

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

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<b>JACQUELINE PRZEGON,</b>	:	
<b>Plaintiff,</b>	:	<b>CIVIL ACTION</b>
<b>vs.</b>	:	<b>NO. 04 - 5313</b>
	:	
<b>JO ANNE B. BARNHART,</b>	:	
<b>COMMISSIONER OF THE SOCIAL</b>	:	
<b>SECURITY ADMINISTRATION,</b>	:	
<b>Defendants.</b>	:	

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**DUBOIS, J.**

**MARCH 6, 2006**

**MEMORANDUM**

**I. BACKGROUND**

Plaintiff, Jacqueline Przegon, filed this action pursuant to 42 U.S.C. § 405(g), seeking judicial review of the final decision of the Commissioner of the Social Security Administration ("Commissioner"), denying her claim for Supplemental Security Income ("SSI") under Title XVI of the Social Security Act ("Act"). Both parties filed motions for summary judgment. Pursuant to Local Civil Rule 72.1(1)(d)(1)(c), the Court referred the case to United States Magistrate Judge Peter B. Scuderi for a Report and Recommendation.

Magistrate Judge Scuderi submitted a Report and Recommendation on July 27, 2005, in which he recommended that Plaintiff's Motion for Summary Judgment be granted, in part, the Commissioner's Motion for Summary Judgment be denied, the final decision of the Commissioner be vacated, and the case be remanded to the Commissioner for further development of the record, including a physical examination of plaintiff and any medical expert

and supplemental vocational expert testimony deemed necessary. The Commissioner filed timely objections to the Report and Recommendation. For the reasons that follow, the Court overrules the Commissioner's Objections to the Report and Recommendation, approves and adopts the Report and Recommendation, grants Plaintiff's Motion for Summary Judgment to the extent it seeks a remand and denies the Motion in all other respects, denies the Commissioner's Motion for Summary Judgment, and enters judgment in favor of plaintiff and against the Commissioner.

## **II. STANDARD OF REVIEW**

Under the Social Security Act, a claimant is disabled if she is unable to engage in "any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to . . . last for a continuous period of not less than twelve (12) months." 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. § 404.1505. Under the medical-vocational regulations, as promulgated by the Commissioner, the Commissioner uses a five-step sequential analysis to evaluate disability claims. This requires the Commissioner to consider, in sequence, whether a claimant: (1) is currently employed; (2) has a severe impairment; (3) has an impairment which meets or equals the requirements of a listed impairment; (4) can perform past relevant work; and (5) if not, whether the claimant is able to perform other work in view of her age, education and work experience. 20 C.F.R § 404.1520; Williams v. Sullivan, 970 F.2d 1178, 1180 (3d Cir. 1992).

The claimant bears the initial burden of proving the existence of a disability. 42 U.S.C. § 423(d)(5) (2004). To satisfy this burden, a claimant must establish an inability to return to her former work. Once the claimant makes this showing, the burden of proof shifts to the

Commissioner to show that the claimant, given her age, education and work experience, has the ability to perform specific jobs that exist in the economy. Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979).

Judicial review of the Commissioner's final decision is limited. This Court is bound by the factual findings of the Commissioner if they are supported by substantial evidence and decided according to correct legal standards. Allen v. Brown, 881 F.2d 37, 39 (3d Cir. 1989). "Substantial evidence" is deemed to be such relevant evidence as a reasonable mind might accept as adequate to support a decision. Richardson v. Perales, 402 U.S. 389, 401 (1971); Jesurum v. Sec. of the United States Dep't of Health & Human Servs., 48 F.3d 114, 117 (3d Cir. 1995). Substantial evidence is more than a mere scintilla, but may be less than a preponderance. Brown v. Bowen, 845 F.2d 1211, 1213 (3d Cir. 1988). 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).

