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

WARREN J. GILMORE	:	CIVIL ACTION
	:	
v.	:	NO. 06-1125
	:	
JO ANNE B. BARNHART, Commissioner of Social Security	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J. **November 20, 2006**

Warren J. Gilmore asks this Court to reverse the Commissioner's denial of his claim for Social Security disability benefits. The Magistrate Judge recommends remanding the case for further proceedings to develop the record regarding Gilmore's disability. I will adopt the Magistrate Judge's recommendation but on different grounds.

FACTS

On May 11, 2004, Gilmore filed for supplemental security income (SSI) under Title XVI of the Social Security Act, 42 U.S.C. §§ 1381-1383f. Gilmore alleged disability since October 9, 1999, as a result of back pain, blindness in the right eye, and depression. His application was denied on July 28, 2004. An Administrative Law Judge (ALJ) held a hearing on August 30, 2005, at which Gilmore was represented by counsel. On October 17, 2005, the ALJ denied Gilmore's claim. The Appeals Council denied Gilmore's request for review on February 10, 2006, making the ALJ's denial of his claim for SSI the Commissioner's final decision.

Gilmore timely filed this action pursuant to 42 U.S.C. § 405(g), seeking judicial review of the Commissioner's final decision. Both parties filed motions for summary judgment. Pursuant to

Local Rule of Civil Procedure 72.1II(a), the Court referred the case to United States Magistrate Judge Jacob P. Hart, who recommends Gilmore's motion for summary judgment be granted in part and denied in part, the Commissioner's motion for summary judgment be denied, and the matter be remanded for further development of the record as to his back impairment. The Commissioner filed timely objections.

Gilmore was born on July 23, 1952, legally blind in the right eye. He completed the tenth grade in school and later obtained a GED. Because Gilmore had not engaged in substantial gainful employment in the fifteen (15) years prior to the filing of his petition, the AlJ found Gilmore has no past relevant work experience.

Gilmore states his back problems began October 9, 1999 when a wall collapsed on him while working in construction, and when he fell three stories and landed on his back sometime after that. Gilmore first sought medical treatment for his back injury in April 2004 when he visited the office of his primary care physician, Dr. Joseph Straton and was examined by Dr. David Doukas, M.D. Gilmore complained of "constant back pain and stiffness," which was "worse with standing and alleviated with sitting," and stated "when it rains the back pain shoots to his right hip, down the side of his right leg to his right knee." R. 157. Dr. Doukas prescribed Naprosyn for pain and ordered testing.

After a physical examination of Gilmore on September 7, 2004, Dr. Straton found Gilmore had a normal range of motion in his spine and a negative response to the straight leg raising test. R. 150. An x-ray of Gilmore's lumbar spine showed "minimal misalignment L5/S1" and "minimal disc space narrowing L4/5." R. 150, 172. Dr. Straton ordered a magnetic resonance imaging study (MRI) of Gilmore's back, because the x-ray did not explain the degree of pain Gilmore reported.

He prescribed Ibuprofen and extra strength Tylenol for Gilmore's pain and recommended Gilmore attend physical therapy if his condition did not improve. On November 5, 2004, Dr. Straton found Gilmore suffered from "degenerative disc disease at L4/5 and L5/S1" and "misalignment L5/S1 facet joint arthropathy." R. 171.

Gilmore attended two sessions of physical therapy at the Penn Therapy and Fitness Center. On September 27, 2004, the therapist reported full range of motion in Gilmore's lumbar spine, sensation within the normal limits, and near normal motor strength. Gilmore's condition remained the same at his visit on November, 18, 2004.

On December 29, 2004, Dr. Curtis W. Slipman examined Gilmore for the first time and diagnosed Gilmore with lumbar internal disc disruption syndrome with somatic referral. This diagnosis was based on Gilmore's performance of lumbar discogenic provocative maneuvers, such as pelvic rock and sustained hip flexion, which reproduced Gilmore's usual symptoms. Gilmore was able to heel, toe, and tandem walk without any distress and transfer from the examination table without any protective guarding. Gilmore's straight leg raise, reverse straight leg raise, nerve root tension signs, and a variety of other movements were negative. Gilmore's range of motion of the cervical spine was normal, as well as his right and left lateral rotation and right and left lateral bending. The doctor requested further x-rays, recommended bilateral S1 transforaminal injections, and recommended surgical intervention if Gilmore failed to progress.

