

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

JOHN BLEISTEIN, : CIVIL ACTION
 : NO. 97-6717
Plaintiff, :
 :
v. :
 :
KENNETH S. APFEL, :
Commissioner, Social :
Security Administration, :
 :
Defendant. :

M E M O R A N D U M

EDUARDO C. ROBRENO, J.

JANUARY 27, 1999

This is an appeal from a final decision of the Commissioner of the Social Security Administration denying plaintiff's claim for disability benefits. Before the Court are plaintiff's and defendant's cross-motions for summary judgment, accompanied by a Report and Recommendation of the Magistrate Judge recommending that the Court grant defendant's motion and deny plaintiff's motion. Plaintiff has objected to the Report and Recommendation. For the reasons that follow, the Court will overrule plaintiff's objections, adopt the Report and Recommendation of the Magistrate Judge, grant defendant's motion for summary judgment, and deny plaintiff's motion.

. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff John Bleistein ("claimant") brings this action pursuant to 42 U.S.C. § 405(g) to review the decision of the defendant Commissioner of Social Security ("Commissioner") denying claimant's request for disability insurance benefits

("DIB") and supplemental security income ("SSI") under Titles II and XVI of the Social Security Act (the "Act"), 42 U.S.C. §§ 401-433, 1381-1383(f).

On March 31, 1994, claimant filed his application for DIB and SSI, asserting that he had become totally disabled beginning on December 2, 1993. Claimant avers that he has a learning disability and is unable to read or write. Claimant alleges that he has a low I.Q. and is a functional illiterate, which prevents him from performing substantial gainful employment in the national economy. The Commissioner denied claimant's application for disability benefits at both the initial and reconsideration stages. Claimant requested and was granted an administrative hearing before an Administrative Law Judge ("ALJ"). The hearing was held on July 8, 1996, at which claimant, claimant's sister, who is a psychiatric nurse, and a vocational expert testified.

On November 25, 1996, the ALJ concluded that claimant retained the residual functional capacity to perform jobs as a laborer that did not require claimant to read or write. The ALJ found that since claimant's prior job as a laborer at U.S. Steel Mill did not require reading or writing, claimant could return to his past relevant work and was not disabled under the Act. Claimant asked the Appeals Council to review the ALJ's decision. On October 6, 1997, the request was denied, thereby rendering the ALJ's ruling the final decision of the Commissioner in this case.

See Jesurum v. Secretary of U.S. Dep't Health & Human Servs., 48 F.3d 114, 116 (3d Cir. 1995).

Claimant sought review of the Commissioner's final decision in this Court pursuant to 42 U.S.C. § 405(g). In accordance with the general practice followed in this district, the parties filed cross-motions for summary judgment. The Court then referred the matter to Magistrate Judge Smith for a Report and Recommendation. See Local R. Civ. P. 72.1(I)(d)(1)(J); see also 28 U.S.C. § 636(b)(1)(B). On October 30, 1998, the Magistrate Judge issued a Report and Recommendation recommending that (1) claimant's motion for summary judgment be denied, and (2) the Commissioner's motion for summary judgment be granted. Claimant has filed three objections to the Magistrate Judge's Report and Recommendation, and it is these three objections that are currently before the Court.

. LEGAL STANDARDS

. "Substantial Evidence."

When reviewing a decision of the Commissioner to deny disability benefits, the Court's role is limited to determining whether (1) the ALJ applied the proper legal standard, see Podedworny v. Harris, 745 F.2d 210, 221 n.8 (3d Cir. 1984) ("Our scope of review on matters of law is plenary."), and (2) whether the Commissioner's findings of facts are supported by "substantial evidence." Jesurum v. Secretary of U.S. Dep't of Health & Human Servs., 48 F.3d 114, 117 (3d Cir. 1995) (citing

Brown v. Bowen, 845 F.2d 1211, 1213 (3d Cir. 1988)); see 42 U.S.C. § 405(g). Substantial evidence is defined as "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Jesurum, 48 F.3d at 117 (quoting Richardson v. Perales, 402 U.S. 389, 401, 91 S. Ct. 1420 (1971)). "It is less than a preponderance of the evidence, but more than a mere scintilla." Id. (citing Richardson, 402 U.S. at 401).

The search for substantial evidence "is not merely a quantitative exercise." Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983). Rather the "administrative decision should be accompanied by a clear and satisfactory explication of the basis on which it rests." Cotter v. Harris, 642 F.2d 700, 704 (3d Cir. 1981), reh'g denied, 650 F.2d 481 (3d Cir. 1981). "A single piece of evidence will not satisfy the substantiality test if the [Commissioner] ignores, or fails to resolve, a conflict created by countervailing evidence." Kent, 710 F.2d at 114.

