

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

GWENDOLYN A. KYLE,)
)
 Plaintiff,)
)
 v.) Civ. No. 01-797-SLR
)
 JO ANNE B. BARNHART)
)
 Defendant.)

Gary C. Linarducci, Esquire, Wilmington, Delaware. Counsel for Plaintiff.

Colm F. Connolly, United States Attorney, Paulette K. Nash, Assistant United States Attorney, United States Attorney's Office, Wilmington, Delaware. Counsel for Defendant. Of Counsel: James A. Winn, Regional Chief Counsel, Beverly H. Zuckerman, Assistant Regional Counsel, Social Security Administration, Philadelphia, Pennsylvania.

MEMORANDUM OPINION

Dated: January 6, 2004
Wilmington, Delaware

ROBINSON, Chief Judge

I. INTRODUCTION

Plaintiff Gwendolyn A. Kyle filed this action against Jo Anne B. Barnhart, the Commissioner of Social Security ("Commissioner"), on December 3, 2001, seeking review of the January 23, 2001 decision of the administrative law judge ("ALJ"), which denied her application for disability benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-433. (D.I. 1) Presently before the court are the parties' cross-motions for summary judgment. (D.I. 15, 17) For the following reasons, the court grants the Commissioner's motion for summary judgment and denies plaintiff's motion for summary judgment.

II. BACKGROUND

A. Procedural History

On October, 30, 1998, plaintiff filed an application for Social Security Disability Insurance benefits, alleging that she became disabled and unable to work beginning on October 22, 1999. (D.I. 16 at 4) Plaintiff's claim was denied initially on February 22, 1999, and again upon reconsideration on September 10, 1999. (Id.) Plaintiff requested and received a hearing before an administrative law judge ("ALJ"). (Id.) On January 23, 2001, the ALJ issued an unfavorable decision regarding plaintiff's case. (Id.) On October 22, 2001, plaintiff appealed this decision to the Appeals Council, but the appeal was denied review. (D.I. 16 at 4)

Plaintiff initially filed this action on December 3, 2001. (D.I. 1) On April 30, 2002, she moved the court to remand the case to the Commissioner for further review. (D.I. 9) Plaintiff's motion to remand was granted on May 22, 2002, and the case was closed. (D.I. 9) Plaintiff subsequently filed a motion to vacate the previous order and reinstate the case, which was granted on January 29, 2003. (D.I. 11) Plaintiff now seeks judicial review pursuant to 42 U.S.C. § 405(g) of the Commissioner's decision.

In considering the entire record, the ALJ made the following findings:

1. The claimant meets the nondisability requirements for the period of disability and Disability Insurance Benefits set forth in Section 216(i) of the Social Security Act and is insured for benefits through the date that this decision was issued.
2. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.
3. The claimant has a combination of her arthritic changes in the lumbar spine and status post cervical fusion, and diabetes mellitus, impairments that are severe within the meaning of the Regulations 20 C.F.R. § 404.1520(b).
4. These medically determinable impairments do not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, and Regulation No. 4.
5. The undersigned finds the claimant's allegations regarding her limitations are not

totally credible for the reasons set forth in the body of the decision.

6. The undersigned has carefully considered all of the medical opinions in the record regarding the severity of the claimant's impairments. (20 C.F.R. § 404.1527).
7. The claimant has the following residual functional capacity: light work that did not require extremely keen vision.
8. The claimant is unable to perform any of her past relevant work (20 C.F.R. § 404.1565).
9. The claimant is an "individual closely approaching advanced age" (20 C.F.R. § 404.1563).
10. The claimant has a high school education (20 C.F.R. § 404.1564).
11. The claimant has transferable skills from skilled work previously performed as described in the body of the decision (20 C.F.R. § 404.1568).
12. The claimant has the residual functional capacity to perform a significant range of light work (20 C.F.R. § 416.967).
13. Although the claimant's exertional limitations do not allow her to perform the full range of light work, using Medical-Vocational Rule 202.15 and 202.22 as a framework for decision-making, there are a significant number of jobs in the national economy that she could perform. The claimant has skills in math and record keeping from her past relevant work which are transferable to light work within her residual functional capacity in positions as a sedentary cashier and record clerk. Regarding the sedentary cashier position there are 424,000 jobs in the national economy and 1,100 jobs in Delaware. Regarding the record clerk job, there are 71,000 jobs in the national economy and 200 jobs in Delaware.

14. The claimant was not under a "disability," as defined in the Social Security Act, at any time through the date of this decision (20 C.F.R. § 404.1520(f)).

(D.I. 13 at 22-23) In addition, the ALJ asked the vocational expert whether there were jobs in existence in the national economy for an individual of plaintiff's age, education, past relevant work experience, and residual functional capacity. (Id. at 21) The vocational expert testified that plaintiff would be capable of making a vocational adjustment to other work. (Id.) Based on the testimony of the vocational expert, the ALJ concluded that plaintiff was capable of making a successful adjustment to work that existed in significant numbers in the national economy. (Id. at 22).

