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

CARL IRA NELSON, JR.	:	CIVIL ACTION
	:	
v.	:	NO. 05-3674
	:	
JO ANNE B. BARNHART, Commissioner of Social Security	:	

MEMORANDUM AND ORDER

Juan R. Sánchez, J. **August 7, 2006**

Carl I. Nelson, Jr., injured in a two-story fall, asks this Court to reverse the Commissioner's denial of his claims for Social Security benefits. Because this Court finds the record does not support the decision Nelson's injuries were not disabling, the case is remanded for further proceedings.

FACTS

On December 2, 2002, Nelson protectively filed for disability insurance benefits ("DIB") and supplemental security income ("SSI") under Titles II and XVI of the Social Security Act, respectively. 42 U.S.C. §§ 401-433, 1381-1383f.[1] Nelson said he was disabled by high blood pressure, recovery from a collapsed lung, fractures in his lower lumbar spine, a separated shoulder, nerve damage, sharp pains in his right rib cage, as well as leg, shoulder, and back pain. (Administrative Record, "R.," 62.) Both applications were denied on April 9, 2003. (R. 43-46.) An Administrative Law Judge ("ALJ") held a hearing on August 13, 2004, at which Nelson was represented by counsel.

[1] Because "the regulations implementing the Title II disability standard, 42 U.S.C. § 423(d) . . . and those implementing the identical Title XVI standard, § 1382c(a)(3) . . . are the same in all relevant respects," the Court will cite only to Title II and to those regulations promulgated thereunder. *Sullivan v. Zebley*, 493 U.S. 521, 526 n.3 (1990) (comparing 20 C.F.R. §§ 404.1520-1530 with §§ 416.920-930).

(R. 213-36.) On September 21, 2004, the ALJ denied Nelson's claims. (R. 18-29.) The Appeals Council denied Nelson's request for review on May 16, 2005, making the ALJ's denial of his claims for DIB and SSI the Commissioner's final decision. (R. 8-10.)

Nelson 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 Peter B. Scuderi, who recommends Nelson's motion for summary judgment be denied, the Commissioner's motion for summary judgment be granted, and the final decision of the Commissioner be affirmed. Nelson filed timely objections.

Nelson was born on March 7, 1959, and was forty-five years old at the time of the ALJ's decision. (R. 55, 216.) He has a high school education and has attended some college courses. (R. 217.) Prior to his injury in August of 2002, Nelson had been employed for approximately five years as a security guard at a private club, where he interceded in altercations, moved furniture, and periodically counted money. (R. 218.) His prior relevant work history includes employment with Verizon as a frame attendant, where he installed interior telephone lines. (R. 219.)

On August 14, 2002, Nelson was admitted to the hospital after falling from a second story window. (R. 83.) Hospital records indicate that he suffered no loss of consciousness and complained of right anterior chest pain. (*Id*.) A CT scan of Nelson's head showed no evidence of intracranial injury or abnormality. (*Id.*) On August 23, 2002, Nelson underwent surgery for his collapsed right lung, which procedure he tolerated well. (R. 89-90.) Nelson was discharged from the hospital on September 1,

2002, with diagnoses of high blood pressure, partially fractured vertebrae in his lower back, and air and blood in his chest cavity as a result of his collapsed lung.[2] (R. 83.) His medications included the narcotic pain-killer Percocet and a Fentanyl patch. (*Id.*)

In the year and a half following his August, 2002 trauma, Nelson underwent various radiological procedures and received medical treatment and evaluation from a variety of doctors and specialists including Martha Zubritzky, M.D. (family physician), William Chollak, M.D. (orthopedic specialist), Thomas Zavitsanos, M.D. (pain management specialist), and David Mahalick, Ph.D. (clinical neuropsychologist). In addition, Gerald Gryczko, M.D., performed a Residual Functional Capacity Assessment ("RFC")[3] for the Commissioner, and Mohammad Jaffari, M.D., an orthopedist, evaluated Nelson for the Pennsylvania Bureau of Disability Determination.