The Court's review of the Magistrate Judge's ruling is de novo. See 28 U.S.C. § 636(b). Therefore, the Court "may accept, reject or modify, in whole or in part," the Magistrate Judge's findings and recommendations. Id. In considering claimant's objection to the Magistrate Judge's ruling, the Court has independently reviewed the entire record, including the Report and Recommendation, the ALJ's written decision, the transcript of the hearing, the hearing exhibits, and relevant correspondence.

. "Disability" Defined.

To receive DIB and SSI, a claimant must show that he suffered from a disability as defined by the Act. Jesurum, 48 F.3d at 117. Under the Act, disability is defined as:

[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 12 months [The impairment must be so severe that the claimant] is not only unable to do his previous work but cannot, considering his 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)(1)(A), (d)(2)(A).

The Commissioner has established a five-step inquiry for determining if a claimant is eligible for disability benefits under the Act. To prevail, the claimant must establish (1) that he is not engaged in substantial gainful activity and (2) that he suffers from a severe medical impairment. See Jesurum, 48 F.3d at 117 (citing Bowen v. Yuckert, 482 U.S. 137, 140-41, 107 S. Ct. 2287 (1987)). If the claimant establishes elements (1) and (2), the Commissioner must then determine (3) whether the impairment is equivalent to an impairment listed by the Commissioner as creating a presumption of disability. Id. If it is not, the claimant bears the burden to show (4) that the impairment prevents the claimant from performing the work that he has performed in the past. Id. (citing Bowen, 482 U.S. at 141). If the claimant satisfies this burden, unless the Commissioner can demonstrate (5) that there are jobs in the national economy that

the claimant can perform, the Commissioner must grant the claimant benefits. Id. (citing Ferguson v. Schweiker, 765 F.2d 31, 37 (3d Cir. 1985)).

. ANALYSIS

In this case, the Magistrate Judge found that the ALJ correctly applied the requisite five-step evaluation, and that the ALJ's decision to deny benefits was supported by substantial evidence. The ALJ's decision to deny benefits to claimant turned on the fourth step of the inquiry. The ALJ found that claimant possessed the ability to perform his past work as a laborer. In its Report and Recommendation, the Magistrate Judge affirmed the findings of the ALJ, concluding that claimant's learning disability and illiteracy do not demonstrate that claimant is disabled under the Act and cannot perform his past work in a laborer's position. Claimant presents three objections to the Magistrate Judge's Report and Recommendation. The Court finds no merit to any of claimant's objections.

. Claimant's First Objection.

Claimant alleges that the ALJ made no explicit findings regarding the credibility of claimant and claimant's sister, Mary Jane Bowe, who testified at the administrative hearing. According to claimant, had the ALJ credited the testimony of claimant and Ms. Bowe, the ALJ would have rightly concluded that claimant was disabled under the Act.

The Court finds no merit to claimant's contention that the ALJ failed to explicitly credit the testimony of claimant and Ms. Bowe. While the ALJ's decision must be "accompanied by a clear and satisfactory explication of the basis on which it rests," Cotter, 642 F.2d at 704, there is no statutory requirement that the ALJ make an explicit credibility finding of a lay witness. The record reflects that the ALJ specifically evaluated and gave appropriate weight to the testimony of Ms. Bowe, Tr. at 17 ("As indicated by the testimony of his sister, who is a psychiatric nurse, the claimant has 'terrible impulse control.'"), notwithstanding evidence suggesting that Ms. Bowe's testimony was not credible. For example, Ms. Bowe, who is a psychiatric nurse, medically diagnosed claimant as having "oppositional defiant disorder" or "intermittent explosive disorder." Tr. at 61, 64. However, Ms. Bowe is not an acceptable medical source qualified under the Act to make medical diagnoses because she is not a licensed or certified psychologist. See 20 C.F.R. § 416.913(a). Moreover, Ms. Bowe testified to having very limited contact with claimant, only visiting claimant and their mother for five to six hours a day, twice a month, with no telephone conversations in between visits. Tr. at 60. As such, the Court finds that the record reflects that the ALJ gave Ms. Bowe's testimony the adequate consideration and credit that was warranted.

