

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE**

JUDITH W. WILKES,)	
)	
Plaintiff,)	
)	Civil Action No: 00-655-GMS
v.)	
)	
Larry G. Massanari,)	
Acting Commissioner of Social Security, ¹)	
)	
Defendant.)	
)	

MEMORANDUM AND ORDER

I. INTRODUCTION

On June 20, 1994, the plaintiff, Judith W. Wilkes (“Wilkes”), applied for Social Security Disability Insurance Benefits (“DIB”), alleging that she had been disabled since May 3, 1993. She was denied DIB on September 8, 1994, and again upon reconsideration on April 6, 1995. Ms. Wilkes timely filed a request for a hearing before an Administrative Law Judge (“ALJ”) on May 25, 1995. A hearing was held on July 16, 1996, before ALJ Richard L. De Steno (“ALJ De Steno”) in Newark, New Jersey. By a decision dated September 20, 1996, ALJ De Steno found that Wilkes was not entitled to DIB under Section 223 of the Social Security Act. On October 1, 1996, Wilkes filed a request for review of the hearing decision by the Appeals Council. The Appeals Council, on

¹Larry G. Massanari became the Acting Commissioner of Social Security on March 29, 2001. Under Fed R. Civ. P. 25(d)(1), Massanari is automatically substituted as the defendant in this action. Nevertheless, the court can rule on the merits of the case. *See* 42 U.S.C. § 405(g) (stating “[a]ny action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Commissioner of Social Security or any vacancy in such office.”). Although Massanari is the “Acting Commissioner,” the court will refer to him as the “Commissioner” throughout its memorandum and order.

December 11, 1997, remanded the case back to the ALJ to consider new evidence about Wilkes' mental impairment. De Steno conducted a post-remand hearing on September 16, 1998. On October 2, 1998, the ALJ again denied Wilkes' request for DIB. On October 6, 1998, Wilkes filed a request for review of the hearing decision by the Appeals Council which was denied on April 27, 2000. Having exhausted her administrative remedies, Wilkes filed a complaint with the court on July 17, 2000.² The Commissioner timely answered. Wilkes moved for summary judgment on February 20, 2001, and the Commissioner filed a cross-motion for summary judgment on March 21, 2001. Because the court finds that the ALJ's denial of DIB was supported by substantial evidence, the court will deny Wilkes' motion, grant the Commissioner's motion, and enter judgment accordingly.

II. BACKGROUND

Ms. Wilkes is a right-handed female with a high school education. At the time of her application, she was 50 years old and 52 years old at the time of the hearing before ALJ De Steno. Since 1969, she has worked in the field of data entry. Between 1987 and 1993, she worked for the New Jersey Transportation Authority performing data entry work. In early 1993, she began experiencing pain in her right wrist and hand. Due to this pain, Wilkes ceased working and has not engaged in any substantial gainful employment since May 3, 1993. Ms. Wilkes alleges that she became disabled as a result of the chronic pain in her right wrist, hand, and arm, and that limited movement of the wrist caused her to have impaired concentration.

²On June 19, 2000, Wilkes' attorney filed for an extension of time in which to file a complaint because Ms. Wilkes had moved to Delaware. The Appeals Council, on October 4, 2000, found that an extension of time was allowed and determined that the complaint was timely filed.

A. Medical Evidence

In March 1993, Wilkes initially visited Dr. Paul Lo Verme, a hand specialist. Dr. Lo Verme became her treating physician for the pain she was experiencing. A mass on the dorsal of the right distal forearm was revealed. Dr. Lo Verme subsequently removed a large lipoma from this area on May 4, 1993. The procedure did not lessen the pain. Therefore, Wilkes attended physical therapy, received an injection of Kenolog-10, and received a series of six stellate ganglion and scalene nerve blocks. Wilkes was referred to Dr. Robert Beasley who diagnosed her with reflex sympathetic dystrophy (“RSD”) on October 21, 1993.³ Dr. Beasley found that Wilkes did not have any problems with her shoulder and she could freely use her left hand. The x-rays revealed no gross abnormalities and little bone demineralization. His medical reports state that Wilkes fits the personality type for RSD and that there may be a problem such as depression.

