

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

LUZ ROMAN (o/b/o K.M.J., a minor),	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
JO ANNE E. BARNHART,	:	
COMMISSIONER OF SOCIAL SECURITY,	:	
Defendant.	:	NO. 04-4628

MEMORANDUM AND ORDER

Gene E.K. Pratter, J.

February 28, 2006

I. BACKGROUND

Plaintiff Luz Roman brought this action on behalf of her minor child, K.M.J., to challenge a denial by the Commissioner of Social Security (“Commissioner”) of K.M.J.’s application for Supplemental Security Income (SSI) under Title XVI of the Social Security Act. 42 U.S.C. §§ 1381-1383(c). K.M.J. is a ten-year-old boy who was born on March 16, 1995 (Administrative Record at 44, (herein R. 44)). Ms. Roman applied for SSI on K.M.J.’s behalf on April 29, 2002, alleging that he has been disabled since April 2, 2002 due to hearing and speech impairments. (R. 94-96, 106). This application was denied upon initial review (R. 60-66), and a hearing was then requested before an administrative law judge (“ALJ”).

A hearing commenced on May 1, 2003, but it was continued in order for Plaintiff to obtain counsel. (R. 31-37). Another hearing was held on September 18, 2003, at which Ms. Roman, represented by counsel, testified along with the aid of a interpreter. (R. 38-59). By way of a decision dated November 26, 2003, the ALJ determined that while K.M.J. has severe impairments, those impairments do not equal any of the listed impairments in Appendix 1,

Subpart P, Regulations No. 4 (20 C.F.R. § 416.924(d)). Thus, K.M.J. was found ineligible for benefits. (R. 23-27). The ALJ's findings became the final decision of the Commissioner when, on August 2, 2004, the Appeals Council denied Plaintiff's request for review. (R. 6-8). In due course, the parties filed their respective briefs and motions for summary judgment with this Court. On December 1, 2005, the Clerk of Court entered onto the Docket the Report of the Magistrate Judge Linda K. Caracappa recommending that the Commissioner's motion for summary judgment be granted and that her final decision be affirmed. Ms. Roman then filed objections to the Report.

Having reviewed the underlying record as well as the Magistrate Judge's Report and Recommendation, the Court notes that the ALJ did not explain his consideration of the records of K.M.J.'s primary physician, Dr. Harold White, and did not appear to give meaningful consideration to the non-medical evidence from K.M.J.'s teacher, Ms. Caroline Maxey. Therefore, this case will be remanded to the Commissioner in order for the evidence offered by Dr. White and Ms. Maxey to be evaluated and substantively considered by the ALJ.

II. DISCUSSION

A. Standard of Review

The Court undertakes a de novo review of the portions of a report and recommendation of a magistrate judge to which the plaintiff has lodged objections. See 28 U.S.C. § 636(b)(1); Continental Cas. Co. v. Dominick D'Andrea, Inc., 150 F.3d 245, 250 (3d Cir. 1998). The Court “may accept, reject or modify, in whole or in part,” the findings and recommendations of a magistrate judge. 28 U.S.C. § 636(b)(1). Of course, the Court should uphold the determinations of the ALJ if supported by substantial evidence. Burns v. Barnhart, 312 F.3d 113, 118 (3d Cir.

2002). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988).

B. Social Security Law

To qualify for SSI benefits under the Social Security Act, K.M.J. must demonstrate that he is “disabled” within the meaning of 42 U.S.C. § 1382. A child is considered “disabled” and thereby entitled to benefits under the Act if the child “has a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” Id. at § 1382c(a)(3)(C)(i). The claimant carries the initial burden of proving disability. Plummer v. Apfel, 186 F.3d 422, 428 (3d Cir. 1999).

Under the Social Security regulations, an application for child disability benefits is evaluated according to a three-step sequential process. 20 C.F.R. § 416.924. This process requires the presiding ALJ to review in sequence whether the child (1) is engaging in substantial gainful activity; (2) has a medically determinable impairment or combination of impairments that is severe; and (3) whether the child's impairments, considered alone or in combination, meet or equal any listing set forth in Part 404, Subpart P, Appendix 1. Laracuenta v. Barnhart, No. 04-2278, 2005 U.S. Dist. LEXIS 17424, at *5-6 (E.D. Pa. Aug. 18, 2005).

C. Plaintiff’s Objections to Magistrate Judge’s Report and Recommendations

Here, the ALJ determined that K.M.J.’s alleged speech/language delay, hearing difficulties, asthma, growth impairment, and behavioral problems did not amount to disabilities which would qualify for Supplemental Security Income payments under the Social Security Act. Ms. Roman

objected to the Magistrate Judge's Report which embraced and upheld these findings and argued that (1) the Report wrongly analyzed the evidence and that the Magistrate Judge made factual findings concerning evidence the ALJ failed to address, (2) the record documented that K.M.J. had a growth impairment, and (3) that the ALJ failed to articulate the basis for his credibility findings.

