

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

<b>LAWRENCE COOKE</b>	:	
	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	<b>NO. 06-302</b>
<b>vs.</b>	:	
	:	
<b>JO ANNE B. BARNHART,</b>	:	
<b>SOCIAL SECURITY ADMINISTRATION,</b>	:	
	:	
<b>Defendant.</b>	:	

**ORDER & MEMORANDUM**

**ORDER**

**AND NOW**, this 11th day of January, 2007, after careful and independent consideration of Plaintiff's Motion for Summary Judgment (Document Number 9, filed June 1, 2006), Defendant's Motion for Summary Judgment (Document Number 12, filed August 2, 2006), and Plaintiff Cooke's Reply to Defendant Commissioner's Cross-Motion and Brief for Summary Judgment (Document Number, filed August 10, 2006); and upon review of the Report and Recommendation of United States Magistrate Peter B. Scuderi dated August 30, 2006 (Document Number 15, filed August 30, 2006) and Plaintiff Lawrence Cooke's Written Objections to the Report and Recommendation of the United States Magistrate (Document Number 16, filed September 12, 2006), **IT IS ORDERED** as follows:

1. The Report and Recommendation of United States Magistrate Judge Peter B. Scuderi dated August 30, 2006, is **APPROVED** and **ADOPTED**;
2. The Objections of plaintiff, Lawrence Cooke, are **OVERRULED**;
3. Plaintiff's Motion for Summary Judgment is **DENIED**;
4. Defendant's Motion for Summary Judgment is **GRANTED**; and

5. The decision of the Commissioner that denied disabled insurance benefits and supplemental security income is **AFFIRMED**.

## MEMORANDUM

### **I. INTRODUCTION**

Plaintiff, Lawrence Cooke, 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 his claim for Disability Insurance Benefits and Supplemental Security Income under Titles II and XVI of the Social Security Act. Each party filed a motion 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 August 30, 2006, in which he recommended that Plaintiff’s Motion for Summary Judgment be denied, Defendant’s Motion for Summary Judgment be granted, and the final decision of the Commissioner that denied disability insurance benefits and supplemental security income be affirmed. Defendant filed timely objections to the Report and Recommendation. For the reasons that follow, the Court overrules plaintiff’s objections, and approves and adopts the Report and Recommendation. Accordingly, the Court denies Plaintiff’s Motion for Summary Judgment, grants Defendant’s Motion for Summary Judgment, affirms the decision of the Commissioner, and enters judgment in favor of the Commissioner and against plaintiff.

### **II. BACKGROUND**

The background of this case is set forth in detail in the Magistrate Judge’s Report and Recommendation, and will be recited in this Memorandum only to the extent necessary to

address the issues presented.

Plaintiff was 52 years of age at the time of his alleged disability onset date, January 28, 2002, and 55 years of age at the time of the ALJ's decision, May 31, 2005. (Rep. and Rec. at 4, 5; Tr. at 56.) According to plaintiff's testimony, he is five feet eleven and a half inches tall, and weighs 297 or 298 pounds. (Rep. and Rec. at 4; Tr. at 513.) Plaintiff has a four-year college degree and nine to twelve graduate credits. His work experience includes employment as a limousine driver, food service coordinator, and a substitute/apprentice teacher. (Rep and Rec. at 4; Tr. at 19.)

On July 29, 2003, plaintiff applied for Disability Insurance Benefits and Supplemental Security Income payments, alleging disability due to back pain, muscle spasms, numbness and tingling, sensations or pain in the legs and feet, depression, and anxiety. (Rep. and Rec. at 1; Tr. at 18, 20, 56, 195, 202.) Plaintiff told Dr. Richard H. Kaplan, one of his treating physicians, that he was injured in a motor vehicle accident in June 2001, and that he "had been injured at work" in September 2001. (Rep. and Rec. at 5; Tr. at 83-84). According to Dr. Kaplan, plaintiff stated that these injuries were exacerbated on his alleged disability onset date, when he was "assaulted" by students while working as a teacher within the Philadelphia school system. (Id.)

### **III. 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 his or 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 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).