B. Facts Evinced at the Administrative Law Hearing

Plaintiff was born January 14, 1949, and resides in Newark, Delaware. (D.I. 13 at 605) She is divorced and has two adult children. (Id. at 606) Plaintiff is 5'6" and approximately 205 pounds. (Id.) She previously weighed between 170 and 175 pounds but has gained weight due to her injury because she is unable to properly exercise. (Id.) Plaintiff graduated from Christiana High School in 1967 and took a couple of classes at the local university with the intention of obtaining a degree in chemical engineering. She did not, however, complete the degree. (Id. at 607, 608)

In 1972, plaintiff began working for the university and continued employment there until 1982. (Id.) In 1988, she began working for Metalman Company of Delaware ("Metalman"), which is a metal company. (Id. at 619) Plaintiff started off her career at Metalman as an inspector and later became a supervisor over a group of inspectors. (Id. at 613) After the company experienced lay-offs, plaintiff received the title of quality assurance manager. (Id. at 611, 613)

As the quality assurance manager, plaintiff was responsible for the inspection of parts, calibration of equipment, interaction with customers, documentation of procedures, performing chemistry related tasks, and supervising other inspectors. (Id. at 611, 612) This position required her to walk approximately one hour during her day, stand for two hours, sit for five hours. (Id. at 612) Periodically, she was also required to stand in the crouching position and to handle big and small objects. (Id.) Plaintiff maintains that the job was extremely physical, especially after the company reduced the number of its employees, leaving her as the only person in the quality assurance department. (Id. at 613) Moreover, plaintiff alleges that she sometimes had to move objects weighing as much as one hundred pounds and frequently handled objects weighing ten pounds. (Id. at 612)

Plaintiff was injured on October 31, 1995, while carrying a fifty pound box of parts at work. (Id. at 10, 611) Plaintiff indicates that while holding the box, she attempted to open a door, and the box fell from her hands. She managed to catch the box before it hit the ground but, in doing so, she felt pain in her neck and shoulders. (Id. at 611) Despite this pain, plaintiff continued working. (Id.) Later in the day, plaintiff picked up a heavy piece of metal extrusion and felt pain again in her shoulder and also in her lower back. (Id.) Following her injury, plaintiff continued working at Metalman, but performed only light duty work.¹ (Id. at 614) Plaintiff continued with light duty activities at work approximately one year, but testified that it was difficult as she was in pain and constantly needed to ask other employees to assist in moving items. (Id.) Plaintiff also testified that Metalman was not satisfied with her work and eventually started to give her days off without pay. (Id.) As a result, plaintiff obtained part-time employment as a seamstress one day per week. (Id. at 615)

Plaintiff underwent back surgery on October 26, 1996. (Id.) After the surgery, plaintiff stated that her pain increased and that she experienced difficulty walking and sitting. (Id. at 615) When plaintiff returned to work, Metalman offered plaintiff

¹This light duty work consisted primarily of sitting and only working with smaller objects. She did not lift heavy objects or do anything that involved doing work above her head.

a job at the same pay level she received prior to surgery, but without the title of quality assurance manager.² (Id.)

Plaintiff testified that she declined the offer due to her health problems following the surgery and resigned from Metalman. (Id. at 617)

Plaintiff is currently unemployed and receives welfare benefits. (Id. at 608) At the time of the ALJ hearing, she had been receiving welfare benefits for approximately one year.

(Id.) Initially, her welfare benefits amounted to \$123 per month in the form of a check and approximately \$127 per month in food stamps. (Id. at 609) This amount was increased to \$270 per month in the form of a check and \$197 per month in the form of food stamps after she received custody of her grandson. (Id.)

C. Plaintiff's Medical Conditions

Prior to her surgery, plaintiff claims to have experienced pain in her neck, shoulder, left arm, and a little pain in her lower back. (Id. at 617) After the surgery, plaintiff testified that she continued to have pain in the neck, shoulder, left arm, and lower back, and began to endure pain in both her legs. (Id. at 618) Plaintiff questioned her doctor about the pain, but he was unable to explain the cause of either her continued or new pain. (Id.) He eventually sent her to the St. Francis Pain

²This job did not entail any heavy lifting. Nevertheless, it did involve lifting parts less than twenty-five pounds and performing the tasks normally assigned to three other employees.

Clinic where she received two pain blocks in the lower back and a pain block in the neck. (Id.) None of these treatments stopped the pain. (Id.) In fact, plaintiff claims that the pain in her legs spread to her lower back and intensified if she stood on her feet for more than fifteen minutes. (Id. at 620) Plaintiff likewise describes her back pain as a sharp pain in her lower back just below the waist. (Id. at 621) She maintains that this pain worsens depending on her activity. (Id.) Plaintiff also contends that she experiences continuous pain in the left shoulder and muscular pain in the right shoulder. (Id. at 623) Plaintiff further alleges that she has neck pain which starts at the base of the brain and extends down to the shoulders, which causes migraine headaches. (Id. at 624)

Plaintiff consulted a variety of doctors to diagnose and treat her pain and other medical conditions. Plaintiff initially started seeing Dr. Ann Mack. (Id. at 626) Plaintiff testified that Dr. Mack diagnosed her with carpal tunnel in both hands and prescribed braces to deal with the pain. (Id. at 627) Dr. Mack also allegedly diagnosed plaintiff with tennis elbow and prescribed a second brace for this injury. (Id.) Plaintiff failed to wear any of the braces after they were prescribed because she contends that they further increased the pain and provided her with limited use of her hands. (Id. at 628)

In addition to chronic pain, carpal tunnel, and tennis elbow, plaintiff testified that she suffers from Graves' Disease. (Id.) Plaintiff stated that she was diagnosed with this condition in 1982, and developed a goiter as a result of the disease. (Id.) She also developed protruded eyes, experienced violent mood swings, and had chronic tiredness. (Id.) Dr. Curt Blacklock is her treating physician for this disease, and has prescribed thyroid medication to control her mood swings. (Id. at 629) She contends that this medication contributes to her fatigue. (Id.)

Plaintiff testified that she is battling hypertension, which causes high blood pressure, ringing in her ears, and spots before her eyes. (Id. at 630) Her blood pressure, however, is under control due to Zestrol, Norvasc, and Cardora, which are the medications she is currently taking for this condition. (Id.) Plaintiff further contends that she has high cholesterol and diabetes. (Id.) She takes Lipitor to manage her high cholesterol and Azania and Glucotrol to regulate her blood sugar levels. (Id.)