On December 6, 1993, Dr. Lo Verme performed a cervical spine exam that revealed a normal range of motion. He reported that Wilkes had normal reflexes and sensations, and her lower extremities had a normal range of motion and motor power. Surgery for a right-sided thoracic sympathectomy was performed, but the pain and stiffness in the right wrist were not reduced. Dr. Lo Verme recommended that Wilkes receive pain treatment. On February 1, 1994, he performed a right wrist manipulation under anesthesia with poor results. On March 22, 1994, he reported that due to Wilkes’ wrist pain, she was currently unable to work and was doubtful that she could ever return to data entry type of work.

³ “Reflex sympathetic dystrophy is a type of neuropathic pain in which pain is accompanied by swelling and sweating or changes in local blood flow or by changes in the tissues. . . .” Merck Manual of Medical Information, Home Edition (1997).

Wilkes continued physical therapy through the summer of 1994, at the Hand and Rehabilitation Center. On August 17, 1994, Dr. Glen D. Rowe examined Wilkes for her wrist pain, and he discovered that she had a marked reduction in grip strength. Dr. Rowe believed that she had received all possible traditional treatments and there may not be a cure for her condition. He recommended that she attempt to manage the pain in the best way possible.

Dr. Lo Verme's report, in September 1994, stated that the RSD had stabilized, but not improved. He reported that Wilkes had no active extension in her right wrist and had stiffness in her right wrist with pain in the entire hand, wrist, and forearm. Wilkes was not able to type or perform fine hand manipulations with her right hand. However, she did not have any problems with her gait, station, or balance. The report indicated that there were no cognitive, behavioral, or psychological problems. On December 14, 1994, Dr. John E. Robinton confirmed a diagnosis of RSD and limited wrist extension and flexion. Wilkes did not state any sensory complaints and a clinical examination of the right arm showed there to be no weakness.

In January 1995, Wilkes sought treatment by Dr. We-hsien Wu, a pain specialist. His examination report on January 24, 1995, revealed diagnoses of tenosynovitis and autonomic instability of the right hand. A physical exam indicated that Wilkes did not suffer from any numbness, hyperpathia or allodynia, but the motor power of her right hand was 4/5 of the normal power level due to the pain. He found that she had normal hips, knees, ankles, sensation, cervical spine and deep tendon reflexes. Although movement of the fingers did not cause Wilkes pain, Dr. Wu recommended that she discontinue keyboard operations for at least one year. He prescribed Neurontin and Elavil for pain management as well as hot compresses for pain relief.

Wilkes' last visit with her treating physician on December 5, 1994, revealed that her condition was consistent with symptoms of RSD. Dr. Lo Verme's report, dated June 6, 1995, indicated that Ms. Wilkes was totally and permanently disabled. According to the guides for evaluation of permanent impairment, he concluded that Wilkes had chronic right upper extremity pain with stiffness in the wrist and hand resulting in the loss of function and 100 percent impairment. He suggested that her physical condition and chronic pain had caused her to be profoundly depressed. Dr. Lo Verme concluded that Wilkes would be unable to deal with employment induced stress and perform any task or job within the labor market.

Following the remand order by the Appeals Council, Dr. Alec Roy, a psychiatrist, examined Wilkes on May 6, 1998. Upon examination, Wilkes indicated that she felt depressed "all day, everyday." She claimed that she felt this way for the past three to four years, but did not dwell on these feelings. Although Wilkes had never seen a mental health professional, she was taking antidepressants. Dr. Roy's evaluation revealed that Wilkes was low spirited and did not appear anxious. Her speech patterns, thought processes, and abstract thoughts were normal. She was fully oriented and did not suffer from memory dysfunction or hallucinations. Dr. Roy's diagnosis was adjustment disorder with depressed mood. Ms. Wilkes was assessed a global assessment of functioning ("GAF") score of 60 because her depressed mood contributed to her difficulty in functioning, which was largely due to the pain.⁴ Concerning her work-related mental activity, Dr.

