

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

<b>DWAYNE POWELL</b>	:	<b>CIVIL ACTION</b>
	:	
v.	:	
	:	
<b>JO ANNE B. BARNHART, et al</b>	:	<b>NO. 05-2104</b>

**MEMORANDUM AND ORDER**

**NORMA L. SHAPIRO, S.J.**

**November 2, 2006**

Dwayne Powell seeks judicial review of the Social Security Administration's ("SSA") decision to deny supplemental security income benefits ("SSI") under the Social Security Act ("Act"), 42 U.S.C. §401 *et seq.* The parties filed cross motions for summary judgment. Chief Magistrate Judge Charles B. Smith entered a Report and Recommendation concluding that substantial evidence supported the Administrative Law Judge's ("ALJ") finding that Powell was not disabled and could engage in substantial gainful activity.

Powell objects to the Magistrate's Report on the following grounds: 1) in evaluating Powell's right wrist impairment, the ALJ relied on personal observations at the hearing and not on the medical evidence of record in determining that the impairment was "non-severe"; 2) according to established precedent, an impairment need only have a *de minimis* effect on the claimant's ability to work in order to be deemed "severe"; 3) in evaluating Powell's disability due to Crohn's disease, the ALJ relied on personal observations to override the medical opinions of a treating physician; and 4) the ALJ failed to discuss all of the evidence and did not provide an adequate explanation for disregarding certain evidence.

On *de novo* review, defendant's motion is granted in part because no benefits are owed for any period before February 2003; in all other respects, it is denied. Plaintiff's motion is denied, and the case is remanded to the SSA for further consideration consistent with this opinion.

## **I. Facts and Procedural History**

### **A. Background**

Powell filed a claim for SSI under the Act on February 24, 2003. He claimed a disability since November 1, 1998 due to Crohn's disease, asthma, depression and a right hand impairment. The SSA's state agency denied his claim on April 16, 2003. An administrative hearing on that determination was held on May 3, 2004, after which the ALJ issued a decision finding Powell not disabled and denying him SSI benefits. Following an administrative appeal, which affirmed the ALJ's decision, Powell commenced this action for judicial review of the SSA's final decision.

Powell was thirty-nine years old at the time of the ALJ's decision.<sup>1</sup> He was incarcerated in Michigan from June 1996 to January 2003 and moved to Philadelphia after his release from prison. He has not worked since his release from prison.

### **B. Medical History**

According to the medical evidence of record, Powell was first admitted into the hospital in March 2000 with complaints of abdominal pain. Diagnostic tests revealed nothing remarkable, and he was discharged with prescriptions for various medications. R. 116-117.

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<sup>1</sup>A person of this age is deemed a "younger person" under the Act, which means that age does not seriously affect one's ability to adjust to other work. 20 C.F.R. §416.963(c).

In May 2001, Powell met with Dr. Charles Asplund about an increase in diarrhea. Dr. Asplund noted a history of colitis, diffacele and pancreatitis. The doctor found no blood in the stool but did note weight loss, parumbilical tenderness and suprapubic tenderness. He recommended some diagnostic tests to confirm his diagnosis of inflammatory bowel disease with a history of diffacele and dysurea. R. 197-199.

The follow up CT scan was unremarkable with the exception of fluid in the sigmoid colon and multiple small bowel loops distended with air. The reviewing doctors believed the causes were colitis or ileus/obstruction. R. 265-267. Powell was admitted to the hospital for observation, and studies confirmed an obstruction. A Crohn's disease<sup>2</sup> diagnosis was referenced for the first time in the documents of record.<sup>3</sup> A treatment plan was discussed but no physical limitations were imposed. R. 200-201.

In July 2001, Powell returned to Dr. Asplund with symptoms of diarrhea. Dr. Asplund prescribed medications and placed him on a low residual diet. R. 195. In a follow up visit, Asplund believed the bowel obstruction had returned; he ordered further studies. A colonoscopy confirmed the Crohn's diagnosis. R. 189, 268. Powell continued to complain of abdominal pain and frequent stools, some with bleeding. R. 187.