### **III. DISCUSSION**

The Commissioner argues that the Magistrate Judge's recommendation to remand for further development of the record is not appropriate. Specifically, the Commissioner objects to the Report and Recommendation of the Magistrate Judge on five grounds: (1) the Administrative Law Judge's ("ALJ") decision regarding the need for a consultative physical examination was a discretionary decision and, therefore, not subject to judicial review under 42 U.S.C. § 405(g); (2) no further development of the record is required because plaintiff provided the ALJ with

treatment records from several medical sources; (3) plaintiff's medical records failed to indicate that plaintiff had been treated for any physical deficits related to her obesity; (4) under Rutherford v. Barnhart, 399 F.3d 546 (3d Cir. 2005), a plaintiff's generalized complaint about the limitations caused by her obesity is insufficient to require a remand; and (5) remand would serve no purpose because plaintiff would not be disabled even if she were limited to the performance of sedentary work. The Court addresses each of the Commissioner's objections in turn.

A. Objection: The ALJ's Discretionary Decision Not to Request a Consultative Physical Examination Is Beyond the Scope of Judicial Review Under 42 U.S.C. § 405(g)

The Commissioner argues that the ALJ's decision not to request a consultative physical examination is not subject to judicial review under 42 U.S.C. § 405(g) because the Commissioner's regulations make this decision a discretionary one. This argument misconstrues the function of § 405(g) and the scope of judicial review.

Section 405(g) confers upon federal courts the subject matter jurisdiction necessary to review decisions made by the Commissioner. Additionally, that section provides that review is available only after the Commissioner's determination becomes final. In the instant case, the ALJ issued a decision denying plaintiff's claims on February 23, 2004. (Tr. 13-24). The Appeals Council then denied plaintiff's request for review. Thus, the ALJ's decision of February 23, 2004 is the final decision of the Commissioner and judicial review is appropriate. Pearson v. Barnhart, 380 F. Supp. 2d 496, 497 (D.N.J. 2005).

While the ALJ's decision not to request a consultative physical examination is committed to the ALJ's discretion, the Court must examine the record as a whole and determine whether the

ALJ's ultimate determination is support by substantial evidence. "[T]he findings of the ALJ cannot be said to be supported by substantial evidence where the record upon which those findings are based has not been sufficiently developed." Facyson v. Barnhart, 2003 WL 22436274 at \*3 (E.D. Pa. May 30, 2003). The ALJ's decision not to request a consultative physical examination is subject to review by the Court under § 405(g) because it is part of the determination of whether the ALJ's decision is supported by substantial evidence. Therefore, the Commissioner's first objection is overruled.

B. Objection: No Further Development of the Record Is Required Because Plaintiff Provided the ALJ with Treatment Records from Several Medical Sources

The Commissioner argues that no further development of the record is required because plaintiff provided the ALJ with records from plaintiff's treating physicians and these records contained no evidence that plaintiff had been treated for any physical deficits related to her obesity. The Court disagrees.

The ALJ has a duty to develop a "full and fair record" in social security cases. Ventura v. Shalala, 55 F.3d 900, 902 (3d Cir. 1995). The Court's review of the ALJ's fulfillment of this duty is intertwined with the question of whether the Commissioner's determination is supported by substantial evidence. "[T]he ALJ's duty to develop the record does not require a consultative examination unless the claimant establishes that such an examination is necessary to enable the ALJ to make the disability decision." Facyson, 2003 WL 22436274 at \*3 (quoting Thompson v. Halter, 45 Fed. Appx. 146, 149 (3d Cir. 2002) (non-precedential)). In the instant case, the ALJ ordered several consultative examinations regarding plaintiff's depression, but never ordered plaintiff to undergo a physical examination. The ALJ erred in not doing so. During plaintiff's

testimony before the ALJ, plaintiff stated that due to her obesity, “I can’t breathe. I can’t walk very far. I need to hold onto things when I’m walking. . . . It’s difficult just to get around.” (Tr. 56). Additionally, in response to a question about performing gardening and yard work, plaintiff wrote: “Excessive sweating, tired, short breath, chest heavy, and felt like a stroke.” (Tr. 96).

