FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL V. SMALL	:	**CIVIL ACTION**
Plaintiff,	:	
	:	
vs.	:	**NO. 04-5616**
	:	
JO ANNE B. BARNHART	:	
Commissioner of SOCIAL SECURITY	:	
ADMINISTRATION	:	
	:	

DUBOIS, J. **JULY 12, 2005**

MEMORANDUM

I. INTRODUCTION

Plaintiff, Michael Small, filed this action under 42 U.S.C. § 405(g), seeking judicial review of the final decision of the Commissioner of the Social Security Administration ("Commissioner") denying plaintiff's claim for Supplemental Security Income ("SSI") and Disability Insurance Benefits ("DIB") under Titles II and XVI of the Social Security Act ("the Act"). The parties filed Cross-Motions for Summary Judgment. Thereafter, on May 9, 2005, the case was referred to United States Magistrate Judge Linda K. Caracappa for Report and Recommendation. After the referral, pursuant to an Order dated May 26, 2005, plaintiff filed a Reply Brief.

On June 17, 2005, Magistrate Judge Caracappa filed a Report and Recommendation in which she recommended that plaintiff's Motion for Summary Judgment be denied and the Commissioner's Motion for Summary Judgment be granted. Plaintiff filed Objections to the Report and Recommendation on June 30, 2005. For the reasons which follows, plaintiff's Objections to the Report and Recommendation are sustained and the case is remanded to the Commissioner pursuant to the fourth sentence of 42 U.S.C. § 405(g) for further proceedings consistent with this Memorandum.

II. BACKGROUND

Plaintiff is a 30 year old male born on April 18, 1975. He has a high school education and completed vocational training in masonry. He has past work experience as a paratransit limousine driver, a telemarketer, and a restaurant cook.

Plaintiff was incarcerated at State Correctional Institution Pine Grove, Pennsylvania ("SCI-Pine Grove"), from July 1, 2001, through August 13, 2002. He applied for benefits one month after his release. Disability is alleged as of April 1, 2001, due to a severe skin condition.

Plaintiff's applications were filed on August 23, 2002, and were denied initially. He then requested a hearing before an Administrative Law Judge ("ALJ"). A hearing was held on October 2, 2003, at which plaintiff, represented by counsel, and a vocational expert ("VE") testified. In a decision dated January 29, 2004, the ALJ determined that plaintiff's "atopic dermatitis, especially of the hands, wrists, and heels is 'severe' within the meaning of the Regulations but not 'severe' enough to meet or medically equal, either singly or in combination, one of the impairments listed in Appendix 1, Subpart P, Regulations No. 4" (Tr. 17). The ALJ determined that plaintiff had the residual functional capacity to perform his past work and that, as a consequence, he was not entitled to benefits (Tr. 15-23).

At the hearing before the ALJ, plaintiff argued that Dr. Guy F. Webster was a treating physician who, answered "yes" to an interrogatory which asked "In your opinion, does your patient's condition meet the medical criteria of Listing 8.05 [described as] " Psoriasis, atopic dermatitis, dyshidrosis. With extensive lesions including involvement of the hands or feet which impose a marked limitation of function and which are not responding to prescribed treatment?" (Tr. 221). In rejecting plaintiff's claim, the ALJ stated as follows:

> "I reviewed the claimant's written statements supporting his application

> and appeal, and have reviewed his medical documentation, and could find no direct or indirect reference to any Dr. Guy Webster. In addition, according to Social Security Ruling 96-5p, the determination on such issues as whether an impairment is 'severe,' whether an impairment 'meets or equals' a Listing, or whether the claimant is 'disabled,' are reserved to the Commissioner (and to the Administrative Law Judge at the hearing level). The interrogatory to which Dr. Webster responded indicates that Listing 8.05 requires that the claimant's atopic dermatitis result in extensive lesions including involvement of the hands or feet 'which impose marked limitation of function and which are not responding to prescribed treatment.' However, no evidence supporting Dr. Webster's opinion has been offered, in terms of showing that claimant's skin lesions 'impose marked limitation of function [and] are not responding to prescribed treatment,' and, moreover, his opinion is not consistent in this regard with evidence provided from primary treating sources such as Dr. Victor Diaz (Exs. 2F, 3F) and other physicians associated with Thomas Jefferson University Hospital (Exs. 4F, 6F), as discussed further below"

(Tr. 17).