In April 2002, Powell was hospitalized again for abdominal pain, nausea and a fever. A

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<sup>2</sup>Crohn's disease is defined as "a chronic granulomatous inflammatory disease of unknown etiology, involving any part of the gastrointestinal tract from mouth to anus, but commonly involving the terminal ileum with scarring and thickening of the bowel wall; it frequently leads to intestinal obstruction and fistula and abscess formation and has a high rate of recurrence after treatment." Dorland's Illustrated Medical Dictionary, Twenty-eighth Edition, p. 480 (1994) ("Dorland's").

<sup>3</sup> Plaintiff's counsel's letter to the SSA Appeals Council stated that Powell had been diagnosed with Crohn's in 1997, but no documents of record date back that far in time.

CT scan revealed an acute exacerbation of Crohn's ileitis with partial small bowel obstruction. R. 205-206. As a result, Powell had a laparotomy and a bowel resection. R. 108-109, 272. During the summer of 2002, Powell had continued complaints of diarrhea and abdominal pain. According to prison records, he was uncooperative with medical personnel and sought to have his medical hold lifted. R. 147-149.

The first reference to any pain in his hands surfaced in September 2002. An examination noted no swelling. R. 135. In December of 2002, Powell received nebulizer treatments for his asthma, which were discontinued when doctors noted no alteration in respiratory rate and no labor in his conversation. R. 132.

Powell was released from prison in January 2003. He immediately filed for SSI in February. In May of that year, he went to the emergency room in St. Joseph's, Michigan and was given a prescription for Prevacid for an exacerbation of his Crohn's disease. R. 169.

On May 30, 2003, he was examined by Dr. Yanez of the State of Michigan Family Independence Agency. The evaluation form noted the long-term treatment for Crohn's disease and bronchial asthma and stated that medical treatment would be required for a lifetime. Dr. Yanez noted on the evaluation form that while Powell had a "chronic ongoing illness", he had no medical need for assistance with any personal care activity, including eating, dressing, mobility, meal preparation, shopping/errands, laundry and housework. The examination form then contains an inexplicable conflict. Two form questions asked, "Can patient work at usual occupation?" and "Can patient work at any job?" In response to both these questions, and without elaboration, Dr. Yanez checked "No" and then added a handwritten notation "Life" next to the boxes. On the next page of the form, Dr. Yanez indicated quite a different opinion. He

noted that Powell had “Limited” physical limitations and that Powell was capable of lifting up to 10 pounds “frequently”, up to 25 pounds “occasionally” and over 26 pounds “never”. R. 174. He additionally noted that, “based on an 8 hour work day”, Powell had the physical capability to stand, walk and sit 8 hours per day and should be able to use his extremities for simple grasping, reaching, pushing/pulling and fine manipulating.” Id. No notable mental limitations existed that would restrict him from reading, writing or following directions. Id.

During the summer of 2003, Powell continued to seek medical attention for his Crohn’s disease and wrist pain. The wrist pain was noted to have been “constant” for a month. R. 276-279. A bone density test showed osteopenia.<sup>4</sup> R. 274. X-rays did not reveal any fracture, dislocation or bone erosion. His bones were well mineralized and his joint spaces were well-maintained. R. 229.

Powell moved to Philadelphia in early 2004. He met with a physician there on February 9, 2004 for a new patient evaluation. The report noted Crohn’s disease, asthma and osteopenia, with the notation “right arm–brace–pain”. R. 236. A few days later, he went to Family Health Services at the Philadelphia Department of Public Health. He reported having Crohn’s disease asthma, and it was noted that he “wears brace”, although it appears that the brace may have been on his ankle not his wrist. R. 279.

The last doctor’s visit of record occurred after the administrative hearing. Powell sought an evaluation of his Crohn’s disease at Temple Gastroenterology Associates. R. 280-286. His chief complaint was fatigue, intraumbilical pain, frequent bloody stools and ankle pain. R. 282.

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<sup>4</sup>Osteopenia is “reduced boned mass due to a decrease in the role of osteoid synthesis to a level insufficient to compensate normal bone lysis. The term is also used to refer to any decrease in bone mass below the normal.” Dorland’s at p. 1202. It is not as severe as osteoporosis. Id.