Plaintiff currently visits Dr. Mack once a month for her musculoskeletal problems and visits Dr. Blacklock as needed for all other health related problems. (Id.) When she was receiving the pain blocks in her neck and back, plaintiff was also seeing Dr. Jazoda at the St. Francis Pain Clinic because he is the

doctor who performed these procedures. (Id. at 631, 632)

D. Plaintiff's Living Arrangements and Activities

Plaintiff currently lives in an adjacent split level home with her daughter and grandson. (Id. at 632) The living room, dining room, and kitchen are located on the first level, but the bedrooms and bathroom are on the second floor. (Id. at 633) The house also contains a basement, which consists of a recreation room, crawl space, and laundry room. (Id.) Plaintiff states that she rarely goes down into the basement due to the difficulty in traversing the basement stairs. (Id. at 636)

Plaintiff testified that when she awakes in the morning, she uses a cane to get out of bed or she will use the post on the back of the bed to pull herself up into a sitting position. (Id. at 634) When plaintiff is experiencing extreme pain and it is too difficult for her to get out of bed, she claims that she will wait until her daughter can give her assistance. (Id.) Plaintiff testified that her daughter will assist by pulling plaintiff up into the sitting position and holding her there until plaintiff is able support herself. (Id.) According to her testimony, after awaking and getting out of bed, plaintiff performs whatever activities in the bathroom that need to be performed and then she helps her grandson with his bathroom activities. (Id.) Plaintiff then goes downstairs to the living room and sits in the reclining chair with her feet up, which is

where she spends most of her day. (Id. at 635) Plaintiff babysits her grandson and is there if the grandson needs her, but she is not much help due to her limitations. (Id.) The mother of her grandson's best friend will come to the house to take her grandson outside to play so that she does not have to do that. (Id.)

Plaintiff testified that she can stand or sit outside some days for a limited time but on other days she is not physically able to perform this activity. (Id.) Plaintiff contends at one point after the surgery she was able to pick up her grandson from preschool, watch her grandson, do the dishes or laundry when possible, do stretching exercising in ten to fifteen minute increments for one hour, attend physical therapy sessions and doctors' appointments, grocery shop, and cook; she testified that she is no longer able to do these things. (Id. at 636)

Plaintiff testified that her daughter does the laundry and that plaintiff will fold the clothes. She also testified that her ability to cook is limited to items which only require placement in the oven, and which are of a light weight. (Id.)

Plaintiff testified that her daughter drives her to the grocery store and that she can only be at the store for thirty to forty-five minutes. (Id. at 637) While at the grocery store plaintiff must push the cart to hold herself up and sometimes must go to the car while her daughter finishes shopping. (Id.)

Plaintiff asserts that her daughter must load all of the groceries into the car and usually has to take them out of the car because she is unable to carry any bags unless they contain bread or similar light items. (Id.) Plaintiff also asserts that the only cleaning she participates in is taking out the little garbage cans in the bedroom and bathroom, wiping down some of the mirrors and doing dishes in ten to fifteen minute stretches. (Id. at 637, 638)

Plaintiff testified that she drives only for medical appointments or if there is an emergency. (Id. at 638) She asserts that her thyroid condition has affected her eyesight, and she has trouble turning her neck which makes it difficult to drive beyond short distances. (Id.) Plaintiff also contends that she used to dance and go to the movies but is no longer able to participate in these activities because it is too painful. (Id. at 639) She states that she has problems with washing her back but is able to wash her hair, and has no trouble getting dressed as long as the clothing is loose, stretchy material.³

E. Medical Evidence

Dr. Michael Sugarman, a neurosurgeon, first evaluated plaintiff on May 28, 1996. (Id. at 425) At that time, Dr. Sugarman indicated that plaintiff's pain was largely on her left

³Because she has to wear loose, stretchy clothing, plaintiff states that her physical limitations force her to spend most of her time in sweat pants, sweaters, or T-shirts.

side, with pain also reported in her collar bone and radiating to her fingers. (Id.) Plaintiff told Dr. Sugarman that her left arm got weak and she was not able to hold anything for very long and her arm aches at times. (Id.) After a physical examination, Dr. Sugarman determined that plaintiff had a good range of motion despite some discomfort and tenderness in some of her extremities. (Id.) Dr. Sugarman further determined that plaintiff had degenerative disc disease in her cervical spine with small disc protrusions at C5-6 and C6-7. (Id.) He recommended that she perform certain daily neck exercises to help with the pain. (Id.)

At an August 8, 1996 follow-up with Dr. Sugarman, plaintiff reported continued pain despite physical therapy and neuro-probe treatments, although the neuro-probe provided some relief. (Id. at 423) Dr. Sugarman indicated that plaintiff continued to report severe pain, numbness, and tingling in the left upper extremity. (Id.) The pain radiated into her shoulder and down into her hand, which caused her to sometimes drop things. (Id.) A physical examination revealed pain with any head movement. (Id.) Dr. Sugarman noted a herniated disc and disc protrusions, and concluded that they were the source of her pain. (Id.) Dr. Sugarman concluded that plaintiff had not benefitted from conservative pain management, and that surgical intervention may be required.

On September 24, 1996, plaintiff informed Dr. Sugarman that she wished to proceed with surgery. (Id. at 421) At this visit, plaintiff indicated that her symptoms had worsened and that her neck pain was persistent and severe with pain extending into her left arm. (Id.) Plaintiff also reported that she began to experience pain in her right arm and that physical therapy had been unhelpful. (Id.) Dr. Sugarman then recommended a C5-6 and C6-7 anterior cervical decompression with discectomy and interbody. (Id.)