The record discloses that Dr. Guy F. Webster was a member of Jefferson Dermatology Associates. That group of physicians first treated plaintiff on March 31, 2003. On that date, a member of the group, Dr. Paul Bujanauskas, observed scale/lesions over Mr. Small's neck, upper chest, upper back and extremities, diagnosed atopic dermatitis, and changed plaintiff's medication (Tr. 146-47). On September 18, 2003, Dr. Webster examined plaintiff, noted a history of "bad eczema [for] decades," observed skin lesions on plaintiff's upper extremities, lower extremities and face, and prescribed Lidex and Doxepin for the skin condition (Tr. 146).

The medical records of SCI-Pine Grove disclose a significant history of plaintiff's atopic dermatitis before the first examination by Dr. Bujanauskas on March 31, 2003. An examination at that institution on July 10, 2001, revealed "diffuse lichen - like dry eczematous rash on face, neck, arms, legs, lower back and chest," and Lachydrin was prescribed (Tr. 286). Six days later on July 16, 2001, a physical examination revealed "severe scaling and excoriation over skin on trunk and extremities" (Tr. 293). On November 6, 2001, plaintiff was noted to have generalized

scaly eczematous skin lesions and itching with scratch marks and Hydrocortisone cream was prescribed in addition to the Lachydrin (Tr. 273). On February 1, 2002, plaintiff gave a history of itching all over his body with a macular rash and reported that Benadryl was not working (Tr. 264). Three days later, plaintiff reported that his skin was dry and scaly with oozing areas on both hands; worsening of eczema was diagnosed and Triamterene ointment was prescribed (Tr. 264).

On September 16, 2002, plaintiff was first examined by Dr. Victor Diaz, a family physician, at Jefferson Family Medicine, for atopic dermatitis and asthma (Tr. 131). During that examination, Dr. Diaz noted that plaintiff had atopic dermatitis, asthma and hypertension, and was "applying for SSI disability." He then opined that "Pt. can be employable except for job needing prolonged contact with water and chemicals." On September 30, 2002, Dr. Diaz reported that the patient has severe atopic dermatitis which can be disabling around the winter time - "this has caused him to miss work around the winter time and is currently unemployed without benefits" (Tr. 129). During the September 30, 2002 examination, Dr. Diaz observed "very dry skin throughout, head to foot, cracked skin with bleeding in different stages of healing, especially, hands, wrists, heels" (Tr. 130). On January 3, 2003, plaintiff returned to Jefferson Family Medicine. At that time, Dr. Diaz noted dry, cracked and bleeding skin diffusely on his hands, antecubital area, legs and ankles, and abrasions from scratching his face (Tr. 140). According to Dr. Diaz, plaintiff's skin condition worsened during the winter. The record of the January 3, 2003 examination recites that plaintiff continued to use Lachydrin and Lidex. It was at that visit that plaintiff was referred to Jefferson Dermatology Associates where he was seen by Dr. Bujanauskas on March 31, 2003.

On April 2, 2003, Dr. Diaz completed a Welfare Department Employability Form. He

stated in that Form that the patient was "temporarily disabled" from "1985" to April 2, 2003, due to a primary diagnosis of "severe atopic dermatitis"and secondary diagnoses of "asthma, hypertension" (Tr. 151).

Plaintiff testified at the hearing before the ALJ that he had suffered from atopic dermatitis since childhood. The details of his complaints are set forth in the Report and Recommendation of Magistrate Judge Caracappa and need not be repeated (R&R at 6-7).

III. PLAINTIFF'S OBJECTIONS

Plaintiff filed two objections. The first argues that the ALJ made a fundamental error in failing to identify Dr. Guy Webster as one of plaintiff's treating physicians. In this objection, plaintiff notes that the Social Security Regulations draw a distinction between (a) physicians who provide medical treatment or evaluation in the context of a treatment relationship, and (b) physicians who examine a patient solely for the purpose or providing a report in support of a disability claim.[1] According to plaintiff, Dr. Webster clearly falls within the first category rather than the second.

Plaintiff's second objection is based on claimed error of the ALJ and the Magistrate Judge in concluding that Dr. Webster's opinion is not supported by any objective medical evidence. The Court will address each objection in turn.

IV. 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.

[1]See 20 C.F.R. § 404.1502.

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.