Dr. Slipman found Gilmore's condition had not improved during his January 14, 2005 examination. Gilmore's condition was also substantially the same during his February 11, 2005 appointment, with the exception of a negative response to lumbar discogenic provocative maneuvers. On this date, Dr. Slipman prescribed Relafen, an anti-inflammatory medication, prescribed physical

therapy, and recommended bilateral S1 transforaminal injections.

Dr. Slipman administered injections to Gilmore on March 3, 2005 and March 29, 2005. On May 29, 2005, Gilmore requested further injections, indicating to Dr. Slipman that the injections "significantly improved his symptoms to the point where he was able to function and felt, in fact, cured." R. 191. Dr. Slipman administered additional injections on June 3, and 27, 2005. During an office visit on July 21, 2005, Gilmore indicated his overall improvement was minimal. Dr. Slipman recommended surgical intervention, but Gilmore was not interested.

During his hearing with the ALJ, Gilmore testified his back pain prevented him from gardening, fishing, or spending time with his grandchildren. He stated he takes Nabumeton and occasionally Percocet for pain. Gilmore testified he was able to prepare his own meals, do some household chores, and take care of his own personal hygiene, but with difficulty and pain. Gilmore typically spends his days lying down and watching television.

During the hearing, the ALJ obtained testimony from a vocational expert (VE). The ALJ asked the VE to consider one hypothetical in which an individual was legally blind in his right eye, could lift up to 20 pounds occasionally, 10 pounds frequently, stand and/or walk for a total of six hours in an eight hour day, sit for a total of six hours in an eight hour day, push/pull with the lower extremities occasionally, climb stairs, ramps, and kneel occasionally, but never climb ladders or ropes, or crouch or crawl. The VE testified that such an individual could perform light duty, unskilled jobs that are available in the local and national economy, such as a small parts assembler or an optical frames assembler.

The ALJ posed a second hypothetical in which the individual could stand and/or walk for only two hours in an eight hour work day. The VE testified that such an individual could still work

as a small parts assembler, but the new restriction reduced the number of available jobs in Philadelphia to about 800. The VE testified such an individual could not work as an optical frames assembler.

Based on his determination of Gilmore's Residual Functional Capacity (RFC) and the VE's testimony, the ALJ found Gilmore, "was not under 'disability,' as defined in the Social Security Act, at any time through the date of [October 17, 2005]." R. 21.

DISCUSSION

This Court is bound by the ALJ's factual findings supported by substantial evidence in the record. 42 U.S.C. § 405(g); *accord Doak v. Heckler*, 790 F.2d 26, 28 (3d Cir. 1986) (citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). Substantial evidence is "more than a mere scintilla but may be somewhat less than a preponderance of the evidence." *Rutherford v. Barnhart*, 399 F.3d 546, 552 (3d Cir. 2005) (quotations omitted). It represents "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson*, 402 U.S. at 401 (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)); *Reefer v. Barnhart*, 326 F.3d 376, 379 (3d Cir. 2003).

To be considered disabled and eligible for SSI, Gilmore must demonstrate an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Gilmore would be considered unable to engage in any substantial gainful activity "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." 42 U.S.C. § 423(d)(2)(A).