⁴ A GAF score is a subjective determination which represents "the clinician's judgment of the individual's overall level of functioning." American Psychiatric Assoc., Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), (4th ed. 1994), p. 30. The GAF score is taken from the GAF scale which "is to be rated with respect only to psychological, social, and occupational functioning." *Id.* The GAF Scale ranges from 100 (superior functioning) to 1 (persistent danger of severely hurting self or others, persistent inability to maintain minimal personal hygiene, or serious suicidal act with clear expectation of death). *Id.* at 32.

Roy stated that Wilkes had a “good-fair” ability to make occupational, performance, and personal-social adjustments.

B. Testimony at Hearing Before ALJ De Steno

Two people testified at the hearing before ALJ De Steno: (1) Judith Wilkes, and (2) Benjamin Lebowitz, a vocational expert. At the post-remand hearing, only Wilkes testified. Only the relevant portions of the testimony are described.

1. Wilkes’ Description of her Pain and Activities

Wilkes stated that her surgery, in May 1993, caused her wrist to lock. As a result, she had constant pain in the wrist and hand. After all of her treatments, the wrist had not improved since 1993. The throbbing pain in the right wrist and hand had not ceased. She was taking nine prescription pills a day for the pain, but none of them work. The side effects were mainly weight gain and nausea with some drowsiness. During the 1998 post-remand hearing, she stated, however, that MSIR, a morphine based pain medication, helped subdue the pain somewhat. She also stated that pressing on a pressure point in her hand helped as well. The doctor at the pain management center⁵ she attended said the medication dosages would continue to be increased. On a scale of one to ten, with ten being the worst, at the initial hearing, Wilkes described her pain as a ten at all times. At the post-remand hearing she stated that the pain had increased.

Emotionally, though Wilkes believed that she was depressed, she had only seen a psychiatrist once around 1995 or 1996. She stated, at the post-remand hearing, that sometimes she cried for no reason. At pain management, she had talked about her difficulty sleeping and her

⁵ The pain management center is a program within a hospital that provides effective treatment modalities for pain, and the needed psychological and rehabilitative support that often accompanies chronic and recurring pain.

feelings of depression. She was prescribed Elavil to help her to sleep. She contended that she had not sought psychiatric treatment because it was not suggested by anyone.

Due to her stiff wrist, her household chores and daily activities were minimal. She stated that her right hand was basically useless, but she had adapted to using her left hand for some things. Wilkes used her left hand for vacuuming, combing her hair, brushing teeth and buttoning buttons. She used her right hand to write for short periods of time, and uses both hands to dress herself. Wilkes prepared food and cooked, but her husband had to remove the pots from the stove and cut food because her left hand was not secure enough. Usually she went food shopping with somebody, but occasionally drove herself. Wilkes washed and dried clothes, put dishes in the dishwasher, and carried light packages of meat; but she could not carry groceries.⁶ At the post-remand hearing, however, she stated that her husband did all the household chores and shopping. Wilkes occasionally went for walks (about 20 minutes to a half hour once per day), read, watched television, and visited family. In the average day, she was generally bored; she sat and listened to the radio.

Concerning work, she did not think that she could work if she had to use her right hand. Even if she did not have to use her right hand, she was not sure if she could concentrate long enough to do the work.⁷ She stated that she could concentrate for about 15 minutes before she lost her focus.

2. Testimony of Benjamin Lebowitz, Vocational Expert

⁶ In 1995, Wilkes had obstruction surgeries. She was instructed not to lift anything that she felt was too heavy for her, not even with her left arm. Thus, she stated that she could not lift a bag of groceries weighing five to ten pounds. She described the heaviest object she lifted in a day as a can of soda. However, at the post-remand hearing she stated that she did not pick up a cup of coffee because she had dropped that in the past.

⁷ Due to the pain, she claimed that did not get very much sleep (three to four hours a night) which affected her concentration throughout the day.

After reviewing the record and having heard the testimony, Lebowitz described Wilkes' past occupation as skilled sedentary work with transferrable skills. To consider whether any jobs existed in the region, the ALJ posed the following hypothetical question to Lebowitz:

Consider a person of age 52, high school education, work experience as we've discussed and you've heard, and let's add that such a person has the capacity to lift 10 pounds frequently, exclusively with the left hand and arm. Twenty pounds occasionally, exclusively with the left hand and arm. Stand and walk up to six – actually up to eight hours in an eight hour day. Sit as well up to eight hours in an eight hour day. Push and pull foot controls, however arm controls only with the left hand and where writing is required, write only infrequently for short periods of time. Claimant has a right dominant hand.