The doctor noted an exacerbation of the Crohn's disease. R. 282-283. He had been off steroids for three weeks, and the doctor placed him back on medications and suggested a follow-up in two weeks. R. 283.

C. Administrative Hearing

At the administrative hearing on May 3, 2004, Powell testified that he had not worked since 1996, at which time he was a parking attendant for the city of Pontiac, Michigan. R. 299. Powell also stated that he worked for several years doing maintenance jobs in his family's apartment complex. R. 300. The ALJ remarked that the records showed that he hardly ever worked prior to his incarceration. R. 301. The ALJ also pointed out the absence of prior tax filings. R. 301.

Powell stated that he was not currently employed. He had gone to local shelters to look for work but was unable to do a "really heavy job." R. 297. Powell testified that a doctor had warned him not to lift "more than a pencil." R. 297. When pressed about this alleged limitation, Powell responded that he had undergone several surgeries and had been in and out of the hospital. R. 298. Upon further inquiry, Powell conceded that he had only one surgery and several treatments regarding his Crohn's disease. R. 298.

Powell presently suffers mostly "bad days" involving the flare-up in his diarrhea. R. 309-310. Beyond the diarrhea, he suffers from a constant sharp pain in his abdomen, which increases or decreases depending on heavy lifting, stress and diet. R. 314. The amount of time he could stand would vary and his only problem with sitting was the diarrhea. R. 309-310. The diarrhea keeps him home because he never knows when it is going to strike. R. 315. These bouts prevent him from going out to dinner or to the movies and from riding public transportation. R. 315-316.

Powell lives with his 70 year old aunt, who does all of his driving, cooking and laundry. R. 306-308. In return, he does odd jobs around an apartment building that she owns, including bleeding the furnace, lighting the pilot light, serving eviction papers, and small maintenance tasks. R. 306-308.

As to his wrist impairment, Powell explained that the wrist may possibly be a result of the steroids for his Crohn's disease. R. 320. He stated that his current doctor has placed him on Prednisone, Osicol, Prilosec and multi-vitamins. R. 305.

Vocational expert ("VE") Roslyn Pierce testified that Powell would not be able to do his past work as a car parker because he would not have easy access to a restroom. R. 331-332. However, she opined that he could perform light-duty positions such as a file clerk, duplicating machine operator, or a maintenance scheduler. R. 332-333. With the additional limitation that Powell could not lift anything heavier than a pencil (about an ounce), the VE added that there would be no accommodating positions. R. 333. If the weight limitation were omitted but two other limitations of unscheduled breaks and naps were included, the VE stated that no gainful work activity would exist. R. 334.

#### D. The ALJ's Decision

The ALJ's decision was based on the SSA Commissioner's ("Commissioner") five-step sequential analysis used to evaluate claims of disability. These five steps are as follows: (1) whether the claimant is engaged in substantial gainful employment; (2) whether the claimant

suffers from a “severe” impairment; (3) whether the impairment meets or equals the severity of a listed impairment; (4) whether the claimant can return to his past relevant work; and (5) whether the claimant has the residual functional capacity to engage in other work in the national economy. 20 C.F.R. §404.920 (b)-(g).

Using this sequential analysis, the ALJ found Powell was not disabled for purposes of benefits. R. 16-26. Under Step 1, the ALJ determined that Powell had not engaged in substantial gainful employment since his alleged onset date of November 1, 1998. (R. 17). Under Step 2, she concluded that Powell’s Crohn’s disease was a “severe” impairment within the meaning of the Act, but his allegations of disability due to asthma,<sup>5</sup> right wrist condition, and mental state<sup>6</sup> did not constitute “severe” impairments. (R. 25). In Step 3, the ALJ declined to find that Powell’s Crohn’s disease met or equaled the criteria of Listing 5.07A. (R. 21).