Pursuant to 20 C.F.R. § 404.1520, the ALJ applied the five-step sequential evaluation process in determining Gilmore's ineligibility for SSI.[1] The ALJ's findings numbered 1, 2, 3, 5, 6 and 9 demonstrate he reached step five in the sequential evaluation process before determining that Gilmore is not entitled to SSI.[2]

The ALJ concluded Gilmore was not disabled as defined in 20 CFR § 416.964 at any time

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[1]If a claimant cannot be determined to be disabled or not disabled at any step in the sequential evaluation process, the Commissioner will proceed to the next step, as follows:

> (i) At the first step, a claimant is not disabled if he or she is doing substantial gainful activity.
> (ii) At the second step, a claimant is not disabled if he or she does not have a severe medically determinable physical or mental impairment that meets the duration requirement in 20 C.F.R. § 404.1509, or a combination of impairments that is severe and meets the duration requirement.
> (iii) At the third step, a claimant is disabled if he or she has an impairment(s) that meets or equals one of those listed in Appendix 1 of Subpart P of 20 C.F.R. § 404, and meets the duration requirement.
> (iv) At the fourth step, a claimant is not disabled if he or she can still do past relevant work, based on the Commissioner's assessment of the claimant's RFC.
> (v) At the fifth and last step, a claimant is disabled if, based on the Commissioner's assessment of the claimant's RFC, age, education, and work experience, the claimant cannot make an adjustment to other work.

20 C.F.R. § 404.1520(a)(4).

[2]The ALJ determined:

> 1. The claimant has not engaged in substantial gainful activity since the alleged onset of disability.
> 2. The claimant's back disorder is considered "severe" based on the requirements in the Regulations. (20 CFR Section 416.920(b)).
> 3. The claimant's medically determinable impairment does not meet or medically equal one of the listed impairments in Appendix 1, Subpart P, Regulation No.4.
> 5. The claimant has the residual functional capacity to lift and/or carry twenty pounds occasionally, ten frequently; stand, walk, and/or sit for a total of six hours in an eight-hour workday; push and/or pull occasionally with his lower extremities; climb stairs and ramps occasionally, ladders, ropes, and scaffolds never; stoop, balance, kneel occasionally; crouch and crawl never. The claimant is blind in his right eye.
> 6. The claimant has no past relevant work.
> 9. The claimant can make an adjustment to work with jobs that exist in significant numbers in the national and regional economies.

R. at 21.

through October 17, 2005 and that Gilmore is capable of making a successful adjustment to work in jobs which exist in significant numbers in the national and regional economies. 42 U.S.C. § 423(d)(2)(A). In evaluating the medical evidence, the ALJ rejected the medical source statement of Dr. Straton as unpersuasive and relied on Dr. Bender's RFC assessment to support his findings. *Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999) (stating the ALJ may weigh the credibility of the evidence, but must give some indication of the evidence he rejects and his reasons for discounting such evidence.) The ALJ made a discretionary decision to consult with a VE to determine Gilmore's ability to adjust to work that exists in significant numbers in the national and regional economies in accordance with 20 C.F.R. § 404.1566 (e).

The Magistrate Judge recommended remand for further development of the medical record regarding Gilmore's back impairment, concluding the ALJ's RFC assessment was improper, as it was not supported by medical evidence. The Magistrate Judge found the ALJ rejected both treating physicians' RFC assessments with regard to sitting and standing and impermissibly made an independent medical assessment as to sitting and standing by reviewing raw medical data. *Ferguson v. Schneider*, 765 F.2d 31, 37 (3d Cir. 1985) (noting "[by] independently reviewing and interpreting the laboratory reports, the ALJ impermissibly substituted his own judgment for that of a physician; an ALJ is not free to set his own expertise against that of a physician who presents competent evidence.") (citing *Van Horn v. Schneider*, 717 F.2d 871, 874 (3d Cir. 1983)).

I must review the RFC assessment of the ALJ *de novo*, because the Commissioner objects to the Magistrate Judge's Recommendation, arguing the ALJ properly made the RFC determination and the decision is supported by substantial evidence. 28 U.S.C. § 636(b)(1)(C). While the ALJ's final RFC determination is fully supported by medical evidence, the ALJ's hypothetical question to

the VE did not accurately portray Gilmore's physical impairments that were supported by medical evidence. The VE's opinion, therefore, may not be considered for purposes of determining disability and is not substantial evidence. Because the ALJ relied on the VE's opinion to determine Gilmore was not disabled, the ALJ's determination of Gilmore's disability is not supported by substantial evidence, and this case must be remanded.