Plaintiff had surgery on October 26, 1996, and returned to Dr. Sugarman for a postoperative follow-up on December 5, 1996. (Id. at 419) Plaintiff described her pain as worsened since the surgery, and included pain that radiated up the back of the neck to the base of the skull. (Id.) Plaintiff complained of pain in her shoulders, through her arms and into her fingers, and down her back into the left leg and foot. (Id.) At that time, Dr. Sugarman noted that there were muscle spasms, but no indication of numbness, tingling, or weakness. (Id.) Plaintiff reported that she felt as if something were pushing into her windpipe, making it difficult for her to swallow. (Id.) Dr. Sugarman performed a physical examination and discovered that her surgical incision was healing well but that there were obvious spasms on either side of plaintiff's neck. (Id.) Dr. Sugarman noted tenderness to palpation over the lateral joints and posterior

cervical spine and also in the supraclavicular and infraclavicular fossa, but the strength in her upper extremities was intact. (Id.) Plaintiff's lower back was not tender and her strength in her lower extremities was completely normal. (Id.) At the conclusion of the physical examination, Dr. Sugarman suggested a myelogram and postmyelogram CT scan to further evaluate plaintiff. (Id. at 420)

Plaintiff again visited Dr. Sugarman on January 16, 1997. Plaintiff informed him that she continued to have pain in her neck extending up the back of her head. (Id. at 417) Plaintiff also complained of headaches, weakness, and pain in her upper arms. (Id.) Dr. Sugarman examined plaintiff and determined that her surgical wound had healed and there was no tenderness over the incision itself. (Id.) He also reported that plaintiff's strength in her upper extremities was normal, but there was a limited range of motion in her neck. (Id.) Dr. Sugarman indicated that plaintiff had improved significantly since he last saw her and felt that the pain would gradually get better with physical therapy and stretching exercises. (Id.) Dr. Sugarman stated that he wanted to follow up with plaintiff in four months. (Id.)

On March 28, 1997, Dr. Robinson performed an independent medical examination of plaintiff. (Id. at 409) Plaintiff again complained of pain and headaches. (Id.) Dr. Robinson reviewed

the reports of Dr. Sugarman and he reviewed plaintiff's operative report from October 23, 1996. (Id.) Dr. Robinson's examination of plaintiff demonstrated that plaintiff was alert and her cranial nerves were intact and symmetric. (Id. at 410) Plaintiff was able to rotate her head laterally and bilaterally, and had tenderness in the left trapezius muscle. (Id.)

After reviewing the reports and performing his own examination, Dr. Robinson concluded that plaintiff should continue with another month of physical therapy and then begin home exercise. (Id.) He concluded that plaintiff could return to sedentary work for one month and after that time period would be able to return to a light duty position. (Id.) Dr. Robinson completed a physical capabilities form for plaintiff and determined that she could: (1) sit for a total of eight hours in an eight hour workday; (2) stand for a total six hours in an eight hour workday; (3) walk for four hours total in an eight hour workday; (4) continuously lift one to ten pounds; (5) frequently lift eleven to twenty pounds; (6) occasionally lift twenty-one to twenty-five pounds; (7) continuously carry up to five pounds; (8) frequently carry six to ten pounds; (9) occasionally carry eleven to twenty-five pounds; and (10) occasionally bend, squat, crawl, climb, reach, and drive. (Id. at 411)

Plaintiff followed up with Dr. Sugarman on May 15, 1997. (Id. at 414) Plaintiff reiterated that her back pain was worse than prior to the surgery and that she was unable to perform certain daily activities which she had been doing prior to the surgery. (Id.) Plaintiff indicated to Dr. Sugarman that she had continued pain in her upper extremities and pain radiating from her lower back into her lower extremities. (Id.) Plaintiff also complained of numbness and tingling in her hands, but very little numbness and tingling in her feet. (Id.) Dr. Sugarman examined plaintiff and noticed a limited range of motion in her neck, but the strength in her upper extremities was normal. (Id.)

Dr. Sugarman opined that plaintiff would not be able to return to her previous occupation and completed an evaluation form concerning her physical exertional limitations. (Id.) In this evaluation, Dr. Sugarman stated that plaintiff could: (1) sit for four hours during an eight hour day; (2) stand for two hours during an eight hour day; (3) walk for 2 hours during an eight hour day; (4) lift six to twenty pounds continuously; (5) lift eleven to twenty-five pounds occasionally; (6) push and pull items from six to fifty pounds; (7) carry items ranging from six to twenty pounds; and (8) bend, squat, crawl, climb, reach, and drive occasionally. (Id. at 416)

On August 13, 1997, plaintiff was examined by Tim Chatburn, an assessment specialist. (Id. at 338) The examination produced

a representation of plaintiff's physical capabilities based upon consistencies and inconsistencies when interfacing grip dynamometer graphing, resistance dynamometer graphing, pulse variations, weights achieved, and selectivity of pain reports and pain behaviors. (Id.) Chatburn reported that plaintiff completed the assessment with increased reports of pain, and several demonstrated pain behaviors. (Id.) Plaintiff had decreased use of her left upper extremity along with increased pain in her shoulder and tingling in her left forearm. Plaintiff complained about pains in her lower back and neck, as well as pain in her clavicle on her left side. (Id.) With these complaints of pain, Chatburn indicated that her functional capabilities were severely limited by the pain. (Id.) Chatburn concluded that plaintiff's physical exertional limits included: (1) sitting for one hour in ten to fifteen minute intervals during a workday; (2) standing for one hour in ten minute time periods during a workday; and (3) walking for an hour in short distances during a workday. (Id. at 339)

On January 5, 1998, a MRI of the cervical and lumbar spine region was performed. The diagnostic impressions of that test were that there was no evidence of cord abnormality, cord impression, compression, disc herniation, or other disc abnormality. (Id. at 428-29)

Dr. Sugarman completed a residual functioning capacity assessment on March 13, 1998. (D.I. 13 at 427) His conclusion at that time was that plaintiff "continues to have a lot of pain" and is "unable to work [an eight] hour day." (Id.) His assessment, however, was conditioned upon physical exertional limitations consistent with plaintiff's previous occupation which had a physical demand classification of light to medium exertion. (Id.)

