

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

MARIA M. JUSINO, : CIVIL ACTION  
Plaintiff :  
 :  
v. :  
 :  
 :  
JO ANNE B. BARNHART,<sup>1</sup> :  
Commissioner of Social Security, :  
Defendant : NO. 01-4902

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J.

October 21, 2002

This action was filed under 42 U.S.C. 405(g), for review of the final decision of the defendant Commissioner of Social Security ("Commissioner") denying plaintiff Maria Jusino's claim for Supplemental Security Income ("SSI") payments under Title XVI of the Social Security Act ("the Act"). Before the court are cross-motions for summary judgment. After de novo consideration of objections to the Report and Recommendation ("R & R") of Magistrate Judge Charles B. Smith to whom the motions were referred, this action will be remanded for reconsideration of the credibility of Jusino's complaints of pain and reevaluation of whether Jusino is capable of employment.

---

<sup>1</sup> Larry G. Massanari was named Acting Commissioner of Social Security on March 29, 2001. Jo Anne B. Barnhart, having succeeded Mr. Massanari as Commissioner of Social Security on November 9, 2001, is substituted as defendant Fed. R. Civ. P. 25(d)(1).

## I. BACKGROUND

### A. Procedural Background

On June 20, 2000, Jusino filed a SSI application alleging disability as of November 1, 1990 from a combination of physical and mental impairments (TR.82-83). Although disability is alleged as of November 1, 1990, the record is limited to Ms. Jusino's chiropractic records from July 17, 1992 to March 31, 1995 (mostly illegible) and medical records from December 15, 1999 to May 22, 2001.

Jusino's application for SSI was denied both initially and upon reconsideration (Tr. 44-48, 53-57). A hearing before an Administrative Law Judge ("ALJ") was held on May 3, 2001; plaintiff, represented by counsel, and a vocational expert ("VE") testified (Tr. 20-43). The ALJ determined that the Jusino has a severe impairment, but retains the residual functional capacity to perform limited light work, and is not entitled to benefits (Tr. 10-17).

The ALJ's findings became the final decision of the Commissioner when the Appeals Council denied plaintiff's request for review on August 30, 2001 (Tr. 3-4). Plaintiff appealed that decision to this court.

### B. Medical History and Summary of Physician's Reports<sup>2</sup>

---

<sup>2</sup> Adapted from Judge Smith's R & R with supplemental information from the official record.

Jusino is a forty-four year old female born on December 3, 1957 (Tr. 24). She has a sixth grade education, cannot read or write English,<sup>3</sup> and has no past work experience (Tr. 24-25, 32). The relevant evidence consists of medical reports from the Lancaster Health Alliance and testimony. As of December 15, 1999, when the medical records begin, Ms. Jusino had a medical history of "difficult to control" hypothyroidism, depression, anemia, plantar fasciitis, and chronic back pain secondary to scoliosis (Tr. 158, 166).

On January 26, 2000, Jusino returned to Dr. Nye to discuss test results and adjust her thyroid medication. She stated that she had been having persistent pain in her right upper arm for the past few months and it was getting worse. Dr. Nye noted tenderness to palpitation at Jusino's right upper extremity and down the right side of her back. He ordered x-rays of Jusino's cervical spine for spondylolisthesis<sup>4</sup> and prescribed ibuprofen for her pain (Tr. 165).

On March 10, 2000 Jusino was seen for hypothyroidism, neck and back pain. Dr. Nye stated that the x-ray of her cervical spine was negative, except for some abnormal curvature. Despite conservative treatment, Jusino was still complaining of neck and

---

<sup>3</sup> Plaintiff speaks Spanish primarily and an interpreter was present at the hearing.

<sup>4</sup> Spondylolisthesis is forward displacement of one vertebra over another. Dorland's Illustrated Medical Dictionary ("Dorland's") 1497 (28<sup>th</sup> ed. 1994).

back pain. Dr. Nye referred her to a physical therapist. Dr. Nye noted that Jusino had not been taking her medication for hypothyroidism because prior instructions were not explicit enough. He gave her more explicit instructions to which Jusino agreed. Dr. Nye also noted Jusino suffered with mild depression for which she was taking Celexa, an antidepressant (Tr. 164).

On April 14, 2000, Dr. Nye prescribed Effexor, in addition to the Celexa, for Jusino's depression (Tr. 161). On May 30, 2000, he reported that she was "feeling extremely well since being placed on Effexor" (Tr. 160).