With regard to claimant's testimony, the Court concludes that the ALJ gave due credit and consideration to

claimant's testimony in assessing whether and the extent to which claimant's learning disability and illiteracy affected his ability to work. The ALJ clearly factored claimant's numerous complaints of having a learning disability into its determination of claimant's residual functional capacity. Specifically, the ALJ wrote: "A review of the documentary evidence demonstrates that the claimant has limited intellect, with a full scale I.Q. of 79. He is also functionally illiterate, with reading and spelling abilities at the kindergarten and first grade levels." Tr. at 16. Also, the ALJ noted that claimant's medically demonstrable impairments are "severe." Tr. at 17. In addition, the ALJ, in assessing claimant's prior work at U.S. Steel Mill, observed that claimant underestimated the exertion required of claimant in his past work. Tr. at 15 ("The claimant identified his previous work experience as involving sedentary to medium exertion This assessment underestimates the exertion according to the testimony of the impartial vocational expert . . . [who] classified the claimant's past work at U.S. Steel as involving unskilled medium to heavy exertion."). Given that the ALJ evaluated, weighed, and incorporated claimant's testimony into its determination of claimant's residual functional capacity, it was not necessary for the ALJ to make explicit credibility findings as to claimant's testimony. See Cotter, 642 F.2d at 704 ("The ALJ has a duty to hear and evaluate all relevant evidence in order to determine whether an applicant is entitled to disability benefits.")

Therefore, the Court concludes that because the ALJ gave some credit and appropriate weight to the testimony of claimant and claimant's sister, Ms. Bowe, and that the ALJ's credibility determinations, while not explicitly stated, are supported by substantial evidence in the record, the Court will overrule claimant's first objection to the Magistrate Judge's Report and Recommendation.

. Claimant's Second Objection.

Claimant next avers that the ALJ never stated its explicit reliance upon the report of Mr. Wayne J. Popowski, the Commissioner's psychologist, to support its finding that claimant can return to his past work.

In order to conclude that the ALJ's decision was supported by substantial evidence, the record must reflect that the ALJ evaluated and weighed all the evidence before it. See Cotter, 642 F.2d at 705. In this case, the record reflects that the ALJ evaluated and weighed the testimony of Mr. Popowski in reaching its conclusion that although claimant suffered from a severe learning disability, such disability did not "prevent[] [claimant] from performing physical work activity in a routine and consistent manner, provided that [claimant] not be required to read or write in order to perform the job." Tr. at 17. The ALJ stated that its conclusion was guided by "the medical

evidence of record," Tr. at 17, which includes the opinion of Mr. Popowski. Moreover, immediately prior to reaching its conclusion, the ALJ recited the findings of Mr. Popowski, which indicated that claimant is "functionally illiterate," but "was successful in the work world as a laborer." Tr. at 16. Further evidence that the ALJ gave credit to, evaluated, and weighed Mr. Popowski's opinion is that the ALJ concurred with Mr. Popowski's opinion and specifically rejected the contradictory findings of claimant's psychologist, Dr. Craig D. Weiss. Tr. at 17. Therefore, the record substantially reflects that the ALJ gave due consideration to the opinion of Mr. Popowski. Thus, the Court will overrule claimant's second objection as there is substantial evidence in the record to show that the ALJ credited Mr. Popowski's opinion and that the ALJ's agreement with Mr. Popowski's opinion was justified.

. Claimant's Third Objection.

Claimant's final objection alleges that the ALJ provided no reasonable rationale for rejecting the report of Dr. Craig D. Weiss, claimant's psychologist, and that such rejection was based on a mistake of fact. Claimant contends that the Magistrate Judge erred in not recognizing that the ALJ's rejection of Dr. Weiss' conclusion that claimant is "unable to develop vocationally" because "Dr. Weiss failed to address the claimant's past ability to function in the competitive labor market for more than 13 years, despite his limited intellect" was

improper as a mistake of fact. Tr. at 17. Claimant avers that Dr. Weiss addressed that issue in his report and concluded that claimant's past work at U.S. Steel Mill was not successful.

The Court notes that it is the responsibility of the ALJ to resolve material conflicts in the evidence, to determine credibility, as well as the relative weights to be given to the evidence. Richardson v. Perales, 402 U.S. 389, 399, 91 S. Ct. 1420 (1971); Torres v. Harris, 494 F. Supp. 297, 300 (E.D. Pa. 1980), aff'd, 659 F.2d 1071 (3d Cir. 1981). In this case, the ALJ concluded that claimant was learning disabled and functionally illiterate, but that he retained the residual functional capacity to perform his past work as a laborer, so long as claimant was not required to read or write. In reaching its conclusion, the ALJ rejected the contradictory opinion of Dr. Weiss as not credible because Dr. Weiss' opinion that claimant suffers from a personality disorder, learning disability, and limited intellect, Tr. at 190-95, 201, which prevents claimant from ever being gainfully employed, was not supported by the evidence as a whole.

