

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

KATHY I. NAVAS : CIVIL ACTION  
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 v. :  
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 MICHAEL J. ASTRUE<sup>1</sup>, : No. 06-3677  
 Commissioner of :  
 Social Security Administration :

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**MEMORANDUM**

**Juan R. Sánchez, J.**

**July 30, 2007**

Kathy Navas asks this Court to reverse the Social Security Commission decision denying her disability insurance benefits. Navas says she has been disabled by back pain since 2000. The Commissioner argues Navas is able to perform light work and is not eligible for benefits. Because I agree, I will adopt the U. S. Magistrate Judge Thomas J. Rueter's Report and Recommendation and deny her request for review.

**FACTS**

Navas first filed an application for disability benefits under Title II of the Social Security Act on October 5, 2001, alleging disability as a result of lower back pain. On January 22, 2002, her claim was denied at the initial review, and she did not appeal the decision. Two years later, Navas filed the present application alleging disability since April 22, 2000 due to lower-back problems.

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<sup>1</sup> On February 12, 2007, Michael J. Astrue became Commissioner of the Social Security Administration. Michael J. Astrue substitutes former Commissioner Jo Anne B. Barnhart as defendant in this suit. Fed. R. Civ. P. 25(d)(1).

The ALJ affirmed the denial of her second application on June 24, 2005, after a hearing on December 29, 2004 where both Navas and her treating physician, Dr. Mark Zibelman, appeared and testified.

Navas was born on November 28, 1949. She completed high school, attended Junior College, and currently lives in a two story row house with her husband, Frank Navas. From 1987 to 1994, Navas worked as an assistant buyer. Most recently, she worked part-time performing data entry until her back pain became disabling in April 2000. Navas first injured her back in November 1999 when she and her husband were involved in a motorcycle accident where she “had to lift the motorcycle off of him.” R. 230. Though she began seeing a chiropractor in January 2000, the pain soon became too excruciating for her to sit at work and subsequently she started seeing Dr. Zibelman.

Navas claims she has chronic pain which at times leaves her totally incapacitated. She can stand or walk for approximately fifteen minutes, and sit for an hour before having “to move around” to relieve the pain. She has diminished concentration and memory, and she can lift no more than five pounds without pain. She is unable to perform many of her household chores such as vacuuming, doing laundry, or preparing meals, and she can no longer drive for more than an hour before having to exit the car to stretch.

Navas began seeing Dr. Zibelman in 1998 to treat migraine headaches and neck pain. During these treatments, Navas could not tolerate the medications normally prescribed for neck pain. Instead, Dr. Zibelman prescribed steroidal anti-inflammatory drugs such as Naprosyn and the muscle relaxant, Flexeril. After steroidal injections failed to relieve all of Navas’s neck pain, Dr. Zibelman told her she most likely will have to live with the pain.

In May 2000, after Navas complained of lower back pain radiating down her right hip into her anterior thigh, the focus of her treatment switched to her lower back. Though Dr. Zibelman did not perform a straight leg raising test, other tests – x-ray, MRI, and CT scans – were performed in May 2000. The tests revealed abnormalities in her lower spine, arthritic type changes, and disc bulges. Dr. Zibelman prescribed two epidural steroid injections to treat a broad based disc bulge at L3-4 on May 31, 2000 and then on June 12, 2000. Though the epidurals helped with the pain, Navas’s muscle spasms persisted. In June 2000, she began experiencing pain on the left side of her neck, lower back, and leg. Navas was prescribed muscle relaxers and anti-inflammatory medications, and began physical therapy in June 2000. That October, she discontinued physical therapy because she claimed it worsened her back spasms.

In November 2000, Navas was involved in another motorcycle accident where she sustained abrasions and a hematoma in her left leg, but no further back injuries. After the second accident, the focus of her treatment shifted to her elbow, and an ulcer on her left knee. According to Dr. Zibelman’s testimony, the claimant’s medical issues worsened with her November 2000 motorcycle accident. The symptoms since May 2000 “wax and wane,” and the main source of her disability is her lower back condition. R. 272.