1. When the ALJ fails to explain his implicit rejection of evidence the Court cannot conclude that his findings were supported by substantial evidence.

Ms. Roman argues that the ALJ did not properly address evidence from (1) Dr. White, (K.M.J.'s treating physician from July 27, 2002 through September 19, 2003) (R. 89), (2) Ms. Maxey (K.M.J.'s kindergarten teacher), and (3) Ms. Wendy Hershey (Speech-Language Pathologist). Ms. Roman argues that "the ALJ not only failed to articulate how he evaluated evidence from K.M.J.'s treating pediatrician, Dr. White, the ALJ failed to even realize that evidence from the treating source was submitted and entered into the record." Pl.'s Obj. at 1. Ms. Roman argues that the ALJ first learned at the hearing that Dr. White treated K.M.J., and further that the ALJ agreed to contact Dr. White himself. (R. 57-59). Ms. Roman notes that evidence from Dr. White was entered into the record after the hearing, (R. 89, 226-28), even though, as Ms. Roman points out, the ALJ expressly stated in his decision that no additional evidence was received after the hearing and before issuance of the decision. (R. 23). Thus, Ms. Roman argues that "the ALJ could not have recognized much less evaluated properly Dr. White's evidence." Pl.'s Obj. at 2. Ms. Roman also argues that "the ALJ's decision did not acknowledge Ms. Maxey's observations or explain the weight he accorded her report" and that "the ALJ did not articulate how he evaluated an assessment by Ms. Hershey." Pls.' Obj. at 2.

The Third Circuit Court of Appeals has held that "[t]he ALJ is not required to supply a

comprehensive explanation for the rejection of evidence; in most cases, a sentence or short paragraph would probably suffice.” Cotter v. Harris, 650 F.2d 481, 482 (3d Cir. 1981). But the Court of Appeals has also held an “ALJ's failure to explain his implicit rejection of this evidence or even to acknowledge its presence was error.” Cotter v. Harris, 642 F.2d 700, 707 (3d Cir. 1981). Furthermore, “[w]here there is conflicting probative evidence in the record, we recognize a particularly acute need for an explanation of the reasoning behind the ALJ's conclusions, and will vacate or remand a case where such an explanation is not provided.” Fagnoli v. Halter, 247 F.3d 34, 42 (3d Cir. 2001).

“The Third Circuit has made it clear that the failure of an ALJ to address evidence prevents a reviewing district court from properly exercising its responsibility under 42 U.S.C. § 405(g) to determine whether a challenged decision of the Commissioner is supported by substantial evidence.” Proper v. Apfel, 140 F. Supp. 2d 478, 484 (E.D. Pa. 2001) (citing Fagnoli v. Halter, 247 F.3d 34, 43-44 (3d Cir. 2001). Additionally, “the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.” Fagnoli v. Halter, 247 F.3d 34, 43-44 n.7 (3d Cir. 2001) (quoting SEC v. Chenery Corporation, 318 U.S. 80, 87 L. Ed. 626, 63 S. Ct. 454 (1943). Certainly, evidence from parents, school teachers, early intervention team members, and childcare providers can be sources to show the severity of a child’s impairment(s) and how it affects the child’s ability to function. 20 CFR § 416.924a; see also Williams v. Apfel, 98 F. Supp. 2d 625, 631 (E.D. Pa. 2000).

Here, the ALJ briefly discussed portions of the evidence offered by Ms. Hershey and cited one of her reports. (R. 25). He also cited the notes from Dr. White, even though Ms. Roman argues he did not recognize the fact they were in the record. (R.24). From the record, it does seem to be

an inescapable conclusion that the ALJ did fail to directly address evidence from Ms. Maxey. The Report and Recommendation, however, specifically addresses the evidence from Ms. Hershey, Dr. White, and Ms. Maxey in more detail than the ALJ's decision. In the evaluation by the Magistrate Judge of this particular evidence in the Report and Recommendation, the Magistrate Judge exceeded her limited scope of review. Thompson v. Barnhart, 281 F. Supp. 2d 770, 776 (E.D. Pa. 2003). "As such, it is impermissible for a district court to rectify ALJ errors by making an independent analysis and relying on information not relied upon by the ALJ." Id.¹ In Thompson the Court held the magistrate judge exceeded his limited scope of review when he undertook an independent analysis

¹ The Report and Recommendation states on page 9, footnote 9:

Plaintiff also asserts the record also contains evidence from his kindergarten teacher, Caroline Maxey, which shows limitations in these domains. He states that Ms. Maxey acknowledged that plaintiff was passed through kindergarten even [though] he was not ready to do so because he was slow, unable to keep up with class pace, did not meet expectations, could not read, had low test scores, and had a shorter than expected attention span. (R. 152-155). This assertion, however, is meritless since plaintiff failed to mention that Ms. Maxey also noted in a Teacher/Counselor Questionnaire that plaintiff stammered but is 100% intelligible, is not a behavior problem or disruptive in class, gets along "fine" with her, and relates "fine" and is liked by other children. (R. 152-155).

