

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

RICHARD T. WISNIEWSKI	:	CIVIL ACTION
Plaintiff	:	
v.	:	NO. 04-2576
	:	
JOANNE B. BARNHART, et al.	:	
Defendants	:	

**Memorandum and Order**

Yohn, J.

March\_\_\_\_, 2005

Plaintiff Richard Wisniewski appeals the final decision of the Commissioner of Social Security ("the Commissioner") denying his claim for disability benefits under Title II of the Social Security Act ("the Act"), 42 U.S.C. §§ 401-44. Wisniewski and the Commissioner have filed cross motions for summary judgment. I referred the motions to a magistrate judge, who submitted a report and recommendation that I grant Wisniewski's motion and reverse the Commissioner's decision. The Commissioner has filed objections to the report and recommendation. For the reasons set forth herein, I decline to adopt the magistrate judge's report and recommendation; instead, I will grant the Commissioner's motion for summary judgment.

**I. Factual Background<sup>1</sup>**

Plaintiff Richard Wisniewski is a fifty-year-old man with a tenth-grade education who worked for approximately twenty-seven years as a longshoreman for the Delaware River Stevedores, loading and unloading cargo from ships. (R. 34.) On March 29, 2000, while at work,

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<sup>1</sup>The facts summarized here are taken from both the Joint Statement of Undisputed Facts (submitted by the parties on January 3, 2005) and the administrative record of the case. All citations are to the administrative record.

Wisniewski fell fifteen feet from a catwalk after the railing supporting him snapped. (*Id.* at 94.) He fractured his left leg and his right arm in the fall. (R. 121, 132-34.) Wisniewski has not worked since the accident. (*Id.* at 34.)

On April 1, 2000, Wisniewski underwent surgery on his left leg at Cooper Hospital.<sup>2</sup> (R. 121.) The operating surgeon was Dr. Robert Taffet, an orthopedist who has since supervised Wisniewski's care. (*Id.*) Wisniewski was discharged from the hospital on April 5. (*Id.*) On May 12, 2000, he began physical therapy with a licensed physical therapist three times a week. (*Id.* at 235.) His condition improved, and by July 2000, his injured leg could bear full weight. (R. 233.) X-rays of the fracture site showed that it had healed completely. (*Id.*) At that time, Dr. Taffet reported that Wisniewski's range of motion was "fair," with further improvement expected, and that Wisniewski might be able to return to sedentary work after another month. (*Id.*) Wisniewski was ordered by Dr. Taffet to continue physical therapy for another six weeks. (*Id.*)

In August 2000, Dr. Taffet referred Wisniewski to a licensed social worker, who treated him for depression resulting from his injuries and his inability to return to work as a longshoreman. (R. 231.) The social worker, Steven Perkel, in turn referred Wisniewski to a psychiatrist, Dr. Allen Rubin, for treatment with anti-depressant medication. (*Id.* at 175.) Wisniewski began treatment with Dr. Rubin in September 2000. (*Id.*)

By November 8, 2000, Wisniewski had reached a plateau with physical therapy and was ready to begin an exercise program at a gym. (R. 230.) He was complaining of tightness in his knee, but was not complaining of pain, which he was successfully controlling with Motrin. (*Id.*)

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<sup>2</sup>Wisniewski underwent an open reduction and internal fixation of his left lateral tibia and placement of a left iliac crest bone graft. (R. 121.) Wisniewski's arm healed without complications and with no resulting limitations. (*Id.* at 152-155, 233, 236.)

Dr. Taffet recommended that Wisniewski return to see him in three months and noted that Wisniewski would require a total left knee replacement at some point in the future. (*Id.*)

On December 7, 2000, Dr. Rubin reported that Wisniewski's mood had improved and that the more severe symptoms of his depression had abated. (R. 173.) Wisniewski's response to anti-depressant treatment with Wellbutrin and Celexa was "moderately favorable." (*Id.*) He was still experiencing fatigue, but he was "keeping busy at home" and exercising regularly at a local gym. (*Id.*) Wisniewski returned to see Dr. Rubin in early February 2001. At that time, Dr. Rubin reported that Wisniewski's depression had resolved, that he was thinking less about his knee injury, and that he was experiencing an overall increase in functional capacity. (*Id.* at 170.)