Dr. Chollak, the orthopedic specialist, first evaluated Nelson on October 1, 2002, and diagnosed his right shoulder separation. (R. 129.) Nelson demonstrated good range of motion in his shoulder, and the doctor recommended rehabilitation in lieu of surgery. (*Id.*) During a follow-up visit with Dr. Chollak on November 5, 2002, the doctor reviewed with Nelson the results of an MRI of his lumbar spine performed on October 27, 2002, which indicated mild degenerative disc disease and spondylosis without significant stenosis.[4] (R. 128, 173.) Dr. Chollak advised Nelson he is predisposed to back problems. (R. 128.) On a subsequent visit in February of 2003, Dr. Chollak told Nelson nothing surgical was indicated to alleviate his back pain. (R. 126.) On May 12,

[2] Nelson suffered from right pneumothorax; L1, 2, and 3 transverse process fractures; loculated hemothorax; and hypertension. Pneumothorax and loculated hemothorax are the presence in the pleural cavity of free air and blood, respectively. STEDMAN'S MEDICAL DICTIONARY 807, 1412 (27th ed. 2000) (*SMD*).

[3] "'Residual functional capacity' is defined as that which an individual is still able to do despite the limitations caused by his or her impairment(s)." *Hartranft v. Apfel*, 181 F.3d 358, 359 n.1 (3d Cir. 1999) (citing 20 C.F.R. § 404.1545(a)).

[4] Nelson's spondylosis, the stiffening of his vertebral joints as the result of a disease process, did not result in significant narrowing of his spinal canal. *SMD* at 90, 1679, 1695.

2003, Dr. Chollak reiterated that orthopedic intervention for Nelson's back was unrealistic, found Nelson's motor skills, senses and reflexes intact, and administered a straight-leg raising test, which Nelson passed. (R. 156.)

Dr. Zubritzky, Nelson's family physician, and Dr. Gryczko, a nonexamining physician, completed differing assessments of Nelson's work-related limitations in March and April of 2003, respectively. (R. 134-35, 136-43.) Dr. Gryczko explained the significant difference between the doctors' opinions by stating his was an assessment of Nelson's projected RFC, based on anticipated improvement in Nelson's symptoms through further pain management. (R. 141-42.)

On March 26, 2003, Nelson visited Dr. Zavitsanos, the pain management specialist, for the first time. (R. 148.) Nelson walked with a marked rightward list due to muscle spasms in his back and chest, passed a straight-leg raising test, and performed heel, toe, and tandem walking. (R. 148-51.) Dr. Zavitsanos's diagnoses included multiple rib fractures, possible history of lumbar compression fractures, lumbar facet joint arthropathy, bilateral sacroiliitis, intercostal neuralgia, and severe thoracic myofascial pain disorder.[5] (R. 150.) Upon re-examination by Dr. Zavitsanos in September of 2003, Nelson passed a straight-leg raising test, exhibited some quadriceps, knee extension and flexion weakness, and complained of exquisite rib and lumbar tenderness. (R. 161.) The doctor's March diagnoses were largely unchanged in September, though Nelson's bilateral sacroiliitis was noted to be "quiescent," his severe myofascial pain "improved," and his intercostal neuralgia "residual." (*Id.*)

[5] Arthropathy and sacroiliitis together indicate inflammation of the sacroiliac joint, located below the lumbar vertebrae and above the fused segment of the vertebral column that forms part of the pelvis. *SMD* at 150, 1587. Intercostal neuralgia is pain of a severe character between the ribs, (*id.* at 910, 1206), and the origins of thoracic myofascial pain are sheets of tissue that enclose muscles in the chest. (*Id.* at 647.)

On October 28, 2003, Dr. Jaffari performed an orthopedic evaluation of Nelson for the Pennsylvania Bureau of Disability Determination. (R. 164-65.) Although the doctor was able to make some preliminary observations and test Nelson's grip strength in both hands, he could not properly evaluate Nelson's range of motion and could not come to any definite conclusions and recommendations, because he "did not have the necessary cooperation and help from [Nelson]." (*Id.*)

On a questionnaire related to his disability claim, Nelson stated he used to engage actively in martial arts, weightlifting, juggling, basketball, and recreation with his children. (R. 78.) During his hearing with the ALJ, Nelson testified the ever-present pain prohibits any activity or care for his children. (R. 230.) Nelson stated he takes blood pressure medication, and uses a narcotic patch, Valium, Neurontin, and Daypro [phonetic] for pain. (R. 220-21.) Nelson experiences side effects from these medications including dizziness and fatigue. (*Id.*) Dr. Zubritzky has accordingly instructed him not to drive. (R. 222.) Nelson typically spends his days reclined on his couch watching television, sleeping, reading as dizziness and fatigue permit, and occasionally engaging in some light walking at Dr. Zubritzky's suggestion. (R. 223-26.) Nelson requires assistance in preparing meals, bathing and dressing. (R. 76-82, 224-26.)