In support of this objection, the Commissioner points to notes from psychiatric evaluations that revealed normal heart and lung sounds. (Tr. 110-11). These records, the Commissioner contends, demonstrate that no further physical evaluation is required. The Court is not persuaded by the Commissioner’s argument. This limited medical evidence is not sufficient to refute the testimony provided by plaintiff. Because the record has not been sufficiently developed, it cannot be said that the ALJ’s findings are supported by substantial evidence. Therefore, the Commissioner’s second objection is overruled.

C. Objection: No Further Development of the Record Is Required Because Plaintiff’s Medical Records Failed to Indicate that Plaintiff Had Been Treated for Any Physical Deficits Related to Her Obesity

The Commissioner contends that further physical evaluation of plaintiff is not required because her medical records lack evidence of obesity-related physical limitations. The Court disagrees.

The relevant Social Security Ruling (“SSR”) states: “An assessment should also be made of the effect obesity has upon the individual’s ability to perform routine movement and necessary physical activity within the work environment. Individuals with obesity may have problems with the ability to sustain a function over time.” SSR 02-01p. The ruling does not require that plaintiff’s medical records contain evidence of obesity-related limitations before the ALJ is required to analyze the effects of obesity. Instead, the ruling simply requires the ALJ to take

plaintiff's obesity into account. Therefore, the issue before the Court is whether the ALJ properly assessed the effect of obesity upon plaintiff's ability to "perform . . . physical activity within the work environment." SSR 02-01p. As noted above, the ALJ failed to develop the record sufficiently in this regard and, therefore, the Commissioner's third objection is overruled.

D. Objection: Under *Rutherford*, Plaintiff's Generalized Complaint About the Limitations Caused by Her Obesity Is Insufficient to Require Remand

The Commissioner contends that the Third Circuit's ruling in Rutherford precludes remand when a claimant's generalized complaint that obesity limits a claimant's functional ability is not supported by evidence of specific functional limitations. In Rutherford, the Third Circuit explained that though notations of height and weight were "adequate to notify the ALJ of an obesity impairment, the ALJ was not required to explicitly consider obesity when plaintiff failed to allege obesity as an impairment and where the ALJ's explicit consideration would not have affected the outcome of the case." Demiranda v. Barnhart, 2005 WL 1592950 at \*1 (E.D. Pa. July 5, 2005) (citing Rutherford, 399 F.3d at 552-53).

Rutherford can be distinguished from the instant case. To start, plaintiff specifically alleged obesity as an impairment in the proceeding before the ALJ. (Tr. 38-40). Second, plaintiff has made more than generalized complaints about the limits caused by her obesity. During her testimony before the ALJ, plaintiff stated that prior to gaining 120 pounds, "I would climb telephone poles for a living. . . ." (Tr. 42). Plaintiff's testimony supports her position that her obesity has caused a severe change in her physical functions. Thus, the holding in Rutherford is inapplicable to this case. Instead, the issue before the Court is whether the ALJ sufficiently developed the record in order to determine the extent of plaintiff's physical limitations based on her obesity. The Court concludes that the ALJ did not do so and, therefore, the Commissioner's fourth objection is overruled.

E. Objection: Remand Would Not Alter the Outcome of the Case Because Plaintiff Would Not Be Disabled Even If She Were Found to Be Limited to the Performance of Sedentary Work

Lastly, the Commissioner contends that remand would serve no purpose in the instant case because plaintiff would not be disabled even if she were found to be limited to the performance of sedentary work. In support of this argument, the Commissioner cites the testimony of the vocational expert (“VE”). The VE testified that there were jobs within the national economy for a hypothetical individual with plaintiff’s mental limitations (as opposed to physical) who was further limited to the sedentary exertional level work. (Tr. 29). However, the ALJ also asked the VE whether any jobs were available for plaintiff if her testimony were deemed fully credible. In response, the VE stated that there were no jobs for an individual suffering from such limitations. (Tr. 30). On this issue, the ALJ determined that plaintiff’s testimony regarding her limitations was not fully credible. (Tr. 24).