Furthermore the Report and Recommendation states on page 12:

Plaintiff argues that his pediatrician, Dr. White, treated him for Attention Deficit Disorder. This is based on notes from Dr. White that are almost entirely illegible where the letters "ADD" are barely readable. There is no indication from these notes that even if plaintiff [was diagnosed as having] ADD that he [also] has severe behavior problems.

The Magistrate Judge also analyzed the content of an assessment offered by Ms. Hershey, while the ALJ only cited in his decision a different report by Ms. Hershey. Ms. Roman takes issue with the fact that the ALJ failed to cite or explain the evaluation of this assessment as well. Ms. Roman's argument on this issue, however, is without merit due to the fact that the ALJ addressed the issues raised by this assessment when he identified K.M.J.'s language difficulties in his decision. (R. 25).

of the administrative record, rather than focusing only on the reasons set forth by the ALJ. Id. Specifically, the magistrate in Thompson recommended the adoption of the ALJ's decision and concluded a physician's notes were "inconsistent at best," and suffered from "inherent ambiguity," and thus were "of very limited value" even though these characterizations and conclusions did not appear in the ALJ decision. Id.

Here, while the ALJ has concluded that there is no indication of behavioral problems in the treatment records, because the ALJ has not explained how he evaluated either the evidence offered by Dr. White which indicated that K.M.J. was being treated for attention deficit disorder ("ADD") or the evidence from Ms. Maxey indicating K.M.J.'s attention span was not as long as it should have been and that he should have repeated kindergarten, this Court cannot properly determine if the ALJ's decision was supported by substantial evidence. See note 1 supra. Therefore, the case must be remanded for the purposes of ensuring the thorough examination of this evidence.

2. K.M.J.'s growth impairment.

Ms. Roman argues that the case should be remanded because "[a]lthough the ALJ did not have an opportunity to see the results of K.M.J.'s bone test, the evidence alerted the ALJ that an impairment existed." Pl.'s Obj. at 8. Additionally, Ms. Roman argues that ALJ was obligated to obtain the bone test once he was informed of its existence, and that even if the growth impairment was not disabling by itself, the ALJ had to consider it in combination with all of K.M.J.'s other impairments.

Ms. Roman cites Bailey v. Sullivan, 885 F.2d 52, 59-61 (3d Cir. 1989), which states that "in determining an individual's eligibility for benefits, the Secretary shall consider the combined effect of all of the individual's impairments without regard to whether any such impairment, if considered

separately, would be of such severity.” (Citations omitted). The ALJ here did in fact refer specifically to Ms. Roman’s testimony that K.M.J. was “not growing enough and weighs only 46 pounds.” (R. 24). Furthermore, the ALJ evaluated these impairments and found that the impairments both “singly and in combination, do not meet or medically equal the criteria of any of the listed impairments of Appendix 1, Subpart P, Regulations No. 4.” (R. 25).

While Ms. Roman stated at the hearing before the ALJ that K.M.J. “was not growing enough and so they have done one test for his bones,” the Report and Recommendation, however, notes the fact that the bone test was never provided to the ALJ, and only given to the Appeals Council four months after the ALJ’s decision. The Appeals Council denied review of the ALJ decision even after viewing the bone test evidence. (R. 6-7).

[W]hen the Appeals Council has denied review the district court may affirm, modify, or reverse the Commissioner's decision, with or without a remand based on the record that was made before the ALJ (Sentence Four [of 42 U.S.C. § 405(g)] review). However, when the claimant seeks to rely on evidence that was not before the ALJ, the district court may remand to the Commissioner but only if the evidence is new and material and if there was good cause why it was not previously presented to the ALJ (Sentence Six [of 42 U.S.C. § 405(g)] review).

Mathews v. Apfel, 239 F.3d 589, 593 (3d Cir. 2001) (citations omitted).