At Nelson's administrative hearing, the ALJ obtained testimony from a vocational expert ("VE"). (R. 231-34.) The VE testified that Nelson's past relevant work as a security guard was light, semi-skilled work, and his work as a frame attendant was medium, skilled work. (R. 231.) The ALJ asked the VE to consider a hypothetical individual of Nelson's age, education, and past work experience who required a low stress work environment, was limited to work involving simple decision making due to

occasional lapses in concentration, and had the RFC to lift up to ten pounds frequently, stand and/or walk for a total of two hours, and sit for a total of six hours in an eight-hour workday. (R. 232-33.) The VE testified that such an individual (1) could not perform Nelson's past work as a security guard because the lifting requirements of such work exceeded that individual's lifting capacity, but (2) could perform sedentary jobs that exist in the local and national economy, such as information clerk, alarm system monitor, and dispatcher. (R. 233-34.) The VE also testified that a hypothetical person could not work if they could only perform less than sedentary work.[6] (R. 234.)

Based on his determination of Nelson's RFC to perform sedentary work and the VE's related testimony, the ALJ found Nelson "is not entitled to a period of disability or to [DIB] and is not eligible for [SSI] as he was not disabled as defined in the Social Security Act, as amended, at any time through [September 21, 2004]." (R. 27.)

DISCUSSION

This Court is bound by the ALJ's factual findings supported by substantial evidence in the record. 42 U.S.C. § 405(g); *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*

[6] "Sedentary work involves lifting no more than 10 pounds at a time . . . ." 20 C.F.R. § 404.1567. A sedentary job should require no more than approximately 2 hours of standing or walking per eight-hour work day, and sitting should typically amount to six hours per eight-hour work day. *See* Social Security Administration, Social Security Ruling No. 83-10.

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 DIB and SSI, Nelson 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 [twelve] months." 42 U.S.C. § 423(d)(1)(A). Nelson 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 Nelson's ineligibility for SSI and DIB benefits.[7] The ALJ's findings numbered 7, 8, 13, and 14 demonstrate he reached step five in the

[7] 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).

sequential evaluation process before determining that Nelson is entitled to neither a closed period of disability nor DIB and SSI.[8] (R. 27.)

Nelson argues the ALJ's determination that he can engage in substantial gainful activity – based on his RFC to perform sedentary work and testimony by the VE – is not supported by substantial evidence. Specifically, Nelson claims the ALJ erred in weighing the medical evidence of record, and improperly evaluated the severity of Nelson's pain. Because this argument was renewed as an objection to the Magistrate Judge's recommendation, this Court makes a *de novo* determination of its merit. 28 U.S.C. § 636(b)(1)(C).

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[, and] 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).[9]

[8] The ALJ determined

> 7. [Nelson] has the residual functional capacity to perform the functional demands of a range of sedentary level (20 C.F.R. 404.1545 and 416.945).
> 8. [Nelson] is unable to return to his past relevant work. . . .
> 13. The vocational expert testified that an individual of [Nelson's] age, education, vocational background, and residual functional capacity could perform sedentary, unskilled occupations which exist in significant numbers in the national economy. . . .
> 14. [Nelson] was not under a disability, as defined in the Social Security Act, at any time through the date of this decision (20 C.F.R. 404.1520(g) and 416.920(g)). (R. 28-29.)

[9] As the regulation indicates, Nelson's two pronged argument – improper weighing of evidence, and incorrect evaluation of symptom severity – is essentially a single assignment of error to the ALJ's RFC assessment made at step four of the five-step sequential evaluation process. *See* 20 C.F.R. § 404.1545(a)(5). However, because this Court determines remand to the Commissioner is the appropriate result in this case, based on analysis of the first prong of Nelson's argument alone, the second prong will not be addressed.