## **DISCUSSION**

Navas argues the ALJ gave insufficient weight to the opinion of her treating physician, Dr. Zibelman, and the ALJ improperly assessed Navas’s Residual Functional Capacity (RFC) and credibility. This Court reviews *de novo* Navas’ objections to the Magistrate Judge’s Report and Recommendation. 28 U.S.C. § 636(b)(1)(C) (2006). This Court is bound by the ALJ’s factual

findings supported by substantial evidence in the record. 42 U.S.C. § 405(g) (2006); *Doak v. Heckler*, 790 F.2d 26, 28 (3d Cir. 1986) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). Substantial evidence is “more than a mere scintilla but may be somewhat less than a preponderance of the evidence.” *Rutherford v. Barnhardt*, 399 F.3d 546, 552 (3d Cir. 2005) (quotations omitted). It represents “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Richardson*, 402 U.S. at 401 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Reefer v. Barnhart*, 326 F.3d 376, 379 (3d Cir. 2003). This Court may not weigh the evidence or substitute its own conclusions for that of the ALJ when determining whether substantial evidence exists. *Burns v. Barnhardt*, 312 F.3d 113, 118 (3d Cir. 2002).

To be considered disabled and eligible for benefits, Navas must demonstrate an “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment 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 [twelve] months.” 42 U.S.C. § 423(d)(1)(A) (2006).<sup>2</sup> Navas would be considered unable to engage in any substantial gainful activity “if h[er] physical or mental impairment or impairments are of such severity that [s]he is not only unable to do h[er] previous work, but cannot, considering h[er] age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.” 42 U.S.C. § 423(d)(2)(A).

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<sup>2</sup> Substantial gainful activity is defined as follows:

- (a) Substantial work activity is work activity that involves doing significant physical or mental activities. Your work may be substantial even if it is done on a part-time basis or if you do less, get paid less, or have less responsibility than when you worked before;
- (b) Gainful work activity is work activity that you do for pay or profit. Work activity is gainful if it is the kind of work usually done for pay or profit, whether or not a profit is realized.

The ALJ applied the five-step sequential evaluation process established by the Department of Health and Human Services to determine whether Navas is disabled and eligible for benefits.<sup>3</sup> 20 C.F.R. § 404.1520. At step one, the ALJ found Navas did not engaged in substantial gainful activity for the relevant period in question.<sup>4</sup> At steps two and three, the ALJ found Navas's cervical, lumbar, and upper extremity impairments were severe, but did not meet or equal any listed impairment. At step four, the ALJ found the claimant's and her doctor's assertions about the limiting effects of her impairments not fully credible and found she retained the RFC to perform light level work. Specifically, the ALJ determined Navas's impairments did not prevent her from returning to her previous work. The ALJ did not reach the fifth step in the analysis. *Id.*; 20 C.F.R.

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<sup>3</sup> The Commissioner must proceed to the next step in the analysis if he cannot determine whether the claimant is disabled or not disabled at any step in the evaluation process:

(1) a claimant is not disabled if she is working or doing substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b);

(2) a claimant is disabled if she is found to have a medically determinable severe impairment or combination of impairments which substantially limit her ability to engage in basic work activity and satisfies the duration requirement of 20 C.F.R. § 404.1509. 20 C.F.R. §§ 404.1520(c), 416.920(c);

(3) a claimant is disabled if he or she has an impairment(s) that meets or equals one of those listed in Appendix 1 of Subpart P of 20 C.F.R. § 404. 20 C.F.R. §§ 404.1520(d), 416.920(d);

(4) a claimant is not disabled if he she retains the RFC to perform past relevant work. 20 C.F.R. §§ 404.1520 (e), 416.920(e);

(5) a claimant is disabled if, based on the Commissioner's assessment of the claimant's RFC, age, education, and work experience, the claimant cannot make an adjustment to other work. 20 C.F.R. §§ 404.1520(f), 416.920(f).

<sup>4</sup> The "relevant period in question" refers to the period beginning on April 22, 2000, the claimant's alleged date of disability onset, and ending on June 30, 2001, the date she was last insured for benefits. A claimant is required to establish she became disabled prior to the expiration of her disability insurance. *See* 42 U.S.C. § 423(a)(1)(A); 20 C.F.R. § 404.131(a) (2006); *Matullo v. Bowen*, 926 F.2d 240, 244 (3d Cir. 1990).

§ 404.1520(a)(4) (“If we can find that you are disabled or not disabled at a step, we make our determination or decision and we do not go on to the next step.”).

