

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

MARGARET A. CALCEK,	:	
Plaintiff	:	
	:	3:CV-01-1664
v.	:	
	:	(CHIEF JUDGE VANASKIE)
COMMISSIONER OF SOCIAL	:	
SECURITY,	:	
Defendant	:	

MEMORANDUM

On August 29, 2001, Plaintiff, Margaret A. Calcek (“Calcek”), filed the instant action pursuant to 42 U.S.C. § 405(g) for review of the decision of the Commissioner of Social Security denying Plaintiff’s claim for Disability Insurance Benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-433. Calcek, who was thirty-five (35) years old at the time of the ALJ’s decision, claims that she is totally disabled due to physical impairments, depression and debilitating pain associated with her multiple sclerosis.

In a Report and Recommendation filed on January 23, 2003 (Dkt. Entry 9), United States Magistrate Judge Malachy E. Mannion, to whom this matter had been referred, addressed each of Calcek’s contentions and concluded that the Commissioner’s decision was supported by substantial evidence. Thus, he proposed that the denial of benefits be sustained.

On February 11, 2003, Calcek filed the following objections to the Report and Recommendation:

- I The ALJ failed to set forth his reason for concluding that plaintiff's impairments do [n]ot meet or equal a listed impairment.
- II The ALJ failed to complete a Psychiatric Review Technique Form.
- III The ALJ failed to consider all the relevant evidence.
- IV The ALJ's finding that plaintiff can perform her past relevant work as a telephone directory assistance operator is not supported by substantial evidence.
- V The ALJ improperly rejected plaintiff's claim of disabling pain.
- VI The ALJ improperly rejected the opinion of plaintiff's treating physicians that she is disabled.

(Dkt. Entry 10, pg. 1-3.)

Having considered de novo the issues raised by Calcek in her objections, see 28 U.S.C. § 636(b)(1), I find that the instant matter should be remanded to the ALJ due to his failure to assess Ms. Calcek's symptoms in the context of a pertinent listed impairment and his failure to complete a Psychiatric Review Technique Form in light of the evidence of a diagnosis of depression.¹ Because this matter must be remanded, I will not address the remaining issues presented.

DISCUSSION

As explained in Plummer v. Apfel, 186 F.3d 422, 427-28 (3d Cir. 1999):

In order to establish a disability under the Social Security Act, a claimant must demonstrate there is some "medically determinable basis for an impairment that

¹Magistrate Judge Mannion's Report and Recommendation includes a comprehensive recitation of the facts of this matter, and there is no need to recount the factual background here.

prevents him from engaging in any 'substantial gainful activity' for a statutory 12-month period." A claimant is considered unable to engage in any substantial activity "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." [Citations omitted.]

Judicial review of a decision to deny an application for disability benefits "is limited to determining whether that decision is supported by substantial evidence." Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999). "Substantial evidence has been defined as 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate.'" Plummer, 186 F.3d at 427. Decisions of the United States Court of Appeals for the Third Circuit have instructed that "[t]he search for substantial evidence is . . . a qualitative exercise without which our review of social security disability cases ceases to be merely deferential and becomes instead a sham." Kent v. Schweiker, 710 F.2d 110, 114 (3d Cir. 1983). Essential to judicial review is a written explication of the denial of benefits that evaluates the evidence in accordance with the procedures established by law. An inadequately explained decision, or one that does not address the pertinent issues, does not allow for meaningful judicial review.

In the case at bar, the ALJ assessed the record in the context of the familiar five-step sequential evaluation process established at 20 C.F.R. § 404.1520 (1998).² As Magistrate

²The five-step sequential approach requires the Commissioner to decide whether (1) the claimant has engaged in any substantial gainful activity during the relevant timeframe; (2) the claimant has a severe impairment, meaning one which "significantly limits . . . physical or mental ability to do basic work activities . . .," 20 C. F.R. § 404.1520(c); (3) the impairment

Judge Mannion observed in his Report and Recommendation:

The instant action was ultimately decided at the fourth step of the process, when the ALJ determined that, despite her impairments, the plaintiff retained the functional capacity to return to her past relevant work as a telephone directory assistance operator, work which [the ALJ] determined to be at a sedentary exertional level, and that such work exists in significant numbers in the national and local economy.

(Dkt. Entry 9, p. 3.)