In assessing Powell’s residual functional capacity at Step 4, the ALJ deemed Powell’s testimony evasive and not fully credible. R. 22. Based on her observations of Powell at the hearing and the medical evidence, the ALJ concluded that Powell had the residual functional capacity to perform low stress light work allowing regular access to a bathroom. R. 25. He could not perform his past relevant work, R. 25, but he could work as an assembler, cashier and telephone solicitor , and he could work at jobs considered sedentary, such as a file clerk, duplicating machine operator, and maintenance scheduler. R. 24. The ALJ deemed Powell not

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<sup>5</sup>Powell has not objected to the Magistrate’s Report and Recommendation regarding his asthmatic condition, and it is not considered here.

<sup>6</sup>Powell also underwent a mental health examination at Temple University in March 2004. Powell has not based his objections to the Report and Recommendations on any mental health disorder, so that condition will not be considered here. It is noted, however, that the ALJ performed a very thorough analysis of the medical records relating to this condition.

entitled to disability benefits. R. 25.

#### E. Report and Recommendation

The Magistrate's Report and Recommendation concluded that substantial evidence supported the ALJ's determination that claimant had a residual functional capacity for light work and was ineligible for disability benefits. Powell's objections to this Report and Recommendation are discussed below.

## II. Discussion

### A. Standard of Review

The role of this court on judicial review is to determine whether there is substantial evidence to support the Commissioner's decision. 42 U.S.C. § 405(g); Monsour Medical Ctr. v. Heckler, 806 F. 2d 1185, 1190 (3d Cir. 1986). Substantial evidence is more than a mere scintilla but may be somewhat less than a preponderance of the evidence. Boone v. Barnhart, 353 F.3d 203, 205 (3d Cir. 2003). It is "such relevant evidence a reasonable mind might accept as adequate to support a conclusion." Id.

It is the responsibility of the ALJ to resolve conflicts in the evidence and to determine credibility and the relative weights to be given to the evidence. Plummer v. Apfel, 186 F. 3d 422, 429 (3d Cir. 1999); Mason v. Shalala, 994 F.2d 1058, 1066 (3d Cir. 1993). Upon appeal to this court, the ALJ's factual determinations, if supported by substantial evidence, are conclusive both as to findings of fact and inferences reasonably drawn from that evidence. See Fagnoli v. Massanari, 247 F.3d 34 (3d Cir. 2001).

Notwithstanding this deference due to administrative decisions in disability benefit cases,

the ALJ must comport with proper procedures and apply proper legal standards. Coria v. Heckler, 750 F.2d 245, 247 (3d Cir. 1984). The court “retains a responsibility to scrutinize the entire record and to reverse or remand if the [Commissioner’s] decision is not supported by substantial evidence.” Morales v. Apfel, 225 F. 3d 310, 317 (3d Cir. 2000).

#### B. Disability Date

Powell claimed a disability since November 1, 1998 for his Crohn’s disease. Powell is not entitled to receive benefits from his alleged onset date through January 2003 because he was incarcerated. See 20 C.F.R. §416.211. In addition, Powell is not entitled to receive SSI payments for any period that precedes February 2003, the month in which his SSI application was filed. See 20 C.F.R. §416.202, §416.330, §416.335 and §416.501.

#### C. Right Wrist Impairment

Powell objects that the ALJ, and then the Magistrate, erroneously concluded that Powell’s wrist impairment was “non-severe” (T. 22-25) because: (i) the ALJ inappropriately relied on her personal observations at the hearing to reach this conclusion; and (ii) the finding of non-severity was inconsistent with established precedent.

In reviewing all the medical evidence, the ALJ briefly recited certain medical evidence of record regarding the wrist impairment. It was noted that Powell had osteopenia of the spine, hip and femoral neck but not the radius or ulna. A decreased range of motion was noted by one physician, but a few months earlier a doctor deemed Powell capable of grasping, reaching and

fine manipulation. R. 19.

The ALJ's Step 2 analysis of the "severity" of the wrist impairment was as follows:

The claimant also testified that his right hand gets tight and swells, and he cannot close it (allegedly from a bone deficiency from Crohn's disease). He said he uses a brace. At the hearing, I observed that he was able to thumb through papers with the right hand, which was not braced and looked and functioned normally. Because there appears to be no functional limitation associated with his right wrist, I find it is not a severe impairment. R. 20.