Jusino was seen by Dr. Joseph Degenhard on June 8, 2000 at the Lancaster Health Alliance. She complained of pain in her feet and forearms, in addition to daily headaches. Dr. Degenhard noted diffuse tenderness over the lower back and in the soft tissue of both forearms. Because Ms. Jusino had a family history of arthritis, Dr. Degenhard ordered tests for arthritis (Tr. 158).

Dr. Degenhard stated on a Pennsylvania Department of Welfare Employability Assessment Form, dated June 14, 2000, that Jusino was "temporarily disabled" and would remain so until December 1, 2000 because of arthritic pain and depression. Jusino reported that leg, foot, shoulder, back, arm, and hand pain prohibited her from working (Tr. 167-168).

On June 27, 2000, Jusino was again seen by Dr. Degenhard for

evaluation of continued complaints of pain in her arms and legs. He found multiple tender points over her neck, shoulders, back, arms, sacrum, and anterior chest wall. Dr. Degenhard suspected that she might have fibromyalgia<sup>5</sup> since she also suffered from depression. He spoke with her about the importance of daily

---

<sup>5</sup>Fibromyalgia is a syndrome characterized by chronic pain in the muscles, ligaments, tendons, or bursae around joints. Earl J. Brewer, Jr., MD & Kathy Cochran Angel, The Arthritis Sourcebook (1998) <<http://mywebmd.com/content/article/1680.51250>>. It is called a syndrome because it includes a set of conditions that always occur together. Id. Fibromyalgia is not tendinitis, bursitis, or myositis, which are localized areas of pain or inflammation secondary to a disease such as rheumatoid arthritis or caused by misuse, overuse, or underuse. Id. Fibromyalgia is not a true form of arthritis because it affects soft tissue and muscle, not joints. Id.

In the past, many believed that fibromyalgia was just a psychological aberration because it has no visible signs and could not be confirmed by laboratory tests. Id. The attitude toward fibromyalgia is changing because of current research. Id. It now appears to be a disorder of the neuroendocrine system involving chemicals regulating the perception of pain. Earl J. Brewer, Jr., MD & Kathy Cochran Angel, The Arthritis Sourcebook (1998) <<http://mywebmd.com/content/article/1680.51250>>. These chemical imbalances are beyond the control of the person who feels the pain. Id.

The American College of Rheumatology established guidelines for the diagnosis of fibromyalgia. Id. The guidelines are: widespread aching that lasts more than three months and local tenderness at eleven of eighteen specified sites or trigger points. Id. All points may not be painful at all times in every person. Laboratory tests and x-rays do not establish a diagnosis of fibromyalgia. Id.

Pain is the foremost symptom of fibromyalgia. Id. It occurs in the soft tissue and has been described as burning, gnawing, sore, stiff, shooting, deep, aching, or radiating. Earl J. Brewer, Jr., MD & Kathy Cochran Angel, The Arthritis Sourcebook (1998)

<<http://mywebmd.com/content/article/1680.51250>>. The pain may vary in intensity according to the time of day, weather, activity level, stress, and sleep patterns. Id. Muscle spasms and cramping, more common at night, often keep a person from sleeping soundly. Id. Other symptoms include fatigue, tension headaches, irritable bowel syndrome, bladder disorders, joint pain, and chest pain. Id. Usually a person is stiff upon awakening and may hurt all over to the point of being unable to function normally. Id. Some persons also experience sensations of swelling of the hands, feet, and ankles when no actual swelling is noticeable. Id.

There is presently no cure for fibromyalgia. NSAIDs, a family of pain medications like Advil, aspirin, Naprosyn, and many of the other pain medications prescribed to plaintiff, do not seem to work for those suffering with fibromyalgia. Earl J. Brewer, Jr., MD & Kathy Cochran Angel, The Arthritis Sourcebook (1998) <<http://mywebmd.com/content/article/1680.51250>>. Other medications do help, and many physicians recommend a physical therapy program. Id.

exercise and maintaining a regular sleep pattern. He "assured her that with increased exercise, she would find it easier to do activities." She reported difficulty in any activity because of the pain. She also told Dr. Degenhard that she had trouble sleeping because of the generalized pain that she feels (Tr. 156, 188).