In response to the hypothetical, Lebowitz described the region as northern New Jersey including central New Jersey and the New York metropolitan area. He stated that an individual described as capable of light work, with no use of the dominant hand, would probably be able to do machine tending type work, internal messenger, and light building maintenance. Since these are unskilled jobs, transferability of her skills is not pertinent.

The ALJ added the factor of limited concentration, and the vocational expert conceded that the cited jobs would be appropriate since they only involve simple, repetitive tasks. He stated that within the region, there were an excess of 5,000 jobs for machine tending, an excess of 1,000 jobs for internal messenger, and an excess of 5,000 jobs for light building maintenance. However, an individual would have difficulty performing the tasks if they had a diminished concentration all day long. If an individual were losing concentration one minute every 20 minutes, day in and day out, Lebowitz stated the individual would not be employable.

C. ALJ's Findings

The ALJ issued two written decisions, approximately 10 pages each, for both the initial

hearing (decision on September 20, 1996) and the post-remand hearing (decision on October 2, 1998). At both hearings, ALJ De Steno found, among other things, that (1) Wilkes had not engaged in substantial gainful activity since May 3, 1993, (2) the medical evidence established that Wilkes had a severe impairment of reflex sympathetic dystrophy of the right (dominant) hand, but it did not meet the criteria of any impairments listed in the relevant regulations, (3) Wilkes' subjective complaints of disabling pain, other symptoms, and limitations were not fully credible, (4) Wilkes had the residual functional capacity⁸ to perform work consisting of simple repetitive tasks, (5) Wilkes could not perform her past relevant work as a data entry clerk, (6) based on her exertional capacity for light work, her age, education, and work experience, Wilkes was not disabled within the meaning of the relevant regulations and (7) Wilkes was capable of making an adjustment to jobs that exist in significant numbers in the national economy — such as machine tender, internal messenger, and light building maintenance worker.

III. STANDARD OF REVIEW

The court must uphold the Commissioner's factual decisions if they are supported by "substantial evidence." *See* 42 U.S.C. §§ 405 (g), 1383 (c)(3). Substantial evidence does not mean a large or a considerable amount of evidence. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Rather, it has been defined as "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate." *Ventura v. Shalala*, 55 F.3d 900, 901 (3d Cir. 1995) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)).

⁸Residual functional capacity describes the range of work activities the claimant can perform despite her impairment

Credibility determinations are the province of the ALJ, and should only be disturbed on review if not supported by substantial evidence. *Pysher v. Apfel*, Civ. A. No. 00-1309, 2001 WL 793305, at *2 (E.D. Pa. Jul. 11, 2001) (citing *Van Horn v. Schweiker*, 717 F.2d 871, 973 (3d Cir. 1983)). To demonstrate that the ALJ's opinion is based on substantial evidence, the ALJ must make specific findings of fact to support his or her ultimate findings. *Portlock v. Apfel*, Civ. A. No. 99-931, 2001 WL 753879, at *7 (D. Del. Jul. 3, 2001) (citing *See Stewart v. Secretary of HEW*, 714 F.2d 287, 290 (3d Cir. 1983)). Thus, the inquiry is not whether the court would have made the same determination, but rather, whether the Commissioner's conclusion was reasonable. *See Brown v. Bowen*, 845 F.2d 1211, 1213 (3d Cir. 1988). In social security cases, this substantial evidence standard applies to motions for summary judgment brought pursuant to Fed. R. Civ. P. 56(c). *See Woody v. Sec. of the Dep't of Health and Human Serv.*, 859 F.2d 1156, 1159 (3d Cir. 1988).

IV. DISCUSSION

The purpose of the Social Security Act is to ensure that disabled individuals will be provided with a minimum income. *See Sullivan v. Zebley*, 493 U.S. 521, 524 (1990) (citing 42 U.S.C. § 1381). To be entitled to benefits, a person must be found to be disabled. A person is disabled if he or she is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment," which can result in death or which has lasted or can be expected to last for a continuous period of at least 12 months. *See* 42 U.S.C. § 1382c(a)(3)(A).