#### **IV. DISCUSSION**

Plaintiff argues that, contrary to the Magistrate Judge's recommendation, the Court should remand this case for further clarification, including testimony from an impartial medical expert. Specifically, plaintiff objects to the Report and Recommendation of the Magistrate on four grounds: (1) the Administrative Law Judge's ("ALJ") hypothetical question to the vocational expert ("VE") was based on an inaccurate reading of a non-medical source, a flaw that is not rectified by the ALJ's "purported endorsement of the . . . opinion offered by Dr. Greene," a one-time examining physician; (2) the ALJ erroneously found that plaintiff's liver impairment was not a "severe" condition; (3) although the ALJ found plaintiff's obesity to be "severe," the ALJ failed to consider obesity at every step of the sequential review process; and (4) the ALJ failed to properly consider plaintiff's pain as a non-exertional impairment. The Court addresses each of plaintiff's objections to the Report and Recommendation in turn.

##### **A. Objection Number 1**

Plaintiff's first objection consists of two arguments from his Motion for Summary Judgment, each of which is addressed in the Report and Recommendation: (1) the ALJ's hypothetical question to the VE was based on an inaccurate reading of a non-medical source; and (2) this flaw that was not rectified by the ALJ's "purported endorsement of the adversarial Worker's Compensation opinion offered by Dr. Greene," a one-time examining physician. According to plaintiff, the Magistrate Judge's conclusion on this issue was inconsistent with Morales v. Apfel, 225 F.3d 310 (3d Cir. 2000), in which the Third Circuit stated that, "[i]n choosing to reject the treating physician's assessment, an ALJ may not make 'speculative

inferences from medical reports’ and may reject ‘a treating physician’s opinion outright only on the basis of contradictory medical evidence’ and not due to his or her own credibility judgments, speculation or lay opinion.”<sup>1</sup> *Id.* at 217-218 (quoting *Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999)). The Court next addresses the two components of this objection.

First, the Magistrate Judge rejected plaintiff’s argument “that the ALJ’s decision was not supported by substantial evidence because the hypothetical question posed to the VE allegedly relied upon [Residual Functional Capacity Assessment (“RFC”)] findings noted by a non-medical source Disability Claims Adjudicator . . . .” (Rep. and Rec. at 18.) The Court agrees with the Magistrate Judge. The ALJ may consider “evidence submitted by your treating or nontreating source, *and observations by our employees and other persons.*” 20 C.F.R. § 404.1529(c)(3) (emphasis added.) Contrary to plaintiff’s objection, the Report and Recommendation did not “concede[] that the adopted ‘RFC,’ upon which the ALJ’s controlling vocational hypothetical question relied . . . was not based on . . . any ‘medical’ evidence or opinion, but . . . inspired by an inaccurate reading of a lay, ‘non-medical source.’” (Pl. Obj. at 2.) Rather, the Report and Recommendation stated that “the ALJ did not rely on [the exhibit] as a medical source opinion, but [] noted the opinion in its proper context, as permitted under Social

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<sup>1</sup> A cardinal principle guiding disability eligibility determinations is that the ALJ accord treating physician’ reports great weight, especially when their opinions reflect expert judgment based on a continuing observation of the patients condition over a prolonged period of time. Where, as here, the opinion of a treating physician conflicts with that of a non-treating, non-examining physician, the ALJ may choose whom to credit but cannot reject evidence for no reason or for the wrong reason. The ALJ must consider the medical findings that support a treating physician’s opinion that the claimant is disabled. *Morales*, 225 F.3d at 317-18.

Security regulations.” (Rep. and Rec. at 19.)

Secondly, the Magistrate Judge rejected plaintiff’s argument “that the ALJ improperly gave controlling weight to the opinion of a one- (1-) time examining physician, rather than to Plaintiff’s treating physicians.” (Rep. and Rec. at 7.) According to plaintiff, the Magistrate Judge’s finding was incorrect because Dr. Greene’s “conclusion of total ‘normalcy’ was never ‘adopted’ by the ALJ and, as such, can not constitute ‘substantial’ medical evidence to support” a conclusion in contravention of the treating physicians’ conclusions. (Pl. Obj. at 4.) In support of this assertion, plaintiff argues that Dr. Greene’s opinion was “inconsistent with the findings ultimately adopted by the Social Security ALJ, who conceded the presence of” certain physical problems. (Id.) However, as the Report and Recommendation elaborates, Dr. Green stated that objective tests revealed physical problems, but characterized the problems as degenerative and essentially normal for a person of plaintiff’s age and weight. (Rep. and Rec. at 10.) Moreover, as the Report and Recommendation explains in greater detail, the treating physician’s conclusions were inconsistent with the overall objective medical evidence and the doctor’s own treatment notes, while Dr. Greene’s opinion was based on detailed clinical findings.