An ALJ's assessment of a claimant's RFC must be "based on all the relevant evidence in [the claimant's] case record." 20 C.F.R. § 404.1545(a). Accordingly, the ALJ is obligated to:

> consider any statements about what [the claimant] can still do that have been provided by medical sources, whether or not they are based on formal medical examinations [, descriptions] and observations of [the claimant's] limitations from [his or her] impairment(s), including limitations that result from . . . symptoms, such as pain . . .

20 C.F.R. § 404.1545(a)(3).

The ALJ determined Gilmore's RFC by evaluating Gilmore's impairments based on the medical evidence in the record and his ability to perform work-related activities. As the regulations require, the ALJ considered Dr. Straton's and Dr. Bender's medical source opinions regarding Gilmore's residual abilities. In his January 7, 2005 residual functional ability assessment, Dr. Straton stated:

> Gilmore can occasionally lift and/or carry ten (10) pounds; can stand and walk for two (2) hours or less, and sit for two (2) hours or less, in an eight-hour workday; is significantly limited in repetitive reaching; will need unscheduled breaks every five (5) minutes; and will not be able to return to the job for thirty (30) to sixty (60) minutes.

R. 143–44. In contrast, on August 5, 2005, Dr. Bender, Gilmore's orthopedic specialist, assessed Gilmore as follows:

> Gilmore can occasionally lift and/or carry twenty (20) pounds; can stand and walk

> for four (4) hours, and sit for two (2) hours, in an eight-hour workday; Gilmore is not limited in repetitive reaching; and will need to take about two unscheduled breaks during an eight-hour workday.

R. 180-81.

The ALJ found Dr. Straton's evaluation unpersuasive. In rejecting this opinion, the ALJ properly explained his reasoning by stating Dr. Stranton's conclusions were unsupported by the medical evidence. *See Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999) (stating the ALJ may weigh the credibility of the evidence, but must give some indication of the evidence he rejects and his reasons for discounting such evidence). The ALJ instead indicates he relied on Dr. Bender's assessment of Gilmore to support his residual functional capacity decision.

The Magistrate Judge resoned the ALJ improperly arrived at Gilmore's RFC as to sitting and standing by making his own medical assessment based on raw medical data, instead of analyzing and choosing from the medical evidence. The Magistrate Judge correctly states an ALJ cannot make medical assessments of his own. *See Ferguson v. Schneider*, 765 F.2d 31, 37 (3d Cir. 1985) ("[by] independently reviewing and interpreting the laboratory reports, the ALJ impermissibly substituted his own judgment for that of a physician; an ALJ is not free to set his own expertise against that of a physician who presents competent evidence.") (citing *Van Horn v. Schneider*, 717 F.2d 871, 874 (3d Cir. 1983)).

The following statement by the ALJ supports the Magistrate Judge's conclusion the ALJ impermissibly analyzed raw medical data to determine Gilmore's RFC as to standing and/or walking:

> He can stand continuously for two hours at a time. Dr. Bender estimated that the claimant can do so for a total of four hours in an eight-hour workday. In fact, the evidence shows that the claimant can perform six hours of standing and/or walking in an eight-hour workday. The objective medical evidence shows only "minimal misalignment," "minimal disc space narrowing," and "mild central canal stenosis"

in the claimant's lumbar spine.

R. 19. It appears from this statement the ALJ impermissibly assessed how long Gilmore can stand by considering the "minimal misalignment," "minimal disc space narrowing," and "mild central canal stenosis" revealed in an x-ray, which would constitute raw medical data. There is not substantial evidence in the record to support a finding that Gilmore can stand and/or walk for six continuous hours.

Despite the ALJ's above statement, the ALJ's final RFC determination is fully supported by Dr. Bender's opinion. The ALJ states his reliance on Dr. Bender's opinion,[3] and his final RFC determination does not reflect the conclusion reached inappropriately by the ALJ's analysis of raw medical data. Dr. Bender stated Gilmore can stand and walk for four (4) hours, and sit for two (2) hours, in an eight-hour workday. The ALJ concluded Gilmore can stand, walk and/or sit for a total of six hours in an eight hour workday. R. 180, 21. Both RFC assessments indicate Gilmore can combine standing, walking, and sitting for a total of six hours in an eight-hour workday. Thus, the Magistrate Judge failed to evaluate whether the ALJ's apparent impermissible evaluation of raw medical data affected the ALJ's final RFC determination. I find it did not, and the ALJ's final RFC determination is supported by substantial evidence. Therefore, no relief is necessary solely on those grounds.