To determine if a claimant's disability qualifies for disability insurance, a five-step analysis has been established by governing regulations. *See* 20 C.F.R. § 404.1520. The Commissioner evaluates each case according to this step-by-step process until a finding of "disabled" or "not disabled" is obtained. In sequence, the Commissioner determines whether the claimant: (1) is

currently employed, (2) has a severe impairment, (3) has an impairment that meets or equals the requirements of a listed impairment, (4) can perform past relevant work, and (5) if not, whether the claimant can perform other work, in light of age, education, and work experience.

In the first four steps, the claimant has the burden of proving the elements of the claim by a preponderance of the evidence. To meet the burden of proof to show a disability, the claimant must show that he or she does not engage in any substantial gainful activity, and suffers from a severe impairment which prevents the performance of the claimant's former job.

If the claimant is successful, the Commissioner bears the burden in the final step of the analysis. The Commissioner must demonstrate that the claimant has the ability to perform a significant number of jobs existing in the national economy, given the claimant's medical impairments, age, education, past work experience, and residual functional capacity. *See* 20 C.F.R. § 404.1520(f). The ALJ may use testimony from a vocational expert, although he is not required, to identify other work and occupations where the claimant's skills can be applied. *See Podedworny v. Harris*, 745 F.2d 210, 218 (3d Cir. 1984); 20 C.F.R. § 404.1566. Keeping the shifting burdens in mind, the court will address the issues Wilkes raises in her motion.

Wilkes asks the court to review the Commissioner's decision stating that she is not entitled to DIB under Title II of the Social Security Act ("Act"), 42 U.S.C. § 401- 433. She argues that substantial evidence does not support the finding of "not disabled." Specifically, she argues that the ALJ should have afforded her testimony and all of the medical evidence more weight than he did. She also asserts that the Commissioner has not met his burden. Only the third and fifth prongs of the five-step analysis are in dispute. Therefore, the court will focus on these issues.

A. The ALJ's Findings of Fact, Regarding the Objective Medical Evidence, is Supported by Substantial Evidence

The ALJ must set out a specific factual basis for each finding. *Baerga v. Richardson*, 500 F.2d 309 (3d Cir. 1974), *cert. denied*, 420 U.S. 931 (1975). All of the evidence in the record must be analyzed, and any disregarded evidence requires an adequate explanation. *Adorno v. Shalala*, 40 F.3d 43 (3d Cir. 1994). It is not disputed that Wilkes has not engaged in any substantial gainful activity since May 3, 1993, or that RSD is a severe impairment. Thus, it is not disputed that Wilkes satisfies the requirements for steps one and two, respectively, in the evaluation process used to determine disability. See 20 C.F.R. §404.1520. Wilkes asserts that the ALJ's conclusion of "not disabled" is in direct opposition to her testimony and her treating physician's opinion. Upon consideration of the record and the parties' submissions, the court finds that the ALJ's finding that Wilkes' impairment did not meet the criteria of those listed in the regulations, and thus, his finding of not disabled, is supported by substantial evidence.

Wilkes believes that ALJ De Steno relied primarily upon the testimony of Dr. Wu to determine that her pain was moderate and the impairment was not disabling. She asserts that Dr. Wu's medical opinion conflicted with that of Dr. Lo Verme, her treating physician for over two years, who opined that Wilkes was totally and permanently disabled. However, substantial evidence in the record reveals that Dr. Wu's opinion was credible, and the ALJ considered each examining physician's opinion in forming a conclusion.

In the ALJ's original opinion (dated September 20, 1996), at step three of the evaluation process for determining disability, ALJ De Steno found that neither Wilkes' treating nor any examining physician mentioned findings equivalent in severity to the criteria of listed impairments

in the regulations. The record reveals that the ALJ evaluated all of the medical evidence and that substantial evidence supports the findings.