A district court judge makes a de novo determination of those portions of a magistrate judge's report and recommendation to which objection is made. 28 U.S.C. § 636(b)(1)(c). The Court may "accept, reject or modify, in whole or in part, the magistrate's findings or recommendations." Brophy v. Halter, 153 F. Supp. 2d 667, 669 (E.D. Pa. 2001).

V. DISCUSSION

A. Objection No. 1

This objection is based on the determination of the ALJ, agreed to by the Magistrate Judge, that Dr. Guy Webster was not a treating physician. That finding is not supported by substantial evidence.

The record discloses that plaintiff was referred to the Jefferson Dermatology Associates by his family physician and that he was first examined by Dr. Paul Dr. Bujanauskas of that group on March 31, 2003, for the skin condition at issue in this case. Plaintiff's next examination, on September 18, 2003, was by Dr. Webster, also a member of that group.

The Social Security Regulations draw a distinction between physicians who provide medical treatment or evaluation in the context of a treatment relationship, and physicians who examine a patient solely for the purpose of providing a report in support of a disability claim. 20 C.F.R. § 404.1502. The opinions of treating physicians are entitled to considerably more weight than those of an examining physician.

The manner in which an ALJ must address reports of treating physicians is well stated in Plummer v. Apfel, 186 F.3d 422, 429 (3d Cir. 1999), as follows:

> "Treating physicians' reports should be accorded great weight, especially "when their opinions reflect expert judgment based on a continuing observation of the patient's condition over a prolonged period of time." *Rocco v. Heckler*, 826 F.2d 1348, 1350 (3d Cir.1987); 20 C.F.R. § 404.1527(d)(2) (providing for controlling weight where treating physician opinion is well-supported by medical evidence and not inconsistent with other substantial evidence in the record.) An ALJ may reject a treating physician's opinion outright only on the basis of contradictory medical evidence, but may afford a treating physician's opinion more or less weight depending upon the extent to which supporting explanations are provided. *Newhouse v. Heckler*, 753 F.2d 283, 286 (3d Cir.1985).

The evaluation of the opinions of treating physicians is also covered in 20 C.F.R. § 404.1527(d)(2). Under that regulation, an ALJ is required to " . . . give good reasons in their notice of determination or decision for the weight we give your treating source's opinion."

The fact that Dr. Webster examined plaintiff on only one occasion can certainly be considered by the ALJ in evaluating his opinion under § 404.1527(d)(2)(i). That regulation provides that:

> "Generally, the longer a treating source has treated you and the more times you have been seen by a treating source, the more weight we will give to the source's medical opinion. When the treating source has seen you a number of times and long enough to have obtained a longitudinal picture of your impairment, we will give the source's opinion more weight than we would give it were it from a nontreating source."

It is also significant that Dr. Webster's opinion was set forth in answer to an interrogatory

- he checked “yes” in response to the question which asked whether, in his opinion, plaintiff’s condition met the medical criteria of Listing 8.05, described in the question. Such a report is not entitled to the same weight as a report that requires a physician to explain his medical opinion. *See Mason v. Shalala*, 994 F.2d 1058, 1065 (3d Cir.1993) (“Form reports in which a physician’s obligation is only to check a box or fill in a blank are weak evidence at best.”).

Without more, the ALJ’s statement that Dr. Webster was not a treating physician is arguably insufficient to warrant a remand. However, when considered together with the issue addressed in Objection Number 2, the Court concludes that a remand is required.

B. Objection No. 2

Objection No. 2 is based on the ALJ’s conclusion that “no evidence supporting Dr. Webster's opinion has been offered, in terms of showing that claimant's skin lesions ‘impose marked limitation of function and are not responding to prescribed treatment . . .” (Tr. 17). The ALJ goes on to state that Dr. Webster’s opinion “. . . is not consistent in this regard with evidence provided from primary treating sources such as Dr. Victor Diaz and other physicians associated with Thomas Jefferson University Hospital" (Tr. 17). The Court disagrees with this statement of the ALJ.

In the first place, Dr. Diaz referred plaintiff to Jefferson Dermatology Associates. Although the records of Dr. Diaz and his associates made reference to plaintiff’s atopic dermatitis, they decided to seek a dermatology consultation when that condition did not respond to treatment. That referral led to plaintiff’s treatment by two members of Jefferson Dermatology Associates, Dr. Bujanauskas and Dr. Webster.