The ALJ determined Nelson's RFC by establishing the extent of Nelson's impairments based on the medical evidence of record, and determining the resultant limitations on Nelson's ability to perform work-related activities. As the regulations require, the ALJ considered medical source opinions regarding Nelson's residual abilities: Dr. Zubritzky's, which was based on medical examinations; and Dr. Gryczko's, which was based on a review of the medical record.[10] In her March 5, 2003, Medical Source Statement of Nelson's ability to perform work-related physical activities, Dr. Zubritzky, Nelson's treating physician, stated:

> Nelson can occasionally lift and/or carry two (2) to three (3) pounds; can stand and walk for one (1) hour or less, and sit for one (1) to two (2) hours, in an eight-hour workday; is limited in pushing and pulling with his upper and lower extremities, with such ability possible "only if on pain medication"; can never engage in postural activities; cannot reach due to pain with movement; and should avoid vibration and dampness.

(R. 134-35.) In contrast, on April 7, 2003, Dr. Gryczko, a physician for the State Disability Determination Service, assessed Nelson's RFC as follows:

> Nelson can occasionally lift and/or carry twenty (20) pounds, including upward pulling; frequently lift and/or carry ten (10) pounds, including upward pulling; stand and/or walk with normal breaks for about six (6) hours in an eight-hour workday; sit with normal breaks for about six (6) hours in an eight-hour workday; frequently balance, stoop, kneel, and crouch; and occasionally climb or crawl.

(R. 137-38.) The differences between the two RFC assessments are clear, and Dr. Gryczko's is dispositive of Nelson's capacity to perform sedentary, as opposed to less

[10] Additionally, the ALJ considered Nelson's own statements regarding his residual abilities. On his initial application, Nelson noted, "I can't sit, stand or walk for a long period of time." (R. 62.) Nelson later stated on a March 10, 2003, questionnaire, in relevant part, he could only climb twelve steps before resting, only climb a flight of steps three or four times a day, only walk fifty yards without stopping, only remain sitting for fifteen minutes at a time, only lift and carry up to five pounds, and he could not tie his shoes. (R. 76-82.) Nelson also addressed his residual abilities at the administrative hearing: as of August, 2004, he could only lift less than five pounds, he could not stand or sit for more than a few minutes, and although he did minimal walking at the suggestion of his doctor, most days were spent lying on his couch. (R. 223-24.)

than sedentary work.[11] The ALJ's final RFC determination closely reflects that of Dr. Gryczko, with adjustments for Nelson's pain and lapses in concentration. (R. 20-21.)

Nelson specifically argues the ALJ improperly rejected the opinions of his treating physicians, Drs. Zubritzky, Chollak, and Zavitsanos, and relied instead on those of Dr. Gryczko, a nonexamining source, in assessing Nelson's RFC. Evidently, the ALJ compared the apparently divergent opinions of Drs. Zubritzky and Gryczko with the objective medical evidence, and characterized the latter doctor's as "more consistent with the medical evidence and the evidence of [Nelson's] ability to function." (R. 23.) It is clear from the ALJ's analysis he proceeded as if he were confronted with conflicting assessments of Nelson's work-related limitations – one from a treating source, the other from a nonexamining source – from which he had to choose based on the extent to which they are supported by the medical evidence. After independently reviewing the record, however, this Court determines the assessments of Drs. Zubritzky and Gryczko were in accord as of April 7, 2003.[12]

Specifically, in response to an invitation to "explain why [Dr. Zubritzky's March 5, 2003, assessment is] not supported by the evidence in the file," Dr. Gryczko noted the "assessment reflects the current status as opposed to the projected RFC."[13] (R. 142.) The ALJ's statement that Dr. Gryczko's opinion is "more consistent with the medical

[11] Sedentary work requires that a claimant be able to lift "no more than 10 pounds at a time." 20 C.F.R. § 404.1567; *see supra* note 6. In connection with the VE testimony at Nelson's hearing that the ability to perform only less than sedentary work "precludes a person from working," (R. 234), Dr. Zubritzky's opinion that Nelson's lifting capacity was limited to two or three pounds indicates that, in her opinion, Nelson retained the ability to perform only less than sedentary work.

[12] For this reason, it is unnecessary to decide whether or not the ALJ's decision to afford Dr. Gryczko's assessment greater weight was improper under the relevant regulations.