The ALJ's above stated conclusion that Gilmore can stand and/or walk for six hours in an eight hour work-day is not supported by the medical evidence. At the hearing held on August 30, 2005, the ALJ addressed the VE:

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[3]"The residual functional capacity set forth above requiring light exertion is supported by the opinion dated August 5, 2005, of Dr. Frank Bender . . ." R. 19.

> Okay. Let me offer to you what I would call hypothetical number one.[4] In hypothetical number one, please assume that an individual could lift up to 20 pounds occasionally, 10 frequently, *stand and/or walk for a total of six hours in an eight hour day, sit for a total of six hours in an eight hour day,* push/pull occasionally with the lower extremities, climb stairs and/or ramps occasionally, ladders, ropes, scaffolds never, stoop occasionally, balance occasionally, kneel occasionally, crouch, crawl never.

R. 257. (emphasis added). Under the ALJ's hypothetical, the VE evaluated jobs available to a person who can stand and/or walk for six hours in an eight-hour workday, or sit for a total of six hours in an eight-hour workday. There is no medical evidence to support a conclusion that Gilmore can either stand and/or walk continuously for six hours in an eight-hour workday. Likewise, there is no medical evidence to indicate that Gilmore can sit for six hours total in an eight-hour work-day. The ALJ's analysis that led him to state, "In fact, the evidence shows that the claimant can perform six hours of standing and/or walking in an eight-hour workday," R. 19, was based on the ALJ's improper evaluation of raw medical data.

A vocational expert's testimony concerning a claimant's ability to perform employment may only be considered for purposes of determining disability if the question accurately portrays the claimant's individual physical and mental impairments. *Podedworny v. Harris*, 745 F.2d 210, 218 (3d Cir. 1984). A hypothetical question is rendered defective and the expert's answer cannot be considered substantial evidence if the question does not include all the conditions affecting the claimant. *Id..; Wallace v. Secretary*, 722 F.2d 1150 (3d Cir. 1983).

The VE's opinion is not substantial evidence because the ALJ's hypothetical question to the VE did not accurately portray Gilmore's individual physical impairments that were supported by

[4] The second hypothetical the ALJ offered was in accordance with Dr. Straton's RFC assessment. R. 258. The second hypothetical is not relevant to this Court's analysis because the ALJ rejected Dr. Stanton's assessment and, therefore, did not rely on the second hypothetical.

medical evidence. The ALJ relied on the VE's assessment to determine the number of jobs available to Gilmore and to conclude he was not disabled. Therefore, the ALJ's determination of Gilmore's disability is not supported by substantial evidence.

This Court finds the ALJ's determination of disability in this case is not supported by substantial evidence, and remands the case to the Commissioner to determine if Gilmore can make an adjustment to work existing in significant numbers in the national and regional economy in accordance with 20 C.F.R. § 404.1520(a)(4).

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WARREN J. GILMORE	:	Civil Action
	:	
vs.	:	
	:	No. 06-1125
JO ANNE B. BARNHART	:	
Commissioner of Social Security	:	

ORDER

AND NOW, this 20th[th] day of November, 2006, upon consideration of the Plaintiff's Motion for Summary Judgment, and the Defendant's Motion for Summary Judgment, and after careful review of the Report and Recommendation of United States Magistrate Jacob P. Hart, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The Defendant's Motion for Summary Judgment is DENIED.

3. The Plaintiff's Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART.

4. The matter is remanded for further development of the evidence of a back impairment, possibly to include an independent medical examination, the taking of testimony from a medical expert, or the re-examination of the vocational expert.

BY THE COURT:

/s/Juan R. Sánchez
Juan R. Sánchez, J.