R. at 28) Had the ALJ included the reference to CTS in the hypothetical question, the vocational expert might very well have reached a different conclusion with respect to jobs plaintiff could perform. Thus, on remand, the ALJ should consider the

limitations caused by plaintiff's CTS in combination with her other impairments.³

C. PLAINTIFF'S FUNCTIONAL LIMITATIONS

Plaintiff's remaining objections relate to the ALJ's findings at step five of the sequential evaluation process concerning plaintiff's functional limitations and their effect on her ability to work. For the reasons that follow, the Court sustains the objections relating to the failure of the ALJ to assess the credibility of plaintiff's husband; the remaining objections are overruled.

1. There is substantial evidence to support the ALJ's evaluation of the November 3, 1993 examination.

Plaintiff argues that the ALJ ignored positive findings revealed by a November 3, 1993 magnetic resonance imaging ("MRI") of plaintiff's cervical spine and, as a result, overestimated plaintiff's functional capabilities. Pl.'s Mot. for Summ. J. at 14. Dr. Robert Bronstein, the radiologist who conducted the MRI, reported: "Posterior osteophytes are seen at C5/6. These compress the thecal sac and impress upon the spinal cord and also compress the left neural foramen. I do not see evidence of disc bulge or herniation at that or other levels. No abnormalities are seen in the spinal cord." (R. at 521) According to plaintiff, the ALJ cited the

³Plaintiff argues that the alternative hypothetical presented to the VE was improper in that it posited both that plaintiff was capable of performing light work and that plaintiff could only lift ten pounds and stand for ten minutes at a time. Pl.'s Reply Brief in Supp. of Mot. for Summ. J. at 10, n.9. According to plaintiff, this hypothetical conflicts with the definition of light work in that the definition of light work requires "frequent" lifting of ten pounds and a "great deal of walking and standing." 20 C.F.R. § 404.1567(b).

The Court rejects this argument. The Third Circuit has approved hypotheticals limiting the range of light work that could be performed. For example, in Plummer, the hypothetical asked the vocational expert to consider a person "capable of performing light work that did not require bilateral dexterity or extensive handling of objects." Plummer, 186 F.3d, at 431. Thus, on remand, it is appropriate for the ALJ to limit the range of light work plaintiff can perform as a result of the functional limitations imposed by her CTS or any other limitations the ALJ finds are supported by the record.

negative findings from this MRI without discussing the osteophytes or compression of the thecal sac, spinal cord, and left neural foramen. Plaintiff argues that the ALJ should have explained why she “rejected” these positive findings. Pl.’s Objections to Rep. and Recommendations at 12.

Plaintiff’s interpretation of the ALJ’s opinion is contradicted by the transcript of the hearing. The ALJ asked Dr. Askin about the significance of the osteophytes, thecal sac compression, and impression upon the spinal cord. (R. at 135) Dr. Askin replied that the finding was “neither dispositive of a medical condition or determinative of a medical condition” and just showed “degenerative changes” that would be no different for “anyone else essentially Miss Kuhn’s age.” (R. at 135) Based on this testimony, and the deference this Court must give to the ALJ’s evaluation of the evidence, the Court can not say that the ALJ erred in her consideration of the November 3, 1993 MRI.

2. The treating physician’s opinion was not supported by objective medical evidence.

Plaintiff argues that the ALJ erred when she “refused to credit” the opinion of plaintiff’s treating physician, Dr. Baldino, that plaintiff was “unable to perform any kind of regular gainful employment.” Pl.’s Mot. for Summ. J. at 18. The Court rejects this argument for a number of reasons.

First, a statement by a treating physician that a patient is “disabled” or “unable to work” is not considered a medical opinion because the Social Security Commissioner reserves the final responsibility for making a disability determination. 20 C.F.R. § 404.1527(e). Second, although a treating physician’s diagnosis should be given “great weight,” an ALJ may reject the opinion on the basis of contradictory medical evidence and may afford the opinion “more or less weight

depending upon the extent to which supporting explanations are provided.” Plummer, 186 F.3d at 429. If the opinions of two doctors are in conflict, the opinion of a medical specialist should be given greater deference. See Mason v. Shalala, 994 F.2d 1058, 1065 (3d Cir. 1993). On this issue, in Stolz v. Massanari, No. 00-4053, 2001 U.S. Dist. LEXIS (E.D. Pa. July 18, 2001), the court rejected the opinion of the plaintiff’s long term care physician that his patient was disabled because the doctor’s conclusion was contradicted by two specialists. Id. at *6.