On August 1, 2001, Dr. Taffet examined Wisniewski in preparation for surgery to remove hardware from his left knee. (R. 229.) Dr. Taffet noted again that Wisniewski would eventually require a total knee replacement. (*Id.*) On September 17, 2001, Wisniewski underwent surgery to remove the hardware. (*Id.* at 146-147.) Upon Wisniewski's release from the hospital, Dr. Taffet ordered another course of physical therapy. (*Id.* at 227.) At a follow-up visit on November 6, 2001, Dr. Taffet reported that Wisniewski was experiencing sporadic pain but was "doing well" with physical therapy. (*Id.* at 226.) Dr. Taffet renewed Wisniewski's prescription for pain medicine and also prescribed a knee brace and further physical therapy. (*Id.*)

On January 30, 2002, at another follow-up visit, Dr. Taffet reported that Wisniewski's symptoms were fairly well-controlled with the aid of the brace and that his range of motion was slightly improved. (R. 220.) Dr. Taffet recommended that Wisniewski not return to work at any occupation other than a "purely sedentary" one. (*Id.*)

In early June of 2002, Wisniewski underwent another surgery—to remove a wire that had

loosened as a result of his having slipped on a garden hose. (R. 219.) On June 19, 2002, Dr. Taffet reported that the pain associated with the displaced wire had resolved, and the incision from the operation to remove it had fully healed. (*Id.* at 218.)

On September 10, 2002, Wisniewski underwent an orthopedic consultative evaluation by Dr. Arthur Marks, a specialist in occupational medicine, at the request of the Commissioner. (R. 152-156.) Dr. Marks reported that Wisniewski walked with a mild limp, favoring his left leg, that he did not use assistive devices or supports, that he appeared comfortable seated on the examination table, and that he had no difficulty getting on or off the table. (*Id.* at 153-154.) Wisniewski was able to walk on his heels and toes, but unable to squat. (*Id.* at 154.) He reported no pain, although there was some grinding in his knee. (*Id.*) Dr. Marks reported no other significant functional limitations, but stated that Wisniewski would be undergoing total knee replacement surgery in the near future. (*Id.*)

At a follow-up appointment with Dr. Taffet on September 17, 2002, Wisniewski complained of pain and stiffness in his knee progressing throughout the day. (R. 216.) X-rays revealed advanced lateral compartment arthrosis<sup>3</sup> in Wisniewski's left knee. (*Id.*) After discussing treatment options with Dr. Taffet, Wisniewski consented to full knee replacement surgery, which was performed on November 4, 2003. (*Id.* at 205-206.) After discharge from the hospital, Wisniewski was again prescribed a course of physical therapy. (*Id.* at 205.)

On December 31, 2002, Dr. Taffet reported that Wisniewski was "doing well," with improved range of motion in his left knee. (R. 208.) He could get his knee to within about three

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<sup>3</sup>Arthrosis is a degenerative condition affecting the joints. *See* TABER'S CYCLOPEDIA MEDICAL DICTIONARY (F.A. Davis, Inc. 2002).

to five degrees of full extension and had flexion to ninety degrees. (*Id.*) There was some advancement in pre-existing joint damage to Wisniewski's right knee, which had been aggravated by his favoring his left leg. (*Id.*) Dr. Taffett reported that he expected Wisniewski to reach maximum medical improvement in six months. (*Id.*)

On January 28, 2003, Wisniewski told Dr. Taffett during a routine follow-up appointment that he was having difficulty standing, walking, and sitting for prolonged periods. (R. 327.) Dr. Taffett noted that Wisniewski was "coming along fairly well" and was ready to be "pushed with more aggressive physical therapy." (*Id.*) Dr. Taffett also opined that Wisniewski was disabled, due to his lack of formal education, his inability to sit or walk for any length of time, and his inability to return to his prior occupation. (*Id.*)

Wisniewski underwent a consultative examination on February 19, 2003 by Dr. Nithyashuba Khona, a specialist in physical medicine and rehabilitation, at the request of the Commissioner. (R. 304-307.) Dr. Khona reported that Wisniewski walked with a limp, favoring his left leg. (*Id.* at 306.) He was unable to squat or to walk on his heels and toes, but he needed no help changing his clothes, getting on or off the examining table, or getting out of a chair. (*Id.*) His left knee had decreased flexion to eighty degrees and extension to fifteen degrees. (*Id.*) Dr. Khona reported that Wisniewski's prognosis was "fair" and that he had a "moderate restriction" for standing, walking, squatting, and kneeling because of his recent surgery, but she specified no other significant functional limitations. (*Id.* at 307.)