In reaching its conclusion that claimant's learning disability and limited intellect do not prevent claimant from returning to his past work as a laborer with medium to heavy exertion, so long as claimant does not have to read or write, the ALJ relied upon several key factors: (1) an opinion from claimant's treating physician that claimant does not suffer from any physical impairments; (2) the fact that claimant's job at

U.S. Steel Mill was terminated because the plant closed down, and not because of claimant's limited intellect or learning disability; and (3) claimant's prior difficulties at U.S. Steel Mill were a result of claimant's behavioral problems, such as having a lack of control, and not due to claimant's limited intellect or learning disability. Tr. at 17.

The Court finds that there is substantial evidence to support the ALJ's rejection of Dr. Weiss' opinion for his failure to address claimant's ability to function competitively in the labor market, despite claimant's limited intellect. Although Dr. Weiss' report discusses difficulties in claimant's work history as a laborer, which range from termination and reinstatement to written warnings, Tr. at 190-95, Dr. Weiss' report does not adequately establish a causal link between claimant's learning disability and claimant's disciplinary problems. Claimant's most serious disciplinary incident occurred in 1981 and involved "activat[ing] the air interlock signal without permission or authority which resulted in lost production and damage to equipment," for which claimant was terminated, but eventually reinstated. Tr. at 274. Claimant has also been disciplined for violations of plant and work safety rules, such as not wearing safety glasses, poor performance, impermissible riding on a railroad car, and walking off the job without proper relief. Tr. at 250-51, 272, 276-78, 280-81, 284-87. However, the evidence in the record reveals, and the ALJ so found, that such infractions by claimant were not due to claimant's limited intellect or

learning disability, but rather to claimant's behavioral problems. Thus, Dr. Weiss' report, in its assessment of claimant's vocational ability as a laborer with medium to heavy exertion, fails to attribute claimant's employment difficulties to claimant's complaints of low intellect and having a learning disability. As claimant's past employment as a laborer only required medium to heavy exertion, did not require claimant to read or write, claimant did not suffer from any physical impairments, and disciplinary action taken against claimant did not result from claimant's low intellect or illiteracy, the ALJ's decision to reject Dr. Weiss' vocational assessment of claimant is supported by substantial evidence in the record. Therefore, the Court finds that claimant's third objection to the Magistrate Judge's Report and Recommendation will be overruled.

. CONCLUSION

The Court concludes that there is substantial evidence in the record to support the ALJ's denial of disability insurance benefits and supplemental security income to claimant. The ALJ considered claimant's complaints of low intellect and learning disability, and gave appropriate weight to the testimony of claimant and claimant's sister. Further, the ALJ resolved a conflict in the record between the conflicting reports of Mr. Popowski and Dr. Weiss as to claimant's ability to work in the competitive labor market as a laborer with medium to heavy exertion that did not require claimant to read or write. In

doing so, the ALJ explained its reasons for accepting Mr. Popowski's opinion and rejecting Dr. Weiss' opinion by referring to documentary and testimonial evidence in the record.

For the reasons state above, the Court adopts the Report and Recommendation of the Magistrate Judge. Plaintiff's motion for summary judgment shall be denied. The Commissioner's motion for summary judgment shall be granted.

An appropriate Order follows.

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ORDER

AND NOW, this **27th** day of **January, 1999**, upon consideration of plaintiff's motion for summary judgment (doc. no. 16), defendant's motion for summary judgment (doc. no. 17), plaintiff's reply brief (doc. no. 20), the Report and Recommendation of the Magistrate Judge (doc. no. 23), plaintiff's objections thereto (doc. no. 24), and defendant's response to plaintiff's objections (doc. no. 25), it is hereby **ORDERED** that: plaintiff's objections are **OVERRULED** and the Report and Recommendation of the Magistrate Judge is **ADOPTED**; It is further **ORDERED** that defendant's motion for summary judgment (doc. no. 17) is **GRANTED**, and plaintiff's motion for summary judgment (doc. no. 16) is **DENIED**.

It is further **ORDERED** that **JUDGMENT** shall be entered in favor of defendant and against plaintiff, and the Clerk shall mark this case **CLOSED**.

AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.