Salvatore Lullan,<sup>6</sup> Ph.D., completed a Psychiatric Review Technique Form on August 23, 2000. He opined that Jusino had an affective disorder, but that it was not severe. He noted that she had recently been on an antidepressant and had a "very good result" and that her depression was "mild." He also found Jusino's degree of limitation to be "slight" in activities of daily living and maintaining social functioning, "seldom" in concentration, persistence, and pace, and "never" in having episodes of deterioration in the workplace (Tr. 170-178).<sup>7</sup>

On August 7, Jusino saw Dr. Degenhard for a reevaluation of her multiple complaints of pain. Although she stated that the pain in her feet and arms had improved, she continued to have pain in her low back into her left buttock, down into her left leg and knee. She also complained of continued headaches and generalized fatigue. Dr. Degenhard noted several tender points

---

<sup>6</sup> This doctor's name is handwritten on the PRT form and it is unclear if this is the correct spelling.

<sup>7</sup> These responses only describe the degree of limitation Jusino experiences due to her affective disorder, depression. These responses are not in reference to limitations she experiences as a result of fibromyalgia.

over her body. He recommended physical therapy, but she said that it was difficult for her to get to the Health Campus (Tr. 189).

Dr. Degenhard saw Jusino again on September 13, 2000 for hypothyroidism, depression, and fibromyalgia. She tested positive for all of the outlined fibromyalgia tender points (18), and "questionable bilateral trace ankle edema" was also noted. Dr. Degenhard again discussed with Jusino the importance of physical therapy, but she again resisted. She was more "enthusiastic" about increasing activity to help with her fibromyalgia and depression. Dr. Degenhard referred her to the rheumatology clinic. (Tr. 191, 192).

Jusino was seen at the rheumatology clinic by Dr. Derick Brubaker on October 5, 2000. She reported having pain in most of her body. Dr. Brubaker diagnosed fibromyalgia because he found tenderness in essentially all trigger points. Jusino admitted she had not done the exercises recommended by Dr. Degenhard. She stated that she worked watching children for about two hours a day, but could not tolerate any other physical activity. She had previously tried Ultram, a pain medication, but reported experiencing increased pain and nausea. Dr. Brubaker recommended that she try the Ultram again in a lesser dose. In addition, Dr. Brubaker noted that Jusino had been "significantly hypothyroid recently" (Tr. 193).

On November 17, 2000, Jusino visited the Lancaster General Hospital Emergency Room with complaints of right-sided neck pain. Dr. Jonathan S. Gish noted muscle tenderness and prescribed Vicodin, a narcotic analgesic similar to codeine, and Advil. She was instructed to follow-up with her primary physician (Tr. 195).

Jusino was seen by Dr. Pamela Vnenchak on December 7, 2000 for fibromyalgia, hypothyroidism, depression, and shin pain. They spoke about her husband and eldest son who were causing her psychological stress and she was referred to a psychologist. In addition, Dr. Vnenchak confirmed multiple fibromyalgia trigger points with full range of motion (Tr. 196).

On January 29, 2001, Dr. Degenhard saw Jusino for depression, fibromyalgia, shin and back pain, and difficulty sleeping. Tenderness was detected over her legs, ankles, back, shoulders, neck, and extremities. Dr. Degenhard prescribed Feldene (piroxicam), a non-steroidal pain medication, which had previously helped, and referred her to Dr. Peggy Nepps for counseling (Tr. 197).

Jusino saw Dr. Vnenchak again on March 13, 2001. She was troubled by soreness in her lower back and arms. She also complained that the skin on her back was so sensitive that even the lightest touch causing pain. Dr. Vnenchak increased the strength of her piroxicam prescription (Tr. 199).

On March 22, 2001, Jusino returned to the Lancaster Health



Clinic because of right lower extremity pain, tenderness, and inflammation. She was diagnosed with superficial phlebitis (inflammation of a vein). Dr. Vnenchak prescribed Indomethacin, a potent anti-inflammatory medication, and suggested she keep her feet elevated and remain home from work the next day (Tr. 200).

Dr. Althea Nelson of the Lancaster Health Alliance examined Jusino on May 9, 2001 for pain in her hip and knee (Tr. 201). On May 22, 2001, Dr. Nelson examined knee and hip x-rays that showed "no bony abnormality" (Tr. 202-203). She increased the dosage of Jusino's thyroid medication and prescribed Amitriptyline before bedtime for fibromyalgia (Tr. 204).