Wisniewski was also examined on February 19, 2003 by Dr. Theodore Brown, a psychologist, at the request of the Commissioner. (R. 300-303.) In Dr. Brown's opinion, Wisniewski was suffering from major depressive disorder and generalized anxiety disorder. (*Id.*)

at 302.) Dr. Brown reported that Wisniewski was able to follow and understand simple directions and perform simple, rote tasks. (*Id.*) Dr. Brown further reported that Wisniewski's memory was mildly impaired and that his attention and concentration were intact, but that his ability to sustain concentration was potentially compromised by distraction due to a variety of factors, including poor retention, fatigue, and low tolerance for pressure and stress. (*Id.*) In Dr. Brown's view, Wisniewski's overall prognosis was "fair." (*Id.* at 303.)

On April 14, 2003, Wisniewski underwent another operation on his left knee to restore as much extension and flexion as possible following the knee replacement. (R. 313.) Dr. Taffet reported that the procedure was without complications and that Wisniewski's condition after the surgery was stable and satisfactory. (*Id.*) When Dr. Taffet saw Wisniewski for post-operative follow-up on August 26, 2003, Wisniewski was walking well and had nearly full knee extension and flexion to 110 degrees with no knee instability. (*Id.* at 314.) Dr. Taffet reported that Wisniewski was ready to end physical therapy and resume exercising on his own at a gym. (*Id.*) Dr. Taffet further reported that Wisniewski was still disabled and unable to return to his prior occupation. (*Id.*)

On December 1, 2003, Dr. Taffet prepared a work restriction evaluation for Wisniewski. (R. 333.) Dr. Taffet opined that Wisniewski could work for two hours a day with intermittent sitting, walking, and standing; that he could drive a car; and that he could use his right foot to operate foot controls or for repetitive movement. (*Id.*) No hand- or reach-related restrictions were reported. (*Id.*) Dr. Taffet reported that Wisniewski had not yet reached maximum improvement,

as Wisniewski was then complaining of back pain with radiculopathy.<sup>4</sup> (*Id.*)

On December 4, 2003, Wisniewski's treating psychiatrist, Dr. Rubin, issued an assessment of Wisniewski's ability to do work-related activities. (R. 331-332.) Dr. Rubin reported that Wisniewski had "fair" ability to deal with work stresses, relate to co-workers, and deal with the public; that he had "good" ability to follow rules, use judgment, function independently, and maintain concentration; that he had "poor adaptation to physical functional losses" due to the accident at work; and that he responded moderately favorably to anti-depressant treatment. (*Id.* at 331.)

## **II. Procedural History**

Wisniewski filed a Title II disability application on April 17, 2002. (R. 82-84.) The application was denied by initial and reconsidered state agency determinations of October 30, 2002 and March 19, 2003. (*Id.* at 59-63, 65-67.) On May 12, 2003, Wisniewski filed a timely request for a hearing before an Administrative Law Judge ("ALJ"). (*Id.* at 68.) He appeared and testified before ALJ Javier Arrastia on December 4, 2003. (*Id.* at 25-55.) Also testifying at the hearing was William Hausch, a certified rehabilitation counselor, who testified as an impartial vocational expert. (*Id.* at 80-81, 46-53.)

In a thorough opinion dated February 5, 2004, the ALJ concluded that at all times relevant to the decision (except for brief periods following Wisniewski's accident and each of the five successive surgeries to his leg), Wisniewski was not under a disability within the meaning of the Social Security Act. (R. 21.) In making his assessment of Wisniewski's mental and physical

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<sup>4</sup>Radiculopathy is a disease of the nerve root. *See* TABER'S CYCLOPEDIA MEDICAL DICTIONARY, *supra* note 3.

functional capacities, the ALJ relied on (1) medical records submitted by Wisniewski's treating orthopedist, social worker, and psychiatrist; (2) professional opinions expressed by the state agency's reviewing physicians and psychologists; (3) professional opinions expressed by the orthopedic examiners and the psychologist consulting for the Commissioner; (4) Wisniewski's testimony at the hearing concerning his ongoing medical care, his ordinary daily activities, and his subjective perception of his limitations. (*Id.* at 16-20.)