According to the ALJ, Dr. LoVerme's opinion that Wilkes was totally and permanently disabled did not merit controlling evidentiary weight. Generally, the regulations provide that the opinion of the treating physician will be given controlling weight if it is "well supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record." 20 C.F.R. §§ 404.1527 (d)(2), 416.927 (d)(2), (1995). In the post-remand hearing opinion, ALJ De Steno discredited Dr. Lo Verme's opinion of total and permanent disability for two reasons. First, he found that the opinion contradicted the vocational expert's opinion which stated that Wilkes' RSD of the right hand causes significant vocationally relevant limitations. The vocational expert believed that a person with Wilkes' impairment could perform jobs involving simple repetitive tasks. Second, Dr. Lo Verme rendered a vocational opinion of what jobs Wilkes is capable. This type of opinion requires a vocational analysis which Dr. Lo Verme is not qualified to conduct and was not performed. Because the ALJ thoroughly explained on the record the reasons for rejecting the treating physician's opinion, the court finds his decision not to ascribe controlling weight to Dr. Lo Verme's opinion to be supported by substantial evidence.. *See Allen v. Bowen*, 881 F.2d 37, 41 (3d Cir. 1989).

Moreover, not only did Dr. Lo Verme's finding of disabled contradict the vocational expert, it also contradicted his own prior findings without any reasoning, as well as those opinions of other examining physicians. In his past reports, Dr. LoVerme stated that Wilkes had an inability to perform fine hand manipulations with the right hand and that she could not perform her past work as a data entry clerk. He had found Wilkes to suffer from right upper extremity pain and stiffness

in the right wrist. In the lower extremities, he found no motor, reflex, or sensory changes, and that she did not have any problems with her gait, station, or balance.

Similar to Dr. LoVerme's prior report that Wilkes was unable to perform data entry, Dr. Wu, a pain specialist, recommended that Wilkes refrain from keyboard operations for at least one year. He identified motor weakness and decreased movement of the right hand. His examination found her lower extremities to be normal. In response, he proscribed an antiarrhythmic (Mexiletine) and a hot compress for the pain.

Reports from other examining physicians were similar in content to Dr. Wu's. For example, these reports found that Wilkes suffered from stabilized RSD, in which she had reduced grip strength with limited flexion and extension of the right wrist. She did not have any shoulder problems or gross abnormalities, and was able to use her left hand freely. The reports also found that although she had various treatments and surgeries, the results had been poor. The ALJ could have found that the reports of other examining physicians supported the finding by Dr. Wu. In weighing the medical evidence in the record, the ALJ is not bound to accept the opinion of the treating physician. *Kent v. Schweiker*, 710 F.2d 110, 115 n.5 (3d Cir. 1983). Although the ALJ named Dr. Wu in its opinions, substantial evidence in the record indicates that his opinion is credible, and that the ALJ accounted for all opinions by each examining physician.

B. The ALJ's Conclusions Regarding Residual Functional Capacity

To determine whether a claimant is "disabled," the diagnosis of a treating physician is considered. Nonetheless, the ALJ has the final responsibility to determine the claimant's residual functional capacity ("RFC") to perform past relevant work. 20 C.F.R. § 404.1527 (e)(2). These findings must be supported by the medical evidence. *Doak v. Heckler*, 790 F.2d 26, 29 (3d Cir.

1986). Residual functional capacity describes the range of work activities the claimant can perform despite her impairment. Within the RFC assessment, solicitude must be given to subjective allegations relating to (1) the nature, location, duration, onset, frequency and intensity of pain, (2) precipitating and aggravating factors, (3) type, dosage, effectiveness and side-effects of any pain medication, (4) all treatments for pain relief, (5) functional restrictions and (6) the claimant's daily activities. 20 C.F.R. § 404.1529.

Wilkes argues that during the residual functional capacity determination, the ALJ erred in his conclusions regarding the credibility of her testimony and her non-exertional limitations of subjective complaints of pain and alleged depression. The ALJ concluded, in light of Wilkes' own description of daily activities and lifestyle and the reports of the practitioners, that her statements concerning the impairment were not fully credible. Aside from Dr. Lo Verme's discredited opinion, the record indicates that the objective medical evidence substantially supports the ALJ's finding that Wilkes, given her remaining functional limitations, possessed a residual functional capacity to support a finding of not disabled.