On May 30, 2001, Dr. Nelson filled out a Fibromyalgia Residual Functional Capacity Questionnaire ("FRFCQ"). She stated that Jusino had multiple fibromyalgia trigger points, a depressed affect, and lower-extremity swelling (Tr. 180). She reported that Jusino could only sit 15 minutes, stand for 15 minutes, sit for a total of about 2 hours, stand/walk for a total of about 2 hours in an 8-hour workday, and occasionally lift 10 pounds (Tr. 183, 184). Dr. Nelson determined Jusino would not have "significant limitations" in doing repetitive reaching, handling, or fingering (Tr. 185), her pain was "seldom" severe enough to interfere with her attention and concentration, and she could tolerate moderate stress in a job (Tr. 182).

Dr. Nelson noted as a result of Jusino's impairments and

treatment, she would likely be absent from work about three times a month (Tr. 185). Jusino identified the following factors that would precipitate her pain: changing weather, cold, fatigue, hormonal changes, movement/overuse, static position, and stress (Tr. 182). Dr. Nelson did not view Jusino as a malingerer (Tr. 181).

There were some inconsistencies in Dr. Nelson's responses to the FRFCQ. She stated that Jusino could only sit for about 2 hours and stand/walk for a total of about 2 hours in an 8 hour workday (Tr. 183). This would imply that Jusino could work for approximately 4 hours in an 8-hour workday, but Dr. Nelson continued to answer questions regarding an 8-hour workday. She stated in the FRFCQ that Jusino would have to take unscheduled 10 minute breaks every four hours (Tr. 184). Elsewhere in the FRFCQ, she reported that Jusino would need 3 minute periods of walking around every 15 minutes in an 8-hour workday (Tr. 183).

Jusino testified at the administrative hearing that she does a little bit of housework, but needs the help of her four children and her 63 year-old mother who also lives with her. She does grocery shopping with a friend and works two hours a day watching children at an elementary school two blocks from her house.<sup>8</sup> She does not do exercises the doctors prescribed because

---

<sup>8</sup> Jusino's original job at the elementary school was cleaning lunch tables, but because this brought on pain in her arms, the principal now requires her only to watch and/or supervise the school children (Tr. 33).

they are very painful and the physical therapy center is far from her home (Tr. 27-35).<sup>9</sup>

A vocational expert also testified. The ALJ asked the VE if a hypothetical person with the Jusino's vocational profile and the following limitations could perform any gainful activity: limited to light work, can lift no more than 10 pounds at a time, stand/walk no more than 6 hours and sit no more than 6 hours in an 8-hour workday with a sit/stand option, limited use of the English language, with mild to moderate limitations in concentration and attention, and mild to moderate difficulty interacting with co-workers.<sup>10</sup> The VE responded that such a person could perform work as a conveyor line bakery worker, a hand packer, a dowel inspector, or a plastic design applicator and that such jobs exist in significant numbers in the local and national economy (Tr. 38-41).

The ALJ posed three additional hypotheticals for the purpose of determining whether Jusino is disabled within the meaning of the Act. First, she asked the VE to add the following limitations to the original hypothetical: this person has the ability to handle a moderate degree of stress, must avoid

---

<sup>9</sup> Ms. Jusino does not have a drivers' license (Tr. 25).

<sup>10</sup> Jusino's limitations in the ALJ's hypothetical differed from her description of physical limitations due to pain and the limitations described by Dr. Nelson. Ms. Jusino testified that she felt that she could not work for more than 2 hours a day, even with a sit/stand option (Tr. 33). Dr. Nelson concluded that Ms. Jusino could sit and stand/walk for about 2 hours each in an 8-hour workday on plaintiff's Fibromyalgia Residual Functional Capacity Questionnaire (Tr. 180-185).

exposure to cold, can twist occasionally, and can occasionally raise her extremities. The VE responded that the previously cited jobs would not be available to such a person (Tr. 40-41).

Second, she asked the VE to add the following conditions to the original hypothetical: the need for unscheduled breaks and at least three absences from work every month. The VE replied that the jobs he previously cited would not be available to such a person (Tr. 41).

Third, if the ALJ credited Jusino's testimony "as to severe and constant pain, which would give her a moderate to severe inability to maintain concentration, [and] persistence in pace," the VE opined that there would be no substantial work that such a person could perform (Tr. 41).