The ALJ in this case acknowledged that “[o]rdinarily, great weight is given to the opinion of a treating source.” However, the ALJ noted that Dr. Baldino’s reports were “inconsistent with several objective diagnostic tests, and appear to be based primarily on the claimant’s subjective complaints.” (R. at 25) In particular, the ALJ concluded that Dr. Baldino’s reports conflicted with the opinions of two specialists – Dr. Glickman and Dr. Gonzalez. Dr. Glickman, an orthopedic specialist, “concluded that there was no orthopedic process that would prevent the claimant from being able to resume her normal activities” in 1989. (R. at 24, 517-20) In 1988, Dr. Gonzalez reviewed a computerized axial tomography (“CAT scan”) of plaintiff’s spine and found it to be “entirely within normal limits.” (R. at 24, 516) A 1993 MRI revealed no evidence of disc bulge or herniation and no abnormalities in the spinal cord. (R. at 521) All of these tests were conducted after March 30, 1998, the date of the accident that allegedly caused plaintiff’s injuries. Finally, Dr. Askin testified that, although plaintiff was limited to light work by her lumbar and cervical impairments, her back and neck impairments were not as “functionally limiting as she testified.” (R. at 23, 25, 134) The ALJ stated, “I assign a greater weight to the opinions of Dr. Askin, Dr. Glickman, and Dr. Gonzalez, as their opinions are fully explained and are most consistent with the objective medical evidence in the record.” (R. at 25) The decision

to credit the finding of several specialists that plaintiff was not completely disabled was supported by substantial evidence in the record.

Plaintiff also states that the ALJ disregarded the opinion of Dr. Thakarar that she could “lift less than ten pounds, and could do less than two hours of sitting, and less than six hours of standing/walking in an eight hour day.” Pl.’s Mot. for Summ. J. at 19. The ALJ rejected Dr. Thakarar’s opinion because it was based on plaintiff’s subjective complaints. Pl.’s Mot. for Summ. J. at 20 (R. at 25) In addition, the ALJ stated that Dr. Thakarar’s findings conflicted with the narrative portion of Dr. Thakarar’s report and the testimony of the claimant. (R. at 25) Although Dr. Thakarar’s report describes a limited range of motion in the lumbar spine, he also wrote that plaintiff had a full range of motion in the cervical spine and that she was “independent in activities of daily living.” (R. at 510) Most of Dr. Thakarar’s findings cited by plaintiff – limitations on lifting, sitting, standing, and walking – were recorded on a form. On this issue, the Third Circuit has stated that “[f]orm reports in which a physician’s obligation is only to check a box or fill in a blank are weak evidence at best.” Mason v. Shalala, 994 F.2d 1058, 1065 (3d Cir. 1993). Because answers recorded by Dr. Thakarar on the form conflict with the narrative portion of his report and plaintiff’s statements to him, the ALJ was justified in rejecting the lifting, sitting, standing, and walking limitations noted in the form.

3. The ALJ properly evaluated the credibility of plaintiff.

Plaintiff contends that her subjective complaints of pain were not considered by the ALJ. “An ALJ must give serious consideration to a claimant’s subjective complaints of pain, even where those complaints are not supported by objective evidence.” Mason v. Shalala, 994 F.2d 1058, 1067 (3d Cir. 1993). “Where medical evidence does support a claimant’s complaints of

pain, the complaints should then be given ‘great weight’ and may not be disregarded unless there exists contrary medical evidence.” Id. at 1067-1068. Once an ALJ concludes that medical evidence could reasonably cause the pain described by a plaintiff, the ALJ must “determine the extent to which a claimant is accurately stating the degree of pain or the extent to which he or she is disabled by it.” Hartranft v. Apfel, 181 F.3d 358, 362 (3d Cir. 1999). However, “[c]redibility determinations are the province of the ALJ and should be disturbed on review only if not supported by substantial evidence.” Rush v. Apfel, No. 00-2825, 2001 U.S. Dist. LEXIS 18247 (E.D. Pa. Nov. 7, 2001)

In Hartranft, the Third Circuit found that an ALJ’s decision that a claimant could perform light work despite complaints of incapacitating pain was supported by substantial evidence. Id. The court based that decision on evidence that Hartranft’s complaints of pain conflicted with the objective medical evidence, Hartranft’s testimony about his rehabilitation and treatment regimen, and Hartranft’s description of his daily activities. Id.