Thus, based exclusively on her personal observations and with no thorough analysis of the previously noted medical evidence, the ALJ concluded that evaluation of the wrist impairment should not proceed beyond Step 2 of the sequential analysis.

At Step 2 of the sequential evaluation process, a "severe impairment" is one "which significantly limits [one's] physical or mental abilities to do basic work activities". 20 C.F.R. §404.1520(c). Although the express language of the regulation implies a strict test for determining "severity", the Commissioner's interpretation of this language has substantially diluted the degree of limitation required. Under Commissioner's Social Security Ruling 85-28, a finding of non-severity at this step is permitted when "medical evidence establishes only a slight abnormality...which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education or work experience were specifically considered." Social Security Ruling 85-28, 1985 SSR LEXIS 19 at \*7.

Courts have followed the Commissioner's interpretation of "significant limitation" in defining "severity" at Step 2 in the sequential analysis. Our Court of Appeals has stated that

“Step 2 should rarely be the stage at which an applicant’s claim is rejected. ‘The step-two inquiry is a *de minimis* screening device to dispose of groundless claims’”. Jakubowski v. Commissioner Social Security, 131 Fed. Appx. 341, 2005 WL 834649 at \*2 (3d Cir. April 2005) (not precedential), quoting Newell v. Commissioner of Social Security, 347 F3d 541, 546 (3d Cir. 2003). “Because step two is to be rarely utilized as basis for the denial of benefits, its invocation is certain to raise a judicial eyebrow.” McCrea v. Commissioner of SSA, 370 F. 3d 357, 361 (3d Cir. 2004). “Reasonable doubts on severity are to be resolved in favor of the claimant.” Id. at 547.

The ALJ did not heed these precedents in determining the severity of Powell’s wrist impairment. The opinion cited only the “significant limitation” language of the regulation, but did not discuss the *de minimis* standard mandated by the Commissioner and the courts. The medical evidence showed that Powell was seen a number of times for complaints of right wrist pain. R. 135-138; 218-222; R. 236; R. 276. The pain was noted as “constant, sharp” in the summer of 2003. R. 276. Instead of resolving doubts about this impairment in favor of Powell, the ALJ substituted her own personal observation of his wrist for a thorough analysis of this medical evidence in determining non-severity. The ALJ did not discuss whether Powell’s arm brace was prescribed or the significance of his not wearing a brace at the hearing. While an ALJ may consider his or her personal observations at a hearing, these observations cannot be used to override medical opinions of a treating physician that are supported by the record. Morales v. Apfel, 225 F.3d 310, 317 (3d Cir. 2000). This is especially true when the limitation at issue involves the use of the hands. See Social Security Ruling 83-14 at p. 4. Accordingly, this action

will be remanded for additional consideration of the severity of Powell's wrist impairment in light of the standards set forth in established precedent.

No inference should be drawn from the remand of this issue as to the appropriate outcome. On a fuller examination of the medical record, the wrist impairment may, in fact, be deemed less than "slight or minimal" and thus may not meet even the *de minimis* standard of "severity" under the Step 2 analysis. The court does not find this *de minimis* standard was met here, but only that no explanation of the medical evidence in the context of this standard was presented by the ALJ.

#### D. Crohn's Disease

The ALJ discussed whether the Crohn's disease met or exceeded any listing under Step 3 of the sequential analysis. She reviewed his use of Prednisone and observed that he was not underweight. She then stated, "[h]e also looked and moved fine. Also at the hearing, he went to the rest room in a quick and efficient manner." R. 21. She relied on this personal observation of efficiency and quickness twice more in the opinion: once when discussing Powell's credibility, R. 22, and then again in the Step 5 analysis of whether claimant could perform work existing in the national economy consistent with his age, education and residual functional capacity. R. 23. These personal observations are of limited usefulness, because there is no evidence that Powell was experiencing diarrhea at the time of the hearing or that his quick trip to the bathroom was indicative of the time he would require if he were experiencing an exacerbation of the Crohn's disease. Again, personal observations are not a substitute for medical evidence. Morales, 225 F.

3d at 310.