The ALJ found that Jusino has a severe impairment, but this impairment does not limit her ability to perform limited light work, thus Jusino is not entitled to benefits. The ALJ's findings became the final decision of the Commissioner when the Appeals Council denied Jusino's request for review. Plaintiff appealed that decision to this court. Cross-motions for summary judgment were referred to Magistrate Judge Smith. Judge Smith filed a R & R, recommending that Jusino's motion for summary judgment be denied and the Commissioner's motion for summary judgment be granted. Ms. Jusino has filed three objections to Judge Smith's R & R recommending summary judgment in favor of the

Commissioner. She claims that the ALJ erred by failure to: (1) assess her combination of impairments; (2) consider the impact of non-exertional limitations on her ability to perform work when determining residual functional capacity ("RFC"); and (3) find her testimony credible.

## II. DISCUSSION

This court reviews objections to the R & R de novo, 28 U.S.C. § 636(b)(1)(C), but applies the substantial evidence standard in reviewing the ALJ's findings of fact. 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 390 (1971). The reviewing court shall accept as conclusive the factual findings of the Commissioner as long as those findings are "supported by substantial evidence." 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 390 (1971). Substantial evidence is "such evidence as a reasonable mind might find as adequate." Plummer v. Adfel, 186 F.3d 422, 427 (3d Cir. 1999) (quoting Ventura v. Shalala, 55 F.3d 900, 901 (3d Cir. 1995)).

Under the Social Security Act, a person is "disabled" for the purpose of SSI eligibility if she or he is unable to "engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42

U.S.C. § 1382(a)(3)(A). The regulations under the Act establish a five-step sequential evaluation process that the Commissioner must use when determining whether an applicant is disabled within the meaning of the Act. 20 C.F.R. § 416.920. The ALJ must consider, in sequence, whether a claimant: (1) is working and the work is considered substantial gainful activity within the meaning of the Act; (2) has a severe impairment or combination of impairments which significantly limits the ability (physical or mental) to do basic work activities; (3) has an impairment(s) which meets or equals an impairment listed in 20 C.F.R. Part 404, Subpart P, Appendix 1; (4) is prevented by the impairment(s) from doing past relevant work; and (5) is prevented by the impairment(s) from doing any other work which exists in the national economy. 20 C.F.R. § 416.920; see also Olsen v. Schweiker, 703 F.2d 751, 753 (3d Cir. 1983). If a positive or negative disability determination can be reached at any of the five steps, further inquiry is unnecessary. See Santise v. Schweiker, 676 F.2d 925, 927 (3d Cir. 1982), cert. denied, 461 U.S. 911 (1983).

#### A. Combination of Impairments

Jusino contends that when assessing the severity of a claimant's impairments, 20 C.F.R. §§ 401.1523 and 416.923 require the adjudicator to consider the effect of the impairments in combination, rather than assessing the effect of each impairment

existed alone.

In her decision, ALJ noted specifically that "a medically determinable impairment or combination of impairments is severe if it significantly limits an individual's physical or mental ability to do basic work activities (20 CFR § 416.921)" (Tr. 11). She recognized that if a severe impairment exists, "all medically determinable impairments must be considered in the remaining steps of the sequential analysis (20 CFR § 416.923)" (Tr. 11). The ALJ determined that Jusino's scoliosis, fibromyalgia, hypothyroidism, and depression were severe impairments within the meaning of the Regulations (Tr. 11); but her plantar fasciitis, anemia, headaches, and urinary tract infections did not cause significant limitations and were not severe impairments (Tr. 12). After this determination, the ALJ proceeded to Steps 3 through 5 and determined Jusino's disability status based on "the totality of the evidence" (Tr. 13).

The ALJ considered the combination of impairments in reaching her decision; the ALJ did not err in assessing Jusino's combination of impairments.

#### B. Non-Exertional Limitations

Jusino claims that in determining her residual functional capacity ("RFC"), the ALJ erred by not considering the impact of her non-exertional limitations on her ability to perform work.

See 20 C.F.R. § 416.969(a) (defining exertional and non-exertional limitations and explaining how they are to be evaluated). Jusino contends the ALJ ignored substantial evidence regarding her inability to communicate in English.