Dr. Webster opined in answer to an interrogatory that plaintiff had extensive lesions

including involvement of the hands and feet which imposed a marked limitation of function and which are not responding to treatment. The ALJ rejected that opinion on the ground that it was not consistent with evidence provided from primary treating sources such as Victor Diaz and other physicians associated with Thomas Jefferson University Hospital.

The rejection by the ALJ of Dr. Webster's opinion that plaintiff's severe atopic dermatitis was not responding to treatment is not supported by substantial evidence. To the contrary, the objective medical evidence of plaintiff's atopic dermatology as summarized in the Background section of this Memorandum discloses that plaintiff had been treated for this condition from at least April 1, 2001, and as of September 18, 2003, it had not responded to treatment. That leaves inescapable the conclusion that the ALJ erred in stating there was no objective medical evidence supporting Dr. Webster's opinion that plaintiff's skin condition was "not responding to prescribed treatment." There was, in fact, substantial medical evidence to the contrary.

The evidence of marked limitation of function is not entirely consistent. Dr. Diaz noted on September 16, 2002, that "patient can be employable except for jobs requiring long contact with water and chemicals" (Tr. 132). Then on September 30, 2002, and on other occasions, he stated plaintiff complained that his atopic dermatitis "can be disabling in the wintertime" and that this has caused him [patient] to miss work around the wintertime and is currently unemployed without benefits" (Tr. 129). These assessments, particularly the September 16, 2002 assessment are not consistent with a Welfare Department Employability Form signed by Dr. Diaz on April 2, 2003, in which he stated that patient was "temporarily disabled" from "1985" to April 2, 2004, due to a primary diagnosis of "severe atopic dermatitis" and secondary diagnoses of "asthma, hypertension" (Tr. 151). Nevertheless, notwithstanding this inconsistent record, the Court

concludes, based on the fact that the ALJ erred in finding that Dr. Webster was not a treating physician, coupled with all of the evidence on this critical issue - the question whether plaintiff's skin lesions imposed marked limitation of function and are not responding to prescribed treatment - requires a remand.

VI. CONCLUSION

Taken together, the objections advanced by plaintiff require a remand to the Commissioner for further proceedings consistent with this opinion and 20 C.F.R. § 404.1527 (d)(2). The remand is ordered pursuant to the fourth sentence of 42 U.S.C. § 405(g).

Appropriate Orders follow.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MICHAEL V. SMALL	**:**	**CIVIL ACTION**
Plaintiff,	**:**	
	:	
vs.	**:**	**NO. 04-5616**
	:	
JO ANNE B. BARNHART	**:**	
Commissioner of SOCIAL SECURITY	**:**	
ADMINISTRATION	**:**	
	:	

AND NOW, this 12th day of July, 2005, upon consideration of the parties' Cross-Motions for Summary Judgment and the record in this case, and after review of the Report and Recommendation of United States Magistrate Judge Linda K. Caracappa dated June 17, 2005, and Plaintiff's Objections to the Report and Recommendation of Magistrate Judge, for the reasons set forth in the attached Memorandum, **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Judge Linda K. Caracappa dated June 17, 2005, is **REJECTED**;

2. Plaintiff's Objections to the Report and Recommendation of United States Magistrate Judge Linda K. Caracappa are **SUSTAINED**;

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

4. 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 attached Memorandum; and,

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

BY THE COURT:

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JAN E. DUBOIS, **J**.

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ADMINISTRATION	**:**	
	:	

AND NOW, this 12th day of July, 2005, in accordance with the Court's separate Order dated July 8, 2005, granting that part of plaintiff's Motion for Summary Judgment which sought a remand of the case to the Commissioner of the Social Security Administration, and remanding the case to the Commissioner of the Social Security Administration in accordance with the fourth sentence of 42 U.S.C. § 405(g) for further proceedings consistent with the attached Memorandum pursuant to *Kadelski v. Sullivan*, 30 F.3d 399 (3d Cir. 1994), and Federal Rule of Civil Procedure 58, **IT IS ORDERED** that**JUDGMENT IS ENTERED** in favor of plaintiff, Michael V. Small, and against defendant, Jo Anne B. Barnhart, Commissioner of the Social Security Administration.

BY THE COURT:

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JAN E. DUBOIS, **J**.