Navas first argues the ALJ failed to give proper weight to the assessment of her treating physician, Dr. Zibelman. The findings and opinions of treating physicians should be given substantial, and, at times, controlling weight, 20 C.F.R. § 416.927(d)(2); *Rutherford*, 399 F.3d at 554 (citing *Mason v. Shalala*, 994 F.2d 1058, 1067 (3d Cir. 1993)), especially “when their opinions reflect expert judgment . . . over a long period of time.” *Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999) (quoting *Rocco v. Heckler*, 826 F.2d 1348, 1350 (3d Cir. 1987)). The weight given to a physician’s opinion depends on the extent the opinion is supported by medically acceptable clinical and laboratory diagnostic techniques, as well as other substantial evidence in the record. 20 C.F.R. § 404.1527(d)(2); *Coria v. Heckler*, 750 F.2d 245, 247 (3d Cir. 1984). An ALJ may reject the opinion of a treating physician only (1) if there is a lack of supporting medical data, or (2) if there is contradictory medical evidence. *See Newhouse v. Heckler*, 753 F.2d 283, 285 (3d Cir. 1985) (holding an ALJ is justified in rejecting the unsupported conclusions of a treating physician); *Frankenfield v. Bowen*, 861 F.2d 405, 408 (3d Cir. 1988) (holding where a treating physician’s opinion is contrary to substantial medical evidence, the ALJ may give his opinion no weight at all). Though the opinion of a treating physician is relevant to determining the nature and severity of the impairment, the regulations explicitly state the ALJ – not the physician – is responsible for determining a claimant’s RFC and whether a claimant meets the statutory definition of disabled. 20 C.F.R. § 404.1527(e)(1); *Adorno v. Shalala*, 40 F.3d 43, 47-48 (3d Cir. 1994).

I find the ALJ properly explained her reasons for affording Dr. Zibelman’s opinion less than controlling weight. In his Lumbar Spine Residual Functional Capacity Questionnaire of December

23, 2004, Dr. Zibelman stated over the course of an eight-hour work day with normal breaks, Navas can sit and stand/walk for a total of less than two hours each. She needs to walk for five minutes every twenty minutes of the work-day, yet she is unable to walk the equivalent of less than a half of a city block without experiencing “severe pain” or “requiring rest.” R. 195. She can “never” crouch or bend, and “constantly” experiences pain severe enough to interfere with her ability to concentrate. R. 195-96. He concluded by stating she has been “unable to work since April 2000,” “cannot work at all,” and is likely to “always” be absent from work. R. 193-96.

After considering Dr. Zibelman’s opinion, the ALJ correctly found the doctor’s determination of the degree of Navas’ limitations was supported by Navas’s own subjective descriptions of her symptoms, not objective medical evidence. Objective medical tests performed during the relevant time period contradict the doctor’s assessment of the patient’s physical functional capacity. An x-ray of Navas’s lumbar spine taken on May 9, 2000 showed “subtle and minimally degenerative spondylosis” and “no evidence of compression fracture, or significant degenerative changes.” R. 154. Though a CT scan of the lumbar spine taken on May 22, 2000 denoted a “broad base disc bulge at L3-4 which appear[ed] to impinge upon the exiting nerve root at the right side,” R. 152, epidural steroid treatments performed on May 31, 2000 and again on June 12, 2000 relieved Navas’s lower back pain. R. 261. Though the spasms persisted following the epidurals and Dr. Zibelman referred her for physical therapy, the medical record does not indicate significant medical treatment for her lower back following her November 10, 2000 motorcycle accident.<sup>5</sup>

Dr. Zibelman failed to perform objective tests to confirm the plaintiff’s subjective

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<sup>5</sup> Navas’s daily activities contradict Dr. Zibelman’s functional assessment. Despite her claim of disabling pain, Navas continued to ride a motorcycle, and on May 18, 2002 saw a chiropractor after exacerbating her chronic problem by taking a long ride on the motorcycle.

complaints. He did not perform a straight leg-raising test when the plaintiff's back problems became the primary focus of her treatment, nor did he perform tests to assess the range of motion in her lumbar spine. Dr. Zibelman also acknowledged Navas's "abnormal gait" was not recorded in his notes, but rather he remembered observing a slight limp as she walked into and out of his office. Finally, Dr. Zibelman confirmed the ALJ's finding and actually testified his opinion was derived largely from Navas's subjective complaints, not from an objective analysis. Substantial evidence supports the ALJ's decision to afford less weight to Dr. Zibelman's testimony.

Navas also argues the Magistrate Judge erred by adopting the ALJ's finding Navas had the RFC to perform light work. Navas argues both the ALJ and the Magistrate Judge erred by referring to a January 14, 2002 RFC assessment without including the report in the current transcript. I disagree. "Although ALJ's [sic] conduct an independent review of an applicant's alleged disabilities, they may certainly consider evidence from any prior decisions and hearings." *Leonard v. Astrue*, 487 F. Supp. 2d 1333, 1337 (M.D. Fla. 2007); *see* 20 C.F.R. §§ 404.900(b), 404.1520(a)(3) (stating all evidence presented and in the agency's records will be considered by the ALJ); *Naudin v. Apfel*, 119 F. Supp 2d 812, 818 (C.D. Ill. 2000) ("[A]n ALJ may properly rely upon evidence presented at a prior hearing in making h[er] determination."); *see also Wolf v. Chater*, 86 F.3d 1072 (11th Cir. 1996) (finding an ALJ's review of conflicting testimony from two prior hearings appropriate); *Banks v. Barnhardt*, 434 F. Supp. 2d 800, 808 (C.D. Cal. 2006) (noting the ALJ relied on vocational expert testimony from a prior hearing). Here, the assessment was completed by a state agency medical consultant for Navas's earlier disability application. The assessment was part of the record from Navas' prior application and provided the basis for the agency's denial of that application. Navas did not appeal the earlier decision, does not suggest the