At Steps 4 and 5 of the sequential evaluation process (if it is reached), the ALJ must determine whether the claimant has the RFC to perform the requirements of her past relevant work or other work existing in the national economy. 20 C.F.R. § 416.920(e), (f)(1). A claimant's RFC (residual functional capacity) is defined as the most an individual can still do after considering the effects of physical and/or mental limitations affecting the ability to perform work-related tasks. 20 C.F.R. § 416.945.

The ALJ enlisted the assistance of an impartial vocational expert ("VE") in determining whether jobs exist in the national economy for an individual of the claimant's age, education, past relevant work experience, and RFC. In presenting her characteristics to the VE, the ALJ asked the VE to assume that "[Ms. Jusino] can't be in a job that requires a command of the English language" (Tr. 39). In addition, Jusino, by testifying through an interpreter at the administrative hearing, made it clear to the VE that she spoke Spanish. The VE determined there were jobs available to Jusino, despite her inability to communicate in English.



The inability to speak, read, or write English does not preclude substantial gainful employment or determination of "not disabled." See Diaz v. Apfel, No. 98-1676, 1999 WL 12965, at \*5 (E.D. Pa. Nov. 8, 1999). The ALJ concluded, considering Jusino's personal characteristics, such as limited command of the English language, that Jusino was capable of making a successful adjustment to work that exists in the national economy. There is substantial evidence in the record that the ALJ considered Jusino's limited command of the English language.

There is not substantial evidence that the ALJ considered other non-exertional limitations, posed in her hypotheticals, in her final determination that Jusino is capable of employment. The ALJ's determination was inconsistent with the additional hypotheticals she posed to the VE. The ALJ modified her original hypothetical by adding some of the restrictions Dr. Nelson listed in the FRFCQ. For example, she asked the VE to consider that Ms. Jusino needed to take unscheduled breaks, might be absent at least three times a month, could only twist and raise her extremities occasionally, and/or should avoid exposure to cold. The VE responded that there would be no work available in the national economy that such a person could perform (Tr. 41). In her decision, the ALJ ignored this testimony of the VE. The ALJ disputed Dr. Nelson's determination that Jusino could sit for 2 hours and stand/walk for 2 hours of an 8-hour workday (Tr. 14),

but did not explain why she rejected the additional qualifications Dr. Nelson included in the FRFCQ. Furthermore, she did not explain why she rejected the modified versions of the hypothetical in favor of the original, incomplete version. The ALJ's decision was inconsistent with the modified hypotheticals that included the medical opinion of Dr. Nelson. Consideration of other non-exertional factors is not supported by the record. On remand other non-exertional limitations and their impact on Jusino's ability to work should be considered.

#### C. Credibility Determination

Jusino objects to ALJ's finding that she was not entirely credible. She takes issue with the ALJ's credibility determination, because of the underweight the ALJ gave to Jusino's limitations, the overweight given to Jusino's ability to perform certain daily activities, and the overweight given to her noncompliance with recommended medical treatment.

First, Jusino alleges that the ALJ failed to follow S.S.R. 96-7p, 1996 WL 374186, at \*6 (S.S.A.). S.S.R. 96-7p states that "allegations concerning the intensity and persistence of pain or other symptoms may not be disregarded solely because they are not substantiated by objective medical evidence." See Ferguson v. Schweiker, 765 F.2d 31, 37 (3d Cir. 1985); Smith v. Califano, 637 F.2d 968, 972 (3d Cir. 1981); Rodriguez v. Schweiker, 523 F.

Supp. 1240, 1246 (E.D. Pa. 1981).

The ALJ concluded that "claimant's allegations as to her limitations and inability to work are not supported by the medical evidence" (Tr. 12). She rejected specifically Dr. Nelson's findings in the FRFCQ (Tr. 180) because Jusino "has consistently had full range of motion, normal strength in the extremities and no signs of swelling" (Tr. 14). This is correct, except for two documented incidents of swelling (Tr. 180, 200), but it is not inconsistent with fibromyalgia. A fibromyalgia syndrome does not affect the joints; it affects soft tissue or muscle. It often causes pain while a person is motionless; that person may not (and often does not) experience swelling or limited range of motion. The only way to identify fibromyalgia objectively is to perform a tender point test; it is undisputed that Ms. Jusino received a positive diagnosis of fibromyalgia syndrome.