Subjective complaints of pain may constitute a disability when they are accompanied by medical signs and laboratory findings. *See Green v. Schweiker*, 749 F.2d 1066, 1070 (3d Cir. 1984), *see also Bittel v. Richardson*, 441 F.2d 1193, 1195 (3d Cir. 1971). Even if subjective complaints of pain are not fully supported by medical evidence, an ALJ must give them serious consideration. *See Welch v. Heckler*, 80 F.2d 264, 270 (3d Cir. 1986). However, the ALJ is not bound to unquestioningly accept the subjective complaints. *See Marcus v. Califano*, 615 F.2d 23, 27 (2d Cir. 1979). Rather, it is within the ALJ's discretion "to evaluate the credibility of a claimant, and to arrive at an independent judgment in light of medical findings and other evidence regarding the true

extent of the pain alleged by the claimant.” See *Brown v. Schweiker*, 562 F. Supp. 284, 287 (E.D. Pa. 1983) (citation omitted).

Substantial evidence supports the ALJ’s finding that Wilkes does not suffer from excruciating pain. She had multiple surgeries and attended physical therapy, however, the problem was not remedied. Each day she took about nine pills to reduce the pain, which the dosages were regularly increased, but only one drug, MSIR, brought relief. Although this was a potentially addictive drug, practitioners have stated that the benefit of pain reduction outweighs the negative aspects of possible addiction. The ALJ concluded that any side effects were minimal and included nausea, drowsiness, and weight gain. Additionally, Wilkes had located a pressure point that impedes the pain. In fact, pain specialist Dr. Wu’s diagnosed Wilkes as having little pain. Moreover, he prescribed a conservative treatment regimen of only hot compresses to address this issue. Nowhere in the medical reports, is there an indication that her left hand or her ability to sit, stand or walk prevents Wilkes from performing light exertional work activities.

Although Wilkes demonstrated an affirmative effort to seek relief for her pain, the medical evidence does not support a finding of excruciating pain which would lead to the conclusion that Wilkes is disabled. The frequency of her treatments did support her allegations of pain, but other factors used in the assessment could reasonably have led ALJ De Steno to conclude that Wilkes’ symptoms limited her ability to work, but did not prevent her from engaging in substantial gainful activity. Namely, the ALJ determined from the initial hearing that her description of her daily activities was not consistent with those of a “totally disabled” person. Throughout the day, her

husband did all of the household chores while she sat, and was “mostly bored.”⁹ Moreover, although she states that her right hand was practically useless, she could write with it for short periods of time and had adapted to doing most things with her left hand.

The ALJ also evaluated Wilkes’ credibility and RFC in relation to her alleged depression and the medical evidence relating to this mental impairment.¹⁰ A mental impairment must be established by medical evidence consisting of signs, symptoms, and clinical findings. 20 C.F.R. § 404.1508. The limitations of a mental impairment must be assessed according to various factors such as the ability to understand, carry out, and remember instructions, as well as the ability to respond appropriately to supervisors, co-workers, and work stresses in a work environment. *See* 20 C.F.R. § 404.1545(c).

Both Dr. Lo Verme and Dr. Beasley made reference to depression. Additionally, Wilkes testified that she sometimes cried for no reason and believed that she was depressed. She also testified, however, that she had neither sought nor received any psychiatric or psychological treatment. She clearly stated that no physician had recommended any mental treatment, even though she discussed her feelings on multiple occasions at the pain management center. In light of her physicians’ decision not to recommend that she seek mental health treatment, the ALJ could have found the physicians’ references to Wilkes’ alleged depression to be unpersuasive. In other words, there is substantial evidence in the record to support the conclusion that Wilkes’ physicians did not

⁹ At the initial hearing, Wilkes testified that she performed various household duties such as washing and drying clothes, food shopping, and cooking. However, at the post-remand hearing, she stated that her husband took on those tasks. The court notes that this discrepancy may be due to her husband’s retirement.