In April 1998, Dr. Emmanuel Devotta evaluated plaintiff's complaints of chronic shoulder, arm, and lower back pain. (D.I. 13 at 440) Dr. Devotta noted that plaintiff had some neck and back tenderness but that a straight leg-raising test was ninety degrees bilaterally (negative),⁴ and there were no motor or sensory deficiencies. (Id.) Dr. Devotta's tentative diagnosis was lumbar facet joint disease and cervical radiculopathy. (Id.)

A July 1998 CT of the lumbar spine showed no evidence of a herniated disc, spinal stenosis or narrowing of the neural foramina. (D.I. 13 at 439) The CT did indicate mild degenerative changes of the facet joints and a possible annular tear at L5-S1. (Id. at 439)

⁴A straight leg-raising test is used to evaluate possible nerve root pressure, tension, or irritation of the sciatic nerve. Andersson and McNeill, Lumbar Spine Syndromes 78 (Springer-Verlag Wein, 1989). To receive a positive result on this test, there must be a reproduction of pain at an elevation of the leg at less than sixty degrees. Id.

In September 1998, plaintiff was evaluated by Dr. Paula C. Ko, M.D., an ophthalmologist, regrading a distortion in plaintiff's lower right quadrant of her visual field. (Id. at 565, 570) Dr. Ko recommended focal laser surgery, which was performed on September 30, 1998. (Id. at 564) Dr. Ko indicated that plaintiff had a microaneurysm and macular edema due to diabetic retinopathy. (Id.) At a January 19, 1999 follow-up, Dr. Ko reported that there were no peripheral visual defects. (Id. at 563)

Jack Dettwyler, Ph.D. provided pain management treatment at St. Francis Pain Center from April 24, 1998 to August 17, 1998. (Id. at 440-458) On May 28, 1998, Dr. Dettwyler reported a discussion he had that day with Dr. Robinson regarding plaintiff's condition. (Id. at 454) Dr. Robinson had opined that plaintiff's complaints of pain likely had a psychological basis.⁵ (Id.)

Dr. Magdy Boulos examined plaintiff on December 30, 1998. (Id. at 479) Dr. Boulos reported that plaintiff had been going through extensive conservative treatment, therapy, analgesics and muscle relaxants. (Id.) Plaintiff had also been going through the St. Francis Pain Management Program where she was receiving pain blocks, which plaintiff claimed were ineffective. (Id.)

⁵Dr. Dettwyler's treatment records indicate his disagreement with Dr. Robinson's conclusions. (Id.)

Dr. Boulos examined plaintiff and found stiffness and tightness of the paraspinal muscles in the cervical and scapular region as well as in the lower lumbar region. After a physical examination, review of certain studies including a MRI of the cervical and lumbar spine, Dr. Boulos concluded that there was no evidence of disc herniation or root compression. (Id. at 480) Dr. Boulos recommended that plaintiff continue with a conservative pain management protocol and opined that no further surgical treatments were necessary. (Id.)

Dr. Ketario performed a residual functional capacity assessment of plaintiff on February 18, 1999. (Id. at 571) Dr. Ketario determined that plaintiff could: (1) occasionally lift twenty pounds; (2) frequently lift ten pounds; (3) stand or walk for about six hours in an eight hour workday; (4) sit for about six hours in an eight hour workday; and (5) plaintiff's pushing and pulling ability was virtually unlimited. (Id. at 572) During this assessment, Dr. Ketario also concluded that plaintiff was capable of occasionally stooping, kneeling, crouching, and crawling. (Id. at 573) In addition, Dr. Ketario indicated that plaintiff had no manipulative limitations,⁶ visual limitations or

⁶Manipulative limitations involve reaching in all directions (including overhead), handling objects, movements involving the fingers, and feeling such as the skin's response to touch.

communicative limitations and virtually no environmental limitations.⁷ (Id. at 574, 575)

On November 21, 2000, Dr. Mack completed a residual functional capacity assessment. (Id. at 598) She concluded that plaintiff could sit for two hours in an eight hour day, and that plaintiff would need to lay down during the course of an eight hour day. (Id.) She also concluded that plaintiff suffered from severe pain every day. (Id.) In response to the evaluation form's request for objective medical evidence supporting these conclusions, Dr. Mack indicated that an MRI supported her assessment as well as physical exertional limitation tests.⁸ (Id.)

On December 7, 2000, Dr. Blacklock completed a residual functional capacity evaluation. (Id. at 600) Dr. Blacklock opined that plaintiff could not sit for one hour in an eight hour workday, and that she would not need to lay down during an eight hour workday. He also concluded that plaintiff suffered severe pain every day and would be unable to work a sedentary job on a full or part time basis. (Id.) In response to what objective

⁷Plaintiff had no limitations as to extreme cold, extreme heat, wetness, humidity, noise, vibration, fumes, odors, dusts, gases, poor ventilation. However, there was a limitation as to hazardous machinery and heights. It was recommended that she avoid concentrated exposure to these areas.

⁸There are not, however, any post-surgical MRI's which support this conclusion.

medical tests he relied on in forming his opinion, Dr. Blacklock states that "anyone who knows and has examined [plaintiff] understands her claim for disability literally speaks for itself." (Id.)