"[A]n ALJ is not free to set [her] own expertise against that of a physician who presents competent evidence." Ferguson, 765 F.2d at 37. Considering the diagnosis of fibromyalgia, there is no basis for her finding that "[t]he claimant's allegations ... are not supported by the medical evidence" (Tr. 13).

The ALJ also stated that Dr. Nelson and Dr. Degenhard's opinions are not supported "by claimant's activities of daily living, which include cooking, shopping, taking care of four

children and some cleaning" (Tr. 14). In Smith v. Califano, 637 F.2d at 971, the ALJ relied heavily on the fact that the claimant went shopping and hunting, and had full use of his hands, arms, and legs in concluding that the claimant did not have a statutory disability. The ALJ's conclusion was found "too speculative to be sustainable." Id. "[S]tatutory disability does not mean that a claimant must be a quadriplegic or an amputee.... Disability does not mean that a claimant must vegetate in a dark room excluded from all forms of human and social activity." Id.

"The ability to do light housework, attend church, or visit with friends on the phone does not qualify as the ability to do substantial gainful activity." Thomas v. Sullivan, 876 F.2d 666, 669 (8<sup>th</sup> Cir. 1989). Thomas lived alone, cared for herself and her children, cooked, cleaned, shopped for groceries, did laundry, visited friends, attended church, and went fishing. Id. at 669. A social security claimant "must have the ability to perform the requisite acts day in and day out, in the sometimes competitive and stressful conditions in which real people work in the real world" and "need not prove she is bedridden or completely helpless to be found disabled." Id.

Ms. Jusino testified at the administrative hearing that, with the help of her four children and 63 year-old mother who lives with her, she does "just a little" of the following: kitchen cleaning (but must alternate hands), dishes, laundry, and

sweeping (Tr. 30). She also does grocery shopping with a friend and works two hours a day watching children at an elementary school two blocks from her house. See Cline v. Sullivan, 939 F.2d 560, 565-66 (overturning the denial of social security disability benefits for a plaintiff who suffered from fibromyalgia, but held a part-time job as a hostess; “[a]n ALJ should not penalize a claimant who, prior to an award of benefits, attempts to make ends meet by working in a modest, part-time job”).

“Where a claimant’s testimony as to pain is reasonably supported by medical evidence, the ALJ may not discount claimant’s pain without contrary medical evidence.” Witmer v. Barnhart, 2002 WL 485663 at \*3 (E.D. Pa. March 28, 2002); Smith v. Califano, 637 F.2d 968, 971 (3d Cir. 1981); Green v. Schweiker, 749 F.2d 1066, 1068 (3d Cir. 1984). The ALJ did not support her opinion with any contrary medical evidence.

Jusino also claims that the ALJ failed to follow S.S.R. 82-59 when considering her noncompliance with prescribed thyroid medication. S.S.R. 82-59, 1982 WL 31384 (S.S.A.), requires the ALJ to determine whether failure to follow prescribed treatment was justified. Jusino claimed she experienced various negative side-effects with certain thyroid medications; the ALJ did not address this.

The ALJ’s credibility determination is not supported by

objective credible evidence. This case is remanded to the Commissioner to reconsider Jusino's complaints of pain and reevaluate whether Jusino is capable of employment. After reevaluating Jusino's complaints of pain, the ALJ should also reconsider the appropriateness of the hypotheticals posed to the VE.

### **III. CONCLUSION**

For the foregoing reasons, this court declines to approve the R & R. This action will be remanded to the Commissioner to reconsider Jusino's complaints of pain and reevaluate whether Jusino is capable of employment.

An appropriate order follows.

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

MARIA M. JUSINO, : CIVIL ACTION  
Plaintiff :  
 :  
v. :  
 :  
 :  
JO ANNE B. BARNHART, :  
Commissioner of Social Security, :  
Defendant : NO. 01-0912

ORDER

AND NOW, this 21st day of October, 2002, upon consideration of the cross-motions for summary judgment, de novo review of the Report and Recommendation of United States Magistrate Judge Charles B. Smith, the objections thereto, and for the reasons stated in the foregoing Memorandum, it is hereby **ORDERED** that:

1. The Report and Recommendation is **NOT APPROVED**
2. Plaintiff's motion for summary judgment is **DENIED**;
3. Defendant's motion for summary judgment is **DENIED**;
4. This case is **REMANDED** to the Commissioner of Social Security **FORTHWITH** for reconsideration in accordance with the foregoing Memorandum.

---

S.J.