[13] Although Dr. Gryczko's handwritten notes are difficult to read, the above-quoted passage is reasonably clear, as are his indications that "[s]tatements are *partially credible* as [illegible] with pain [illegible] relieved for 2-4 hours. [Nelson] is able to climb 12 steps or walk 50 [illegible] lifting up to 5 lbs. possible; additional pain management is anticipated with further improvement anticipated." (R. 141) (emphasis original). Given their identical content, it is reasonable to believe that the statements to which the doctor refers are those that Nelson recorded on a disability-related questionnaire on March 10, 2003. *See supra* note 10.

evidence and the evidence of the [Nelson's] ability to function," (R. 23), fails to consider the significance of a "projected RFC" based on anticipated improvements resulting from further pain management. Dr. Gryczko did nothing to suggest Dr. Zubritzky's RFC was not supported by the evidence. On the contrary, he endorsed it as reflecting Nelson's then-current status. It was the ALJ who made that determination. With respect to Nelson's lifting capacity and ability to sit and stand for certain portions of an eight-hour workday as required by sedentary work, Dr. Gryczko determined Nelson's achievement of the relevant thresholds was contingent on future improvement.

Although the ALJ may weigh the credibility of the evidence, he must give some indication of the evidence he rejects and his reason(s) for discounting such evidence. *See Plummer v. Apfel*, 186 F.3d 422, 429 (3d Cir. 1999); *Cotter v. Harris*, 642 F.2d 700, 705 (3d Cir. 1981). "In the absence of such an indication, the reviewing court cannot tell if significant probative evidence was not credited or simply ignored." *Id.* That the ALJ neglected to address significant probative evidence – Dr. Gryczko's own explanation for his illusory difference of opinion with Dr. Zubritzky – gives this Court pause. The relevant regulations contemplate the Commissioner "will evaluate the degree to which [nonexamining source] opinions consider all of the pertinent evidence . . . including opinions of treating and other examining sources." 20 C.F.R. § 404.1527(d)(3). Dr. Gryczko's endorsement of Dr. Zubritzky's assessment thus falls squarely within the regulations' definition of evidence the Commissioner will consider, and is therefore relevant to the ALJ's determination of Nelson's RFC.

Because Dr. Gryczko agreed with Dr. Zubritzky based on his review of medical findings that were (1) confirmed or repeated in examinations subsequent to his

assessment, and (2) were cited by the ALJ as reasons to discredit Dr. Zubritzky's opinion regarding Nelson's limitations, this Court deems improper the ALJ's substitution of his own medical opinion for those of both Dr. Zubritzky, Nelson's treating physician, and Dr. Gryczko, a nonexamining physician employed by the State Disability Determination Service.[14] *See 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); *Kent v. Schneider*, 710 F.2d 110, 114-15 (3d Cir. 1983); *Kelly v. R.R. Ret. Bd.*, 625 F.2d 486, 494 (3d Cir. 1980); *Fowler v. Califano*, 596 F.2d 600, 602-03 (3d Cir. 1979); *Rossi v. Califano*, 602 F.2d 55, 58 (3d Cir. 1979); *Goer v. Matthews*, 574 F.2d 772, 797 (3d Cir. 1978)); *see also Cotter*, 642 F.2d at 705 (recognizing that an ALJ's required choice between conflicting medical conclusions will not be accompanied by medical or scientific analysis because the ALJ is a non-scientist, and such analysis would be far beyond his or her capability).