F. Vocational Expert Testimony

The vocational expert in this case was Margaret Reno, a certified rehabilitation counselor. (Id. at 642) Reno determined that plaintiff's past position at Metalman was a skilled job. Although the position is classified at the medium exertional level, the job as plaintiff performed it was heavy because plaintiff claimed that she lifted up to one hundred pounds. (Id. at 643, 644) Reno testified that plaintiff moved from that job to a light duty job where she lifted no more than five pounds; she classified this position as an unskilled sedentary job in accordance with the Dictionary of Occupational Titles. (Id.) Reno opined that plaintiff had acquired skills from her employment at Metalman that were transferable to sedentary work. (Id. at 645) While at Metalman, plaintiff worked with math and kept records, which could be transferred to a sedentary cashier position. (Id.) At that time there were approximately 424,000 jobs in the national economy performing this type of work and approximately 1,100 jobs in the local economy performing this sedentary work. (Id.) Reno further opined that plaintiff had skills that could transfer to the

position of a record clerk; there were approximately 71,000 jobs in the national economy and approximately 200 jobs in the local economy performing this type of work. (Id.)

III. STANDARD OF REVIEW

"The findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, [are] conclusive," and the court will set aside the Commissioner's denial of plaintiff's claim only if it is "unsupported by substantial evidence." 42 U.S.C. § 405(g); 5 U.S.C. § 706(2) (E) (1999); see Menswear Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986). As the Supreme Court has held,

"substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Accordingly, it "must do more than create a suspicion of the existence of the fact to be established.... It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."

Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (quoting NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300 (1939)).

The Supreme Court also has embraced this standard as the appropriate standard for determining the availability of summary judgment pursuant to Fed. R. Civ. P. 56:

The inquiry performed is the threshold inquiry of determining whether there is the need for a trial – whether, in other words,

there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Petitioners suggest, and we agree, that this standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986)

(internal citations omitted). Thus, in the context of judicial review under § 405(g),

"[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. Nor is evidence substantial if it is overwhelmed by other evidence – particularly certain types of evidence (e.g., that offered by treating physicians) – or if it really constitutes not evidence but mere conclusion."

Brewster v. Heckler, 786 F.2d 581, 584 (3d Cir. 1986) (quoting Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983)).

"Despite the deference due to administrative decisions in disability benefit cases, 'appellate courts retain 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) (quoting Smith v. Califano, 637 F.2d 968, 970 (3d Cir.

1981)). "A district court, after reviewing the decision of the [Commissioner] may, under 42 U.S.C. 405(g) affirm, modify, or reverse the [Commissioner]'s decision with or without a remand to the [Commissioner] for rehearing." Podedworny v. Harris, 745 F.2d 210, 221 (3d Cir. 1984).

IV. DISCUSSION

A. Disability Determination Process

"Disability" is defined in the Social Security Act 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." 42 U.S.C. § 423 (d) (1) (A). A claimant is considered unable to engage in any substantial gainful activity

only if his physical or mental impairment or impairments are of such severity that he 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 work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work.

42 U.S.C. § 423(d) (2) (A). The Commissioner makes this determination based upon a regulation promulgated by the Social Security Administration that sets out a five-step sequential evaluation process. 20 C.F.R. §§ 404.1520, 416.920 (2003). The

Third Circuit outlined the process in Plummer v. Apfel, 186 F.3d 422 (3d Cir. 1999).

In order to establish a disability under the Social Security Act, a claimant must demonstrate there is some "medically determinable basis for an impairment that prevents him from engaging in any 'substantial gainful activity' for a statutory twelve-month period." A claimant is considered unable to engage in any substantial activity "only if his physical or mental impairment or impairments are of such severity that he 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."

The Social Security Administration has promulgated regulations incorporating a sequential evaluation process for determining whether a claimant is under a disability. In step one, the Commissioner must determine whether the claimant is currently engaging in substantial gainful activity. . . . In step two, the Commissioner must determine whether the claimant is suffering from a severe impairment. . . .

In step three, the Commissioner compares the medical evidence of the claimant's impairment to a list of impairments presumed severe enough to preclude any gainful work. If a claimant does not suffer from a listed impairment or its equivalent, the analysis proceeds to steps four and five. Step four requires the ALJ to consider whether the claimant retains the residual functional capacity to perform her past relevant work. . . .

If the claimant is unable to resume her former occupation, the evaluation moves to the final step. At this stage, the burden of production shifts to the Commissioner, who must demonstrate the claimant is capable of performing other available work in order to deny a claim of disability. The ALJ must show there are other jobs existing in significant numbers in the national economy which the claimant can perform,

consistent with her medical impairments, age, education, past work experience, and residual functional capacity. The ALJ must analyze the cumulative effect of all the claimant's impairments in determining whether she is capable of performing work and is not disabled. The ALJ will often seek the assistance of a vocational expert at this fifth step.

Id. at 427-28

The determination of whether a claimant can perform other work may be based on the administrative rulemaking tables provided in the Social Security Administration regulations ("the grids"). Cf. Jesurum v. Sec'y of Health & Human Servs., 48 F.3d 114, 117 (3rd Cir. 1995) (noting use of the grids for determination of eligibility for supplemental social security income) (citing Heckler v. Campbell, 461 U.S. 458, 468-70 (1983)). In the context of this five-step test, the Commissioner has the burden of demonstrating that the plaintiff is able to perform other available work. See Bowen, 482 U.S. at 146 n.5. In making this determination, the ALJ must determine the individual's residual functional capacity, age, education, and work experience. See 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(c) (2003). The ALJ then applies the grids to determine if an individual is disabled or not disabled. See 20 C.F.R. pt. 404, subpt. P, app. 2, § 200.00(d) (2003).

If the claimant suffers from significant non-exertional limitations, such as pain or psychological difficulties, the ALJ

must determine, based on the evidence in the record, whether these non-exertional limitations limit the claimant's ability to work beyond the work capacity obtained from reviewing the Social Security regulation "grids." See 20 C.F.R. § 404.1569a(c)-(d) (2003). If the claimant's non-exertional limitations are substantial, the ALJ uses the grids as a framework only and ordinarily seeks the assistance of a vocational specialist to determine whether the claimant can work. See Santise v. Schweiker, 676 F.2d 925, 935 (3rd Cir. 1982); 20 C.F.R. pt 404, subpt. P, app. 2, § 200(d)-(e) (2003).