Consideration of the bone report is not compelled under Mathews because Plaintiff did not argue that the ALJ should consider the bone test evidence on Mathews grounds in Plaintiff’s objections to the Report and Recommendation.² This conclusion, however, does not mean the bone

² Ms. Roman argued in her Motion for Summary Judgment and Reply that Plaintiff’s counsel was in the process of obtaining bone test records but due to ongoing evaluation of the records, the providers would not yet release them. However, in her objections to the Report and Recommendation, Ms. Roman relies solely upon the theory that the bone test record should be considered as part of the ALJ’s duty to fully develop the record.

test report should be ignored. The ALJ has a duty to develop the record adequately, even where the claimant is represented by counsel. See Rutherford v. Barnhart, 399 F.3d 546, 557 (3d Cir. 2005); Boone v Barnhart, 353 F.3d 203, 208 n.11 (3d Cir. 2004); Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995) (ALJ has a “duty to develop a full and fair record”); Mayes v. Massanari, 276 F.3d 453, 459 (9th Cir. 2001) (“In Social Security cases, the ALJ has a special duty to develop the record fully and fairly and to ensure that the claimant's interests are considered, even when the claimant is represented by counsel.”); Shaw v. Chater, 221 F.3d 126, 131 (2d Cir. 2000) (similar statement); Freeman v. Apfel, 208 F.3d 687, 692 (8th Cir. 2000) (similar statement); Baker v. Barnhart, No. 05-96, 2005 U.S. Dist. LEXIS 25371, at *32-34 (M.D. Pa. Oct. 28, 2005) (“It is well established in this circuit that an ALJ has a duty to develop the record adequately, even where the claimant is represented by counsel.”)

When the ALJ is aware of the existence of a report that is reasonably necessary for the full presentation of a case, an administrative law judge on his or her own initiative may issue subpoenae for documents that are material to an issue at the hearing. 20 C.F.R. § 404.950(d), see also Murphy v. Secretary of Health & Human Servs., 872 F. Supp. 1153, 1159 (E.D.N.Y. 1994) (Where the court found there was a paucity of evidence on a particular impairment and given the ALJ's references to an additional medical evaluation, the court remanded the case holding “the ALJ should have reviewed the report or at least noted why it was not obtained.”).

Inasmuch as this case is already being remanded for the purposes of thoroughly evaluating the evidence, it is also appropriate to expect the record to be more fully developed by an evaluation of evidence that Ms. Roman identified in the record (R. 55) specifically in relation to listings dealing with growth impairment, i.e. 20 C.F.R. pt. 404 subpt. P, app. 1 §§ 100.00-100.03.

III. CONCLUSION³

For the foregoing reasons, the Court grants Ms. Roman's Motion for Summary Judgment to the extent that the matter is remanded for further evaluation consistent with this Memorandum and Order and denies the Commissioner's Motion for Summary Judgment. An appropriate Order consistent with this Memorandum follows.

BY THE COURT:

S/Gene E.K. Pratter
GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE

³ Ms. Roman also objects to the Report on additional grounds, claiming that the ALJ's "credibility analysis was impermissibly conclusory." Pl.'s Obj. at 8. Credibility determinations by an ALJ need only be supported by substantial evidence on the record as a whole, Wilson v. Apfel, No. 98-5611, 1999 U.S. Dist. LEXIS 16712, at *11 (E.D. Pa. Oct. 29, 1999) (citing Miller v. Commissioner of Soc. Sec., 172 F.3d 303, 304 n.1 (3d Cir. 1999), and when the ALJ weighs the credibility of the claimant's testimony against other evidence in the record as seems to be the circumstances here, the Court must defer to the factfinder. Alvarez v. Secretary of Health & Human Services, 549 F. Supp. 897, 900 (E.D. Pa. 1982) (citations omitted). However, this case is already being remanded on other grounds which may or may not have an impact upon the underlying credibility analysis. Therefore, it is not necessary at this point to address the credibility findings of the ALJ.

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

LUZ ROMAN (o/b/o K.M.J., a minor),	:	CIVIL ACTION
Plaintiff,	:	
	:	
v.	:	
	:	
JO ANNE E. BARNHART,	:	
COMMISSIONER OF SOCIAL SECURITY,	:	
Defendant.	:	NO. 04-4628

ORDER

Gene E.K. Pratter, J.

February 28, 2006

AND NOW, this day the 28th of February, 2006, upon consideration of cross-motions for summary judgment filed by the parties, the responses thereto, the Report and Recommendation of United States Magistrate Judge, and the objections thereto, (Docket Nos. 8, 9, 10, 11, 12, and 13), **IT IS HEREBY ORDERED** that:

1. The Report and Recommendation is **NOT ADOPTED**;
2. The Motion for Summary Judgment filed by plaintiff is **GRANTED** to the extent that the matter is remanded for further evaluation consistent with this Order.
3. The Motion for Summary Judgment filed by the Commissioner is **DENIED**.

BY THE COURT:

S/Gene E.K. Pratter
GENE E. K. PRATTER
UNITED STATES DISTRICT JUDGE