The Court acknowledges that the ALJ is afforded deference with regard to the assessment of the credibility of plaintiff’s testimony. That stated, the ALJ’s failure to fully develop the record precludes the Court from assessing, even with great deference to the ALJ, plaintiff’s testimony regarding her physical limitations. Moreover, because the VE testified that, if plaintiff’s testimony were fully credible, there would be no jobs in the national economy that she could perform, the Court concludes that remand could affect the outcome of the case. Therefore, the Commissioner’s fifth objection is overruled.

**IV. CONCLUSION**

This Court concludes that the ALJ failed to fully develop the record by not ordering a physical evaluation of plaintiff. Such an evaluation is required to determine the extent to which plaintiff’s obesity limits her ability to perform physical functions in the work environment.

Accordingly, the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi dated July 27, 2005, is approved and adopted, the Commissioner's objections are overruled, the final decision of the Commissioner is vacated, the case is remanded to the Commissioner for further development of the record, including a physical examination of plaintiff and any medical expert and supplemental vocational expert testimony deemed necessary, Plaintiff's Motion for Summary Judgment is granted to the extent it seeks a remand and denied in all other respects, the Commissioner's Motion for Summary Judgment is denied, and judgment is entered in favor of plaintiff and against the Commissioner.

An appropriate Order follows.

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

<b>JACQUELINE PRZEGON</b>	:	<b>CIVIL ACTION</b>
	:	
<b>v.</b>	:	
	:	<b>NO. 04 - 5313</b>
<b>JO ANNE B. BARNHART</b>	:	
<b>Commissioner of the Social Security</b>	:	
<b>Administration</b>	:	

**ORDER**

**AND NOW**, this 6th day of March, 2006, after careful and independent consideration of the parties' Cross-motions for Summary Judgment, and upon review of the Report and Recommendation of United States Magistrate Peter B. Scuderi dated July 27, 2005 and the Commissioner's objections, **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Judge Peter B. Scuderi dated July 27, 2005, is **APPROVED** and **ADOPTED**;

2. The Objections submitted by defendant, Jo Anne B. Barnhart, Commissioner of Social Security, are **OVERRULED**;

3. The Motion for Summary Judgment filed by plaintiff, Jacqueline Przegon, is **GRANTED IN PART**, and the case is **REMANDED** to the Commissioner of Social Security in accordance with the fourth sentence of 42 U.S.C. § 405(g) for further proceedings consistent with the Report and

Recommendation of United States Magistrate Judge Peter B. Scuderi dated July 27, 2005. Plaintiff's Motion for Summary Judgment is **DENIED** in all other respects; and

4. The Motion for Summary Judgment filed by defendant, Jo Anne B. Barnhart, Commissioner of Social Security, is **DENIED**.

**BY THE COURT:**

\_\_\_\_\_/s/ Jan E. DuBois\_\_\_\_\_

**JAN E. DUBOIS, J.**

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<b>Plaintiff,</b>	:	<b>CIVIL ACTION</b>
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<b>JO ANNE B. BARNHART,</b>	:	
	:	
<b>COMMISSIONER OF THE SOCIAL</b>	:	
	:	
<b>SECURITY ADMINISTRATION,</b>	:	
	:	
<b>Defendants.</b>	:	

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**ORDER**

**AND NOW**, this 6th day of March, 2006, in accordance with the Court's separate Order dated February 2, 2006, remanding this case to the Commissioner of the Social Security Administration under the fourth sentence of U.S.C. § 405(g) for further proceedings consistent with the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi dated July 27, 2005, pursuant to *Shalala v. Schaeffer*, 509 U.S. 292, 296-297 (1993), *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, Jacqueline Przegon, and against defendant, Jo Anne B. Barnhart, Commissioner of the Social Security Administration.

**BY THE COURT:**

\_\_\_\_\_/s/ **Jan E. DuBois**\_\_\_\_\_  
**JAN E. DUBOIS, J.**