Furthermore, section 404.1529 provides that the ALJ will consider all symptoms, including pain, when determining disability. 20 C.F.R. § 404.1529 (2003). When evaluating complaints of pain, the symptoms must be reasonably consistent with objective medical evidence, meaning that there must be medical signs and laboratory findings which show that a claimant has a medical impairment which could reasonably be expected to produce the pain and other symptoms that are being alleged. Id. If it is determined that the symptoms are consistent with the pain being alleged, and there is objective medical evidence to support this claim, then it will be determined that the person is disabled. (Id.)

B. Application of the Five-Step Test

In the present case, plaintiff disputes the ALJ's conclusions at step three in the evaluation process. Plaintiff contends the following: (1) the ALJ improperly applied a more rigid standard for evaluating plaintiff's subjective complaints of pain; and (2) the ALJ improperly substituted her own judgment for the opinion of a treating source on the issue of nature and severity of her back pain.

1. Standard for Evaluating Claimants Subjective Statements Regarding Pain

Plaintiff contends that the ALJ improperly considered whether the pain reported by plaintiff was consistent with and supported by medical evidence. (D.I. 16 at 13) Plaintiff argues that the ALJ should have limited herself to considering whether the "medical condition could be reasonably expected to produce those symptoms."⁹ (Id.) Social Security regulations provide that:

(1) When the medical signs or laboratory findings show that you have a medically determinable impairment(s) that could reasonably be expected to produce your symptoms, such as pain, we must then evaluate the intensity and persistence of your symptoms so that we can determine how your symptoms limit your capacity for work. In evaluating the intensity and persistence of your symptoms, we consider all of the available

⁹Plaintiff relies on 20 C.F.R. § 404.1529 (1989). In so doing, plaintiff ignores the November 14, 1991 substantive revision to the rules. See 56 Fed. Reg. 57,941-42 (Nov. 14, 1991) (codified at 20 C.F.R. § 404.1529(c)(2003)). The apparent and incorrect import of plaintiff's contention is that the ALJ must take plaintiff's subjective reports of pain at face value.

evidence, including your medical history, the medical signs and laboratory findings, and statements from you, your treating or examining physician or psychologist, or other persons about how your symptoms affect you.

...

(4)...We will consider whether there are any inconsistencies in the evidence and the extent to which there are any conflicts between your statements and the rest of the evidence, including your medical history, the medical signs and laboratory findings, and statements by your treating or examining physician or psychologist or other persons about how your symptoms affect you.

20 C.F.R. § 404.1529(c) (2003). In contrast to plaintiff's contention, the ALJ is to consider whether plaintiff's subjective complaints of pain are consistent with and supported by objective medical evidence as well as plaintiff's description of her own daily activities. In the present case, the ALJ specifically considered the inconsistencies between plaintiff's reporting of pain and the objective medical evidence, as required by 20 C.F.R. § 404.1529(c) (4). Consequently, the court concludes that the ALJ applied the appropriate legal standard under the regulations in concluding that plaintiff was not disabled.

2. Rejection of Treating Sources

Plaintiff contends that the ALJ improperly rejected certain medical opinions. In considering the opinion of treating physicians with respect to complaints of pain, the regulations state:

Because symptoms, such as pain, are subjective and difficult to quantify, any symptom-related functional limitations and restrictions which you, your treating or examining physician or psychologist, or other persons report, which can reasonably be accepted as consistent with the objective medical evidence and other evidence, will be taken into account as explained in paragraph (c) (4) of this section in reaching a conclusion as to whether you are disabled.

20 C.F.R. § 404.1529(c) (3) (2003). Consequently, to the extent that a physician's opinion relates to pain or pain-related exertional limitations, the ALJ only must consider those medical opinions which are consistent with objective medical evidence.

A central issue in the ALJ's consideration is whether plaintiff's subjective complaints of pain are credible. Her credibility is particularly relevant, as the physician opinions on which she relies, are based on her own complaints of pain. The credibility of the plaintiff is a question for the ALJ, as the fact finder, to resolve. See Van Horn v. Schweiker, 717 F.2d 81, 873 (3d Cir. 1983). Upon review by the court, the ALJ's determination must only be supported by substantial evidence on the record as a whole. See Miller v. Comm'r of Soc. Sec., 172 F.3d 303, 304 n.1 (3d Cir. 1999).

In the present case, the ALJ based her determination of plaintiff's credibility on inconsistencies in her statements regarding the effects on her daily activities made at the hearing in comparison to a written statement she gave in January 1999. (D.I. 13 at 20) Further, plaintiff's testimony was inconsistent

with the objective medical evidence presented to the ALJ. In this case, the ALJ considered all of the evidence, including the objective medical evidence, plaintiff's testimony and previous statements, plaintiff's demeanor at the hearing, and medical opinions supported by objective medical evidence. In light of that record, she determined that plaintiff's subjective reports of pain were inconsistent with the objective medical evidence. Consequently, the ALJ's finding that plaintiff's testimony was not credible is supported by substantial evidence in the record.