E. Failure to Discuss Evidence

Powell contends that the ALJ must analyze all of the evidence in the record and provide an adequate explanation for disregarding evidence. Reefer v. Barnhart, 326 F.3d 376, 381-2 (3d Cir. 2003); Fargnoli v. Massanari, 247 F.3d at 42. The ALJ stated that a May 30, 2003 report by a Michigan doctor [Dr. Yanez] indicated that the “claimant could work provided he did not lift over 50 pounds. This doctor also stated that based on an 8 hour work day the claimant could stand for 8 hours, walk for 8 hours and sit for 8 hours. The claimant was also found capable of simple grasping, reaching, pushing/pulling and fine manipulation with both hands.” R. 22. The ALJ noted that “[n]o examining, non-examining or treating physician has found the claimant totally disabled.” R. 22. This ignores, however, the contradictory information contained in Dr. Yanez’ May 30, 2003 report. On the first page of that report, he noted that Powell could not work at his usual occupation and could not work at any job for “Life”. R. 172. It is impossible to discern whether this was the doctor’s true belief or a hurried oversight. But, however characterized, it is not for the Court or the ALJ to ignore. Where an ALJ does not consider all the medical evidence, the ALJ’s findings regarding residual functional capacity are deemed unsupported by substantial evidence. Burnett v. Apfel, 220 F.3d 112 (3d Cir. 2000). This action will be remanded for further consideration of this conflict in the record.

### **III. Conclusion and Remand Recommendations**

Powell's testimony before the ALJ raised a number of issues regarding his credibility, and the court does not substitute its opinion for the ALJ's legitimate finding that Powell's testimony was only partially credible. R.25. The ALJ erred, however, in determining that Powell's wrist impairment was not "severe", as defined by established precedent, by relying exclusively on personal observations at the hearing. In addition, the ALJ did not consider all the medical evidence, especially the contradictory statements of Dr. Yanez about Powell's work capability, in evaluating Powell's residual functional capacity.

On remand, the ALJ shall take additional testimony on the need for Powell to wear a wrist brace and whether a physician prescribed its use. The ALJ shall also review all supporting documentation relating to the wrist impairment, including the need to wear the wrist brace. The existing and additional evidence shall be evaluated thoroughly in the context of established precedent defining "severity" under Step 2 of the sequential analysis.

In light of the contradictory assertions by Dr. Yanez, the ALJ should require Powell to submit to a consulting medical examination by an internist specified or approved by the ALJ for an expert opinion on Powell's present ability to perform various work-related tasks, and to review Powell's history of medications and the ability of medication to prevent recurrences of his Crohn's disease. The ALJ shall require the presence of an independent medical examiner at the hearing to testify about the medical records, the alleged impairments and the consulting

internist's opinion. The ALJ shall also take additional testimony regarding whether the recurrence of symptoms of Crohn's disease were preventable or would have been mitigated by medication and whether the failure to take medication to control the Crohn's disease was intentional.

Disability has not been clearly established and further delay to develop the record will not be unjust. Cf. Morales, 225 F.3d at 320. The action will be remanded for further proceedings before the Commission consistent with this opinion. An appropriate order will issue.

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<b>v.</b>	:	
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<b>JO ANNE B. BARNHART, et al</b>	:	<b>NO. 05-2104</b>

**ORDER**

AND NOW, this 2nd day of November, 2006, upon consideration of Plaintiff's Motion for Summary Judgment and Defendants's Motion for Summary Judgment, United States Chief Magistrate Judge Charles B. Smith's Report and Recommendation, and Plaintiff's Objections to the Report and Recommendation, for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. Plaintiff's Motion for Summary Judgment (Paper #9) is **DENIED**.
2. Defendant's Motion for Summary Judgment (Paper #12) is **GRANTED** in part insofar as no benefits are owed for any period before February 2003; in all other respects, defendant's motion is **DENIED**.

3. The Report and Recommendation (Paper #15) is **NOT ADOPTED**.

4. The case is **REMANDED** to the Social Security Administration for further proceedings consistent with the accompanying Memorandum.

/s/ Norma L. Shapiro

S.J.