After evaluating the evidence in the record, the ALJ determined, *inter alia*, that Wisniewski had not engaged in substantial gainful activity since March 29, 2000; that he was unable to perform his past relevant work as a longshoreman; that his subjective complaints regarding his work-related limitations from symptoms were not fully credible or consistent with objective medical findings; and that, despite suffering from severe impairments, he had the physical residual functional capacity, except during brief periods of time following the initial injury and subsequent operations, for performing the full range of sedentary exertional work and was mentally capable of performing the requirements of simple, repetitive work-related tasks. (R.20-22.) The ALJ held, therefore, that Wisniewski was not disabled for at least a continuous twelve-month period, which is the durational requirement in the Act. (*Id.* at 21.)

Wisniewski appealed the ALJ's decision. (R. 9.) The Appeals Council denied Wisniewski's request for review on April 14, 2004, making ALJ Arrastia's decision the final decision of the Commissioner. (*Id.* at 5.) Wisniewski appealed to this court on June 14, 2004. On August 30, 2004, he filed a motion for summary judgment, requesting reversal of the ALJ's decision. The Commissioner filed a cross motion for summary judgment. On October 4, 2004, the case was referred to a magistrate judge for a report and recommendation. After hearing oral

arguments, the magistrate judge recommended on January 27, 2005 that Wisniewski's motion for summary judgment be granted and that the matter be remanded to the Commissioner for further development of the record.

On February 16, 2005, the Commissioner filed objections to the report and recommendation, challenging the magistrate judge's implicit conclusion that the evidence in the administrative record at the time of the ALJ's decision was insufficient as a matter of law to support a determination that Wisniewski was not disabled within the meaning of the Act.<sup>5</sup>

### III. Standards of Review

Pursuant to the Federal Magistrates Act, 28 U.S.C. §§ 631-639, a district court makes a *de novo* determination of those portions of a magistrate judge's report and recommendation to which objections are made.<sup>6</sup> 28 U.S.C. § 636(b)(1). "A judge of the court may accept, reject, or

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<sup>5</sup>The Commissioner's objections were not timely filed under 28 U.S.C. § 636(b)(1), which allows the filing of objections by either party within ten days of service of the magistrate judge's report and recommendation.

<sup>6</sup>Even though the Commissioner submitted her objections to the Report and Recommendation outside the ten-day filing period specified in § 636(b)(1), I will make a *de novo* determination of the contested portions of the magistrate's report, in light of the absence of controlling Third Circuit law mandating a different standard. *See Grandison v. Moore*, 786 F.2d 146, 148 (3d Cir. 1986) (holding that failure to object to a magistrate's report and recommendation within ten days is not a jurisdictional defect); *Henderson v. O'Brien*, 812 F.2d 874 (3d Cir. 1987) (stating, in dicta, that a failure to file objections altogether may result in the loss of *de novo* review in the district court, but suggesting that the scope of review under such circumstances lies within the discretion of the district court under the statute); *but see Oldrati v. Apfel*, 33 F. Supp. 2d 397, 399 (E.D. Pa. 1998) (following a Fifth Circuit decision that "failure to object timely to a magistrate judge's report and recommendation bars a party from attacking the proposed factual findings and legal conclusions on appeal except upon grounds of plain error"). The Commissioner is reminded, however, of the Third Circuit's caveat in *Grandison* that the ten-day requirement, while not jurisdictional, is still to be "strictly observed." *Grandison*, 786 F.2d at 148. This is particularly true in a case, like this one, where no compelling reason for failing to meet the statutory deadline has been offered.

modify, in whole or in part, the findings or recommendations made by the magistrate.” *Id.*

When reviewing a decision of the Commissioner of Social Security, the court must determine whether there is substantial evidence in the record to support the Commissioner’s decision. *Hartranft v. Apfel*, 181 F.3d 358, 360 (3d Cir. 1999) (citing 42 U.S.C. § 405(g)). Substantial evidence is “more than a mere scintilla.” *Plummer v. Apfel*, 186 F.3d 422, 427 (3d Cir. 1999) (citing *Ventura v. Shalala*, 55 F.3d 900, 901 (3d Cir. 1995)). It “does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (internal citation omitted).