report was in error, and can point to nothing substantial which has changed in her condition to suggest reliance on the prior report is in error. In light of the fact the claimant had an opportunity to review the prior decision and report, and the ALJ cited to other medical evidence to support her RFC determination, R. 26-32, this Court finds the ALJ's reference to the January 14, 2002 RFC assessment was not in error.

Navas next argues the Magistrate Judge erred by not including in the record a report from December 15, 2001 by a consultative examiner, Dr. Korman.<sup>6</sup> Though the ALJ briefly referenced the report in her opinion, Navas argues it was not included in the current record and therefore inappropriate to consider. Navas also argues the opinion of Dr. Korman supports her claim of disability. In actuality, the examination, which was conducted more than five months after Navas' eligibility for benefits expired,<sup>7</sup> showed she could perform a limited range of light work, consistent with her self-described responsibilities from her previous work as a buyer. Navas argues "light work" refers to a job involving standing and walking about six hours a day, and Dr. Korman's report states she can stand and walk between one and two hours daily. The ALJ found Navas was not disabled because retained the RFC to perform *past* relevant work. 20 C.F.R. §§ 404.1520 (e), 416.920(e). Considering Navas's job as a buyer required only the occasional lifting of a box of computer paper, "some" walking, and "some standing," there is no reason to consider step five and

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<sup>6</sup>The record does not provide Dr. Korman's first name.

<sup>7</sup>Though Navas discusses other medical evidence from after her last date insured, I agree with the ALJ this evidence fails to substantiate the level of impairment alleged by the plaintiff. Though the MRI of November 8, 2001 demonstrated a broad based disc bulge at L3-4, R. 135, the MRI of November 7, 2003 revealed mild disc bulges at L3-4 and L4-5. R. 150-51. The results of these MRIs are not relevant because Navas must establish her disability *before* the expiration of her disability insured status. See 42 U.S.C. § 423(a)(1)(A); 20 C.F.R. § 404.131(a); *Matullo*, 926 F.2d at 244.

inquire into her ability to perform other work elsewhere in the national economy. 20 C.F.R. § 404.1520(a)(4) (“If we can find that you are disabled or not disabled at a step, we make our determination or decision and we do not go on to the next step.”). Because the ALJ merely noted Dr. Korman’s examination in her opinion and did not use it as justification for her decision, this Court finds the ALJ’s determination of the claimant’s RFC was not in error.

Finally, Navas argues the Magistrate Judge erred in adopting the ALJ’s finding Navas lacked credibility. Though the ALJ must give credence to the testimony of a claimant’s subjective complaints, if she does not find those complaints to be fully credible, she has the right to reject them in whole or in part. *Baerga v. Richardson*, 500 F.2d 309, 312 (3d Cir. 1974); *see also Burns*, 312 F.3d at 129 (holding subjective complaints must be given serious consideration). “Allegations of pain and other subjective symptoms must be supported by objective medical evidence.” *Hartranft v. Apfel*, 181 F.3d 358, 362 (3d Cir. 1999); *see* 20 C.F.R. § 404.1529. In the present case, the ALJ examined the evidence in the record and determined Navas’s subjective complaints were not substantiated by the medical evidence and her treatment history. While the ALJ acknowledged Navas’s impairments likely caused her pain, Navas’s testimony concerning the severity of her impairments created inconsistencies in the record unfavorable to her case. The ALJ supported her credibility finding with ample medical evidence, and found Navas’s continued participation in recreational activities such as riding a motorcycle, discredited her assertions of disabling pain. Consequently, this Court finds there was substantial evidence to support the ALJ’s credibility determination.

The ALJ was correct in finding Navas is not disabled and is therefore ineligible for disability insurance benefits. The ALJ correctly found Dr. Zibelman’s determination of the severity of Navas’s

limitations was not supported by objective medical evidence, but rather by Navas's own subjective descriptions of her symptoms. The ALJ properly assessed Navas's residual function capacity and credibility. Accordingly, I find the ALJ's determination of disability in this case is supported by substantial evidence.

An appropriate order follows.