The Court concludes: (1) that Dr. Greene’s opinion was not inconsistent with “the findings ultimately adopted by the Social Security ALJ[;]” and (2) that the ALJ did not improperly give controlling weight to the opinion of Dr. Greene. Thus, the ALJ’s opinion on this issue was supported by substantial evidence.

**B. Objection Number 2**

Plaintiff argues that the ALJ erroneously found that plaintiff’s liver impairment was not a “severe” condition. According to plaintiff, the “fact that Mr. Cooke purportedly made few ‘back’

complaints at the specific time of the single, adversarial Worker's Compensation examination does not undercut" his argument that plaintiff's liver impairment was a "severe" condition. (Pl.'s Obj. at 4.) However, as explained in the Report and Recommendation, the ALJ's conclusion was not solely based on the fact "that Plaintiff did not complain of the kind of back pain associated with liver disease during his examination." (Rep. and Rec. at 12.) Indeed, the Report and Recommendation also explains that blood testing did not confirm a hepatitis C diagnosis, and that a hepatologist reported normal liver functioning and no history of hepatitis in March 2004. (Rep. and Rec. at 12.) Thus, the Court concludes that the ALJ's opinion on this issue was supported by substantial evidence.

**C. Objection Number 3**

Plaintiff argues that, although the ALJ found plaintiff's obesity to be "severe," the ALJ failed to consider obesity at every step of the sequential review process. (Pl.'s Obj. at 3.) Plaintiff's third objection restates an argument in Plaintiff's Motion for Summary Judgment that is addressed in the Report and Recommendation. (See Pl's Mot. at 20-22; Rep. and Rec. at 14-16.) The Court agrees with the Report and Recommendation, and notes that the ALJ not only explicitly considered "the record as a whole," but relied on the opinions of Dr. Greene, whose detailed examination report and deposition testimony evince that he was well aware of plaintiff's obesity. (See Rep. and Rec. at 14-16.) Thus, the Court concludes that the ALJ's opinion on this issue was supported by substantial evidence.

**D. Objection Number 4**

Plaintiff argues that the ALJ failed to properly consider plaintiff's pain as a non-exertional impairment. Plaintiff's fourth objection restates an argument in Plaintiff's Motion for

Summary Judgment that is addressed in the Report and Recommendation. (See Pl's Mot. at 22-29; Rep. and Rec. at 16-18.) The Court agrees with the conclusion in the Report and Recommendation that "the ALJ found Plaintiff's lumbar spine condition to be severe and credited his pain to the extent it was supported by the record. In doing so, the ALJ appropriately considered the objective findings of record, plaintiff's reported daily activities, and his treatment history." (Rep. and Rec. at 18.) Thus, the Court determines that the ALJ's opinion on this issue was supported by substantial evidence.

## **V. CONCLUSION**

For the foregoing reasons, the Court overrules plaintiff's objections, and approves and adopts the Report and Recommendation. Accordingly, the Court denies Plaintiff's Motion for Summary Judgment, grants Defendant's Motion for Summary Judgment, affirms the decision of the Commissioner, and enters judgment in favor of the Commissioner and against plaintiff.

**BY THE COURT:**

/s/ Honorable Jan E. DuBois  
**JAN E. DUBOIS, J.**

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

**LAWRENCE COOKE**

**Plaintiff,**

**vs.**

**JO ANNE B. BARNHART,  
SOCIAL SECURITY ADMINISTRATION,**

**Defendant.**

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**CIVIL ACTION**

**NO. 06-302**

**ORDER**

**AND NOW**, this 11th day of January 2007, in accordance with the Court's separate Order dated January 11, 2007 affirming the decision of the Commissioner of the Social Security Administration that denied disabled insurance benefits and supplemental security income, pursuant to Federal Rule of Civil Procedure 58, **IT IS ORDERED** that **JUDGMENT IS ENTERED** in favor of Defendant, Jo Anne B. Barnhart, Commissioner of the Social Security Administration, and against Plaintiff, Lawrence Cooke.

**BY THE COURT:**

/s/ Honorable Jan E. DuBois

**JAN E. DUBOIS**

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