¹⁰ The purpose of the post-remand hearing was to consider Wilkes’ allegation of feeling depressed and the opinion of Dr. Lo Verme that the depression is causally related to the pain.

find her condition to be serious enough to warrant further treatment. The ALJ can use a failure to seek treatment as evidence to contradict a subjective complaint as well as medical reports. *See Mason v. Shalala*, 994 F.2d 1058, 1068 (3d Cir. 1992). Finally, the court notes that when Wilkes was examined by a psychiatrist, Dr. Roy, he diagnosed her with adjustment disorder with a depressed mood. She had normal thought processes, speech, and memory function absent any hallucinations and anxiousness.

Based upon the practitioners' reports and Wilkes' testimony, the ALJ concluded that she suffered from moderate pain that impaired her concentration and limited her work ability. The ALJ also found that Wilkes had the residual functional capacity to perform simple repetitive tasks involving 1) lifting and carrying objects weighing up to 20 pounds, exclusively with the left (non-dominant) hand; 2) frequently lifting and carrying objects weighing up to 10 pounds, exclusively with the left hand; and 3) standing, walking, and sitting up to eight hours in an eight-hour day.¹¹

C. The ALJ Properly Concluded that Jobs Exist in the National and Regional Economy that Wilkes can Perform

The ALJ considered both Wilkes' exertional and non-exertional impairments and found multiple jobs within the labor force that she could perform. Wilkes asserts that ALJ De Steno erroneously applied the Medical-Vocational Guidelines ("grids"). The grids are to be used for purely exertional impairments. *Green v. Schweiker*, 749 F.2d 1066, 1072 (3d Cir. 1984). If a claimant has non-exertional impairments, the claimant's evidence must be rebutted by a vocational expert or other evidence. *See Gilliland v. Heckler*, 786 F.2d 178 (3d Cir. 1986). When there is a combination of

¹¹ Step four of the evaluation for determining disability is not in dispute. Wilkes does not have the residual functional capacity to perform her past relevant work (data entry) because she has a diminished capacity to sustain concentration and manipulate objects with the right hand.

exertional and non-exertional impairments, the grids can be used as a framework. However, identification of specific jobs the claimant can perform is also required. *See Welch v. Bowen*, 854 F.2d 436 (11th Cir. 1988).

ALJ De Steno properly elicited testimony from Lebowitz, a vocational expert, to assist him in determining whether there were jobs in the national and regional economy that Wilkes could perform, given her impaired concentration and physical limitations. Although in the findings section of the ALJ's opinion there is a specific finding of "not disabled" based upon the grids, there is substantial evidence to support the finding that ALJ De Steno relied upon the testimony of Lebowitz, not solely upon the grids. In his opinion, the ALJ stated that strict application of the grids was not possible because Wilkes' non-exertional limitations narrowed the possible range of work. The hypothetical question posed to Lebowitz accurately included Wilkes' age, education, work history, non-exertional limitation and residual functional capacity. In response, the vocational expert identified various jobs within the labor market that could be performed by an individual with these limitations.

Wilkes' ability to adjust to the specific jobs was clearly identified by ALJ De Steno within the findings section. This illustrates the ALJ's reliance upon the vocational expert, although not expressly stated. The ALJ utilized Lebowitz's testimony to form a determination that other jobs existed in the national and regional economy that Wilkes could perform. Therefore, the court finds that the ALJ did not solely rely on the grids and that he made a proper finding.

V. CONCLUSION

Upon review of the medical evidence, the testimony at the hearing and the post-remand hearing, and ALJ De Steno's decisions, the court concludes that the Commissioner's finding that

Wilkes was ineligible for Social Security Disability Insurance Benefits pursuant to 42 U.S.C. § 401-433 is supported by substantial evidence. ALJ De Steno's findings of fact were proper in light of the medical evidence presented. His credibility determinations regarding Wilkes' testimony and residual functional capacity are supported by substantial evidence. Finally, he properly identified jobs within the national and regional economy, through the use of a vocational expert, that Wilkes could perform.

For these reasons, IT IS HEREBY ORDERED that:

1. Wilkes' motion for summary judgment (D.I. 11) is DENIED.
2. The Commissioner's motion for summary judgment (D.I. 13) is GRANTED.
3. Judgment be and is hereby entered in favor of the Commissioner on all claims pending against him.

Dated: September 28, 2001

Gregory M. Sleet
UNITED STATES DISTRICT JUDGE