The ALJ in this case acknowledged that plaintiff’s “allegations of physical limitations cannot be assessed by objective medical evidence alone” but concluded that “the magnitude of [plaintiff’s] subjective complaints is not consistent with many of the objective medical findings.” Pl.’s Mot. for Summ. J. at 25 (R. at 26). Although the ALJ found plaintiff’s testimony “not wholly credible,” she stated that “there [was] some basis in the record for her complaints of pain” and gave “some weight” to her testimony about pain. The ALJ also relied on plaintiff’s testimony in finding that she suffered from severe back and neck impairments. (R. at 26) However, the ALJ found that the objective medical evidence and the testimony of Dr. Askin supported plaintiff’s ability to perform light work despite this severe impairment. As detailed by

the ALJ, plaintiff's claim that she is not able to perform any work is disputed by evidence from specialists, her failure to seek treatment from an orthopedist or neurologist, and her testimony about her daily activities. (R. at 25-26). Based on the Third Circuit's holding in Hantraft, the ALJ appropriately evaluated plaintiff's testimony concerning the magnitude of her functional limitations.

4. The ALJ's failure to assess the credibility of plaintiff's husband is reversible error.

Plaintiff is correct in stating that the ALJ failed to sufficiently address the credibility of plaintiff's husband. Pl.'s Mot. for Summ. J. at 27. The Third Circuit has ruled that the failure to make a specific finding about the credibility of a plaintiff's spouse can be reversible error. Burnett v. Commissioner of SSA, 220 F.3d 112, 122 (3d Cir. 2000), Van Horn v. Schweiker, 717 F.2d 871, 873 (3d Cir. 1983). It is an error to make an adverse finding with respect to a claimant's credibility without addressing the testimony of witnesses that bolster the claimant's credibility. Burnett, 220 F.3d at 122. Although plaintiff's husband had difficulty addressing his testimony to the relevant time period, his testimony corroborates plaintiff's statements regarding pain and household activities. (R. at 142-43) Therefore, on remand, the ALJ should address the effect of the testimony of plaintiff's husband on plaintiff's credibility.

5. The ALJ's failure to discuss a report by the Department of Labor and Industry does not require remand.

Finally, plaintiff argues that the ALJ's should have considered a finding by a Bureau of Worker's Compensation Referee that she was disabled. Pl.'s Mot. for Summ. J. at 28. A worker's compensation claim is evaluated with respect to a different standard of disability. A claimant in a workers' compensation matter must show only that he is incapable of returning to

his previous employment, while an award of Social Security requires a finding that the claimant is unable to perform any substantial work. Rose v. Chater, No. 94-4421, 1995 U.S. Dist. LEXIS 8397 (E.D. Pa. June 13, 1995) (citing Coria v. Heckler, 750 F.2d 245, 247-48 (3d Cir. 1984)). Although the worker's compensation referee's findings of fact state that plaintiff's "disability continued to be present," there are no specific findings regarding plaintiff's CTS, back impairments, or functional limitations. Thus, it is impossible to determine whether any of the ALJ's findings conflict with those of the referee. (R. at 126) Given the different legal requirements and the ambiguity of the referee's decision, this Court finds that the ALJ's failure to mention the referee's report in her decision does not require any additional findings.

D. CONCLUSION

For the reasons stated above, defendant's Motion for Summary Judgment is denied. That part of plaintiff's Motion for Summary Judgment in which plaintiff seeks a remand is granted. The case is remanded to the Commissioner in accordance with the fourth sentence of 42 U.S.C. § 405(g) for further proceedings consistent with this Order and Memorandum. In all other respects, plaintiff's Motion for Summary Judgment is denied. On remand, the Commissioner should incorporate the functional limitations imposed by plaintiff's carpal tunnel syndrome into the hypothetical question presented to the vocational expert and address the impact of the testimony of plaintiff's husband on plaintiff's credibility.

BY THE COURT:

JAN E. DUBOIS, J.