To determine whether a finding is supported by substantial evidence, the court must review the record as a whole. *Schaudeck v. Commissioner*, 181 F.3d 429, 431 (3d Cir. 1999). Overall, the substantial evidence standard is deferential. *Id.* Consequently, the court “will not set the Commissioner’s decision aside if it is supported by substantial evidence, even if [the court] would have decided the factual inquiry differently.” *Hartranft*, 181 F.3d at 360.

#### **IV. Discussion**

To qualify for social security disability benefits, 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.’” *Stunkard v. Sec’y of Health and Human Services*, 841 F.2d 57, 59 (3d Cir. 1988) (internal citations omitted). When evaluating a claim for disability benefits, the Commissioner undertakes a five-step analysis. 20 C.F.R. § 404.1520; *Sykes v. Apfel*, 228 F.3d 259, 262-63 (3d Cir. 2000). The Commissioner considers whether: (1) the claimant worked during the alleged period of disability; (2) the

claimant has a severe, medically determinable impairment; (3) the impairment meets the requirements of a listed impairment;<sup>7</sup> (4) the claimant can continue to perform past relevant work; and (5) the claimant can perform other work in the national economy. 20 C.F.R. § 404.1520. The claimant bears the burden of proving steps one through four.<sup>8</sup> If the claimant satisfies these criteria, the burden shifts to the Commissioner to show that the claimant is capable of performing "other work." *Sykes*, 228 F.3d at 265.

In Wisniewski's case, there is no dispute as to the outcome of the first four steps of the analysis. The ALJ determined that Wisniewski hadn't worked; that he had a severe, medically determinable mental impairment and a severe, medically determinable physical impairment; that his impairments, considered singly or in combination, did not meet the requirement for a listing under the Act; and that he could not perform his past relevant work as a longshoreman. (R. 22.)

The parties disagree, however, concerning the ALJ's conclusion that, notwithstanding his impairments, Wisniewski remained capable, except for brief periods of time following his accident and his subsequent surgeries, of performing sedentary, unskilled work available in the national economy. Wisniewski contests the assessment of the ALJ regarding the extent of his residual functional capacity and his corresponding ability to work. The Commissioner contends that there was sufficient evidence in the record at the time of the ALJ's decision to support the determination that Wisniewski had not been continuously unable to engage in substantial gainful activity for the statutory period.

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<sup>7</sup>Qualifying impairments are listed at 28 C.F.R. pt. 404, subpt. P, app. 1.

<sup>8</sup>Technically, neither party bears the burden of proving step three, because step three involves a conclusive presumption based on listings. *Sykes*, 228 F.3d at 263 n.2.

Under federal regulations, the responsibility for assessing a claimant's residual functional capacity at the ALJ hearing lies with the ALJ, 20 C.F.R. §404.1546(c), who is required to consider "all of the relevant medical evidence and other evidence." *Id.* at § 404.1545(a)(3). It was thus the ALJ's responsibility in this case to decide, based on the record as a whole, whether Wisniewski possessed sufficient residual functional capacity following his accident and during his rehabilitation to allow him to perform types of work less demanding than his past work as a longshoreman.

Wisniewski argues that the ALJ failed to accord proper weight to the opinion of his treating physician, in that the ALJ failed to defer to Dr. Taffet's judgment that Wisniewski was disabled and unable to work for more than two hours a day. Plaintiff's Memorandum of Law in Support of Motion for Summary Judgment ("Plaintiff's Motion") at 11. It is clear from the ALJ's opinion that the ALJ considered the contents of Dr. Taffet's work restriction evaluation, but determined that he could not give Dr. Taffet's opinion controlling weight because the work limitations asserted in the evaluation were not supported by objective findings from the treatment notes documenting Wisniewski's condition and progress. (R. 19.) Nor were they supported, the ALJ decided, by the objective findings and opinions reported in the record by two consulting orthopedic examiners and two state agency review physicians.<sup>9</sup> (*Id.*) After weighing all of the