There is no evidence Nelson's RFC was materially different on August 14,

[14] Dr. Gryczko's RFC assessment indicates he reviewed at least the following pieces of medical evidence: (1) the September 1, 2002 discharge summary, (R. 83); (2) Dr. Chollak's October 1, 2002, and February 10, 2003 reports, (R129, 126); (3) Dr. Zubritzky's March 5, 2003 assessment and report, (R. 130-35); and (4) Dr. Zavitsanos's March 26, 2003 report, (R. 148-51). On the basis of this medical evidence and opinion, Dr. Gryczko agreed with Dr. Zubritzky's RFC assessment indicating Nelson was capable of less than sedentary work. Notably, Dr. Gryczko had in his file evidence that Nelson's back did not require surgery; that he had good range of motion in his separated shoulder; that his motor power was +4/+5; that he could walk without assistance; and that he had previously passed a straight-leg raising test. Three pieces of record evidence were developed after Dr. Gryczko's April 7, 2003 review, only one of which was based on an evaluation that occurred before the twelve month anniversary of Nelson's August 14, 2002 injury: (1) Dr. Chollak's May 12, 2003 report, (R. 156); (2) Dr. Zavitsanos's September 9, 2003 report, (R. 160-62); and (3) Dr. Jaffari's October 28, 2003 report, (R. 164-65). Dr. Chollak's May 12 report simply states Nelson again passed a leg raise test, and reiterates a recommendation the doctor had previously made on February 10, 2003, regarding Nelson's back pain.

2003 – the twelve month anniversary of his injury – from the assessment agreed upon by Drs. Zubritzky and Gryczko on April 7, 2003.[15] The most the evidence shows is the passage of four months, during which Nelson was taking prescription pain medication. (R. 176-90.) While it is possible the "improvement" anticipated by Dr. Gryczko occurred during this period, only a scintilla of evidence supports such a conclusion: Dr. Zavitsanos's post-anniversary report of September 9, 2003, which attributed Nelson's improvement to strict bed rest. Moreover, Dr. Zavitsanos's recommendation of intercostal nerve blocks on that occasion supports the inference Nelson had not made irrevocable progress, even though Nelson refused the therapy due to a slight risk of complications. (R. 161.)

This Court therefore finds the ALJ's benefits determination in this case is not supported by substantial evidence, and remands the case to the Commissioner for further proceedings consistent with this opinion.

An appropriate order follows.

[15] The ALJ could have granted Nelson benefits for a closed period of disability. If Nelson had severe impairments that significantly limited his physical ability to do basic work activities, and lasted not less than twelve months, Nelson is entitled to benefits covering that period even if, at the time of the ALJ's decision, Nelson was not severely impaired. 42 U.S.C. § 423(d)(1)(A); *see also* 20 C.F.R. § 404.1520(c) ("it is possible for [a claimant] to have a period of disability for a time in the past even though [the claimant does] not now have a severe impairment").

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

CARL IRA NELSON, JR.	:	CIVIL ACTION
	:	
v.	:	NO. 05-3674
	:	
JO ANNE B. BARNHART,	:	
Commissioner of Social Security	:	

JUDGMENT

And now, this 7th day of August, 2006, in accordance with the Court's separate Order remanding this case to the Commissioner of Social Security under the fourth sentence of 42 U.S.C. § 405(g), pursuant to *Kadelski v. Sullivan*, 30 F.3d 399 (3d Cir. 1994), and Federal Rule of Civil Procedure 58, it is hereby ORDERED that JUDGMENT is entered in favor of plaintiff, Carl Ira Nelson, Jr., and against defendant, Jo Anne B. Barnhart, Commissioner of Social Security.

BY THE COURT:

_____

Juan R. Sánchez, J.

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

CARL IRA NELSON, JR.	:	CIVIL ACTION
	:	
v.	:	NO. 05-3674
	:	
JO ANNE B. BARNHART, Commissioner of Social Security	:	

ORDER

And now, this 7th day of August, 2006, after careful and independent consideration of the parties' cross-motions for Summary Judgment, and upon review of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi dated March 26, 2006, and the Plaintiff's objections, it is hereby ORDERED

1. Plaintiff's motion for Summary Judgment (Document 6) is GRANTED IN PART, and the case is REMANDED to the Commissioner of Social Security in accordance with the fourth sentence of 42 U.S.C. § 405(g) for further proceedings consistent with this Order. On remand, the ALJ should: (a) consider the significance of evidence showing agreement between the Plaintiff's examining and nonexamining sources regarding his Residual Functional Capacity as of April 7, 2003; and (b) reconsider the severity of Plaintiff's pain in light of this evidence, and its impact on the Commissioner's determination Plaintiff is ineligible for both a closed period of disability, and for disability insurance benefits and supplemental security income. Plaintiff's motion for Summary Judgment is DENIED in all other respects.

2. Defendant's motion for Summary Judgment (Document 11) is DENIED.

BY THE COURT:

_____

Juan R. Sánchez, J.