The ALJ accepted Dr. Sugarman's opinion as reported on May 15, 1997, but not with respect to Dr. Sugarman's later opinion as reported on March 13, 1998. (D.I. 13 at 17-19) The ALJ based her rejection of Dr. Sugarman's later opinion on the absence of objective medical evidence referenced in that opinion. (Id. at 17) See 20 C.F.R. § 404.1527(e)(1) (2003). In contrast, the ALJ found that Dr. Sugarman's previous opinion was controlling, as it was supported by objective medical evidence, including a physical examination and certain imaging tests. (Id. at 19) The court also notes that the form of the March 13, 1998 opinion was specifically addressed to whether plaintiff could resume her previous occupation. (Id. at 427) That position requires a higher level of residual functioning capacity than light work. (Id.) Dr. Sugarman, over the course of his treatment of plaintiff, had consistently indicated that plaintiff was not able

to return to her previous occupation, but it does not follow that Dr. Sugarman's opinion extends to all work. Consequently, the court concludes that while the ALJ's rejection of Dr. Sugarman's March 13, 1998 evaluation was consistent with Social Security regulations, that evaluation is not inconsistent with the ultimate findings of the ALJ.

The ALJ properly credited Dr. Robinson's opinion regarding plaintiff's physical exertional limitations. Dr. Robinson is a specialist, and, therefore, an ALJ may give such assessment more weight. See 20 C.F.R. § 404.1527(d)(5) (2003). Dr. Robinson reached medical conclusions consistent with Dr. Sugarman's regarding plaintiff's residual functioning capacity. Dr. Robinson opined that plaintiff's reports of chronic pain were not consistent with medical evidence, and suggested the presence of a psychological or emotional basis rather than a physiological source for the discomfort.

The ALJ rejected certain opinions offered by Drs. Blacklock and Mack. In doing so, the ALJ expressly indicated that she premised her rejection on the absence of objective medical evidence found in the treating physicians' opinions.¹⁰ An ALJ is not bound by a treating physician's conclusion that a plaintiff

¹⁰The court notes that these evaluations were supplemented into the record after the ALJ commented at the November 8, 2000 hearing that plaintiff's "testimony is clearly at odds with the way the record is presently constituted." (Id. at 646)

is either "disabled" or "unable to work" as such conclusions are not medical opinions within the meaning of the regulations. See 20 C.F.R. § 404.1527(e) (2003). The ALJ found Dr. Mack's opinion as to plaintiff's ability to work to be inconsistent with objective medical evidence. (D.I. 13 at 17) Similarly, the ALJ concluded Dr. Blacklock's opinion to be unsupported by medical evidence or treatment records.¹¹ 20 C.F.R. § 404.1527(d) (2003). In both cases, these opinions rejected by the ALJ were contained on residual functioning capacity evaluation forms. (D.I. 13 at 598, 600)

Plaintiff's argument turns on whether the conclusions regarding her physical exertional limitations contained in the residual functioning capacity evaluations are medical opinions within the meaning of the regulations. The Third Circuit considers such forms to be weak evidence at best and of a suspect reliability when unaccompanied by thorough written reports. See Mason v. Shalala, 944 F.2d 1058, 1065 (3d Cir. 1993). In the present case, the fact that these particular evaluations were completed following the administrative hearing and in light of the ALJ's cautionary note to plaintiff that the record did not

¹¹Notwithstanding the fact that the ALJ left the record open to permit plaintiff to supplement the record with additional treatment records and medical evidence, plaintiff did not submit any additional objective medical evidence of her condition. (D.I. 13 at 646) Further, the last relevant treatment report found in the record from a physician is dated January 22, 1999. (Id. at 482)

support her testimony, only diminishes the reliability of the conclusions contained therein. Further, in the case of Dr. Blacklock's evaluation, he failed to refer to any objective medical evidence, but instead rested on supposed "multiple evaluations of other physicians." (D.I. 14 at 600) Dr. Mack's evaluation references an MRI that supports her conclusion, however, there are no MRI's to be found in the record that provide a diagnostic impression supportive of her conclusions. (Id. at 598) While a treating physician's opinion may often be given greater credit by the ALJ, where (as in this case) those opinions are not supported expressly or implicitly by objective medical evidence, the ALJ may discount the value placed on the opinions. With respect to Drs. Mack and Blacklock, the court concludes that the ALJ's rejection was not in error and that substantial evidence in the record supports the ALJ's findings.

The ALJ also rejected the opinion of Tim Chatburn, an assessment specialist, as not an acceptable medical source under 20 C.F.R. § 404.1513(b), (c) (2003). Plaintiff contends that Chatburn's opinion was admissible and should have been considered under section 404.1513(d). That section provides for the consideration of other evidence for the purpose of showing the severity of an impairment. The assessment performed by Chatburn, however, is apparently based upon plaintiff's subjective reporting of pain and not objective medical evidence. The

relevancy of the Chatburn's assessment, therefore, is conditioned upon the credibility assigned to plaintiff. Consequently, Chatburn's opinion was properly rejected by the ALJ.

Plaintiff argues that the ALJ failed to consider the opinion of Dr. Ketario, a state agency physician, who concluded that plaintiff's symptoms were attributable to a medically determinable impairment. (D.I. 16 at 13) Plaintiff's characterization of Dr. Ketario's opinion is incomplete. While Dr. Ketario did find that plaintiff's symptoms were attributable to a medically determinable impairment, Dr. Ketario did not indicate whether plaintiff's reporting of the severity of those symptoms was proportionate with the expected severity for her impairments. (D.I. 13 at 576) Further, as Dr. Ketario concluded that plaintiff could stand for six hours in an eight hour work day, walk for six hours in an eight hour work day, occasionally lift twenty pounds and frequently lift ten pounds, it does not appear to the court that Dr. Ketario would agree with plaintiff's characterization of the severity of her pain. (D.I. 13 at 572-75) Dr. Ketario's assessment of plaintiff's physical exertional limitations are consistent with a conclusion that plaintiff has a residual functioning capacity to perform light work. Consequently, while the ALJ's decision does not reflect a consideration of Dr. Ketario's assessment, the assessment is consistent with the ALJ's findings.

IV. CONCLUSION

For the reasons stated, the court shall grant defendant's motion for summary judgment and deny plaintiff's motion for summary judgment. An appropriate order shall issue.