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<sup>9</sup>The state agency review physicians who assessed Wisniewski's residual physical functional capacity were Dr. Joseph Vitolo and Dr. G.F. Atiena. (R. 17.) They reported that, despite his severe fracture, Wisniewski had improved to the extent that he had the residual physical functional capacity to lift up to ten pounds on occasion, to stand and/or walk at least two hours per eight-hour workday, and to sit for about six hours per eight-hour work day. (*Id.*) They further reported that Wisniewski had no limitations on operating foot controls; that he could occasionally climb ramps or stairs, but never ladders, ropes, or scaffolds; and that he had no other significant physical limitations. (*Id.*)

The state agency review psychologists who assessed Wisniewski's residual mental

relevant medical evidence, the ALJ concluded that the functional capacity assessments of the consulting physicians were “more consistent with the record considered as a whole” than was Dr. Taffet’s assessment in the work restriction evaluation. (*Id.*)

Wisniewski also argues that the ALJ failed to accord proper weight to his subjective testimony concerning his own functional capacity. Plaintiff’s Motion at 14. The ALJ determined, based on medical and other evidence in the record, some of which he found was inconsistent with Wisniewski’s hearing testimony, that Wisniewski was not fully credible on the issue of his functional limitations. (R. 19.) The ALJ did not, as Wisniewski asserts, simply “disregard” or “discount” his testimony. Plaintiff’s Motion at 14. On the contrary, the ALJ expressly weighed Wisniewski’s testimony against other, competing evidence in the record and ultimately judged Wisniewski’s testimony to be less worthy of credit.

As the regulations require, the ALJ carefully considered the full range of evidence in the record and determined that Wisniewski possessed sufficient residual functional capacity to perform “sedentary, unskilled jobs” (R. 21) during significant portions of the period for which he was alleging a continuous inability to engage in substantial gainful activity. What Wisniewski asks this court to do, but what this court may not do, is re-weigh the evidence supporting the Commissioner’s conclusion. *See Williams v. Sullivan*, 970 F.2d 1178, 1182 (3d Cir.1992) (stating that the district court is not empowered to weigh the evidence or substitute its

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functional capacity were Dr. Fugate and Dr. Wakin. (R. 17.) They expressed the opinion that, despite a “severe” combination of major depression and alcohol abuse, Wisniewski had only “moderate” mental limitations in the areas of activities of daily living, social functioning, concentration, understanding, remembering, completing a normal workday and workweek, and responding appropriately to changes in work setting. (*Id.*) Drs. Fugate and Wakin concluded that Wisniewski was capable of performing simple, repetitive, work-related tasks. (*Id.*)

conclusions for those of the fact-finder).

In light of the care taken by the ALJ in this case to weigh inconsistent evidence in the record and to explain the basis for the factual findings supporting his decision, I conclude that there is ample evidence to sustain the Commissioner's ultimate determination that Wisniewski did not meet the criteria for disability under the Act. The ALJ properly concluded that Wisniewski was not disabled for the statutory period of at least twelve continuous months, because he retained sufficient functional capacity to perform sedentary work during the years following his accident, interrupted only by brief periods of time following his injury and each of his subsequent operations.

There is no gainsaying that Wisniewski suffered a tragic accident, and that his recovery has been long and arduous in both physical and psychological terms. However, while I am sympathetic to Wisniewski's situation, I may not overturn a decision by the Commissioner that is supported, as the decision in this case is, by evidence sufficient to satisfy the applicable legal standard.

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

RICHARD T. WISNIEWSKI

Plaintiff

v.

JOANNE B. BARNHART, et al.

Defendants

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CIVIL ACTION

NO. 04-2576

**Order**

AND NOW, this \_\_\_\_\_ day of March 2005, upon consideration of the parties' cross-motions for summary judgment, and after careful and independent review of the magistrate judge's report and recommendation and the defendants' objections thereto, it is hereby ORDERED that:

1. The defendants' objections are SUSTAINED.
2. The plaintiff's motion for summary judgment is DENIED.
3. The defendants' motion for summary judgment is GRANTED.
4. Judgment is entered AFFIRMING the decision of the Commissioner.

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William H. Yohn, Jr., J.