I. The ALJ's Step Three Analysis

The Commissioner has established a listing of medical impairments which, if met, require a finding of disability without consideration of age, education and work experience. See Burnett v. Commissioner of Social Sec. Admin., 220 F.3d 112, 119 (3d Cir. 2000); 20 C.F.R. § 404.1520(d). The Listing of Impairments is set forth as Appendix 1 to Subpart p of Part 404 of 20 C.F.R. "At step three [of the five-step sequential evaluation process] the ALJ determines whether the claimant's impairment 'is equivalent to one of a number of listed impairments that the [Commissioner] acknowledges as so severe as to preclude substantial gainful activity.'" Clifton v. Chater, 79 F.3d 1007, 1009 (10th Cir. 1996). "[T]o show that [an] impairment matches a listing, it must meet *all* of the specified medical criteria. An impairment that

meets or equals a "listed impairment," in which case the claimant will be found to be disabled without consideration of age, education and work experience; (4) if the impairment does not meet the requirements of a listed impairment, the impairment prevents the claimant from performing past relevant work; and (5) there exists jobs in the economy that the claimant can perform if unable to perform past relevant work.

manifests only some of those criteria, no matter how severely, does not qualify.” Sullivan v. Zebley, 493 U.S. 521, 530 (1990). The claimant bears the burden of showing that she satisfies the criteria for a listed impairment. See Nielson v. Sullivan, 992 F.2d 1118, 1120 (10th Cir. 1993).³

In this case, the ALJ addressed the step three issue in the following manner:

The medical evidence indicates that the claimant has multiple sclerosis and migraine headaches, impairments that are severe within the meaning of the Regulations but not severe enough to meet or medically equal one of the impairments listed in Appendix 1, Subpart P, Regulations No. 4. (R. 11)

Calcek asserts that this analysis is inadequate. In support of this contention, Calcek cites Burnett v. Commissioner of Social Sec. Admin., 220 F.3d 112, 120 n.2 (3d Cir. 2000), arguing that “[i]t is the ALJ’s responsibility to identify the relevant listed impairments.” (Dkt.

³The Code of Federal Regulations explains as follows how medical evidence is evaluated at step 3 of the five-step sequential evaluation process:

We will decide that your impairment(s) is medically equivalent to a listed impairment in appendix 1 if the medical findings are at least equal in severity and duration to the listed findings. We will compare the symptoms, signs, and laboratory findings about your impairments(s), as shown in the medical evidence we have about your claim, with the medical criteria shown with the listed impairment. If your impairment is not listed, we will consider the listed impairment most like your impairment to decide whether your impairment is medically equal. If you have more than one impairment, and none of them meets or equals a listed impairment, we will review the symptoms, signs, and laboratory findings about your impairment to determine whether the combination of your impairments is medically equal to any listed impairment.

20 C.F.R. § 404.1526 (2001).

Entry 7, p. 11.) Calcek also cites Eberhart v. Massanari, 172 F.Supp. 2d 589, 595 (M.D. Pa. 2001), for the proposition that “[a] simple conclusion that the applicant’s impairments do not meet or equal a listed impairment without identifying the relevant listed impairments, discussing the evidence, or explaining the reasoning is a bare conclusion that is beyond judicial review.” (Dkt. Entry 7, p. 11.)

In Burnett, the claimant had based her application for benefits on complaints of back and knee impairments. On appeal, claimant argued, inter alia, that the “ALJ erred by making only a conclusory statement without mentioning any specific listed impairments or explaining his reasoning.” Burnett, 220 F.3d 119. In addressing this contention, the Burnett court explained that “this Court requires the ALJ to set forth the reasons for his decision.” Id. The Burnett court cited Clifton v. Chater, 79 F.3d 1007 (10th Cir. 1996), noting that:

the Tenth Circuit Court of Appeals set aside an ALJ’s determination because the ALJ “merely stated a summary conclusion that appellant’s impairments did not meet or equal any Listed Impairment,” without identifying the relevant listed impairments, discussing the evidence, or explaining his reasoning. Id. at 1009. The Court concluded “[s]uch a bare conclusion is beyond judicial review.” Id.

Burnett, 220 F.3d at 119. After agreeing with Burnett’s claim that the ALJ’s conclusory statement was similarly beyond meaningful judicial review, the Third Circuit stated:

Because we have no way to review the ALJ’s hopelessly inadequate step three ruling, we will vacate and remand the case for a discussion of the evidence and an explanation of reasoning supporting a determination that Burnett’s “severe” impairment does not meet or is not equivalent to a listed impairment. On remand, the ALJ shall fully develop the record and explain his findings at step three, including an analysis of whether and why Burnett’s back and knee

impairments, or those impairments combined, are or are not equivalent in severity to one of the listed impairments.

Id. at 120. The Third Circuit made clear that “[p]utting the responsibility on the ALJ to identify the relevant listed impairment(s) is consistent with the nature of Social Security disability proceedings which are ‘inquisitorial rather than adversarial’ and in which ‘[i]t is the ALJ’s duty to investigate the facts and develop the arguments both for and against granting benefits.’” Id. at 120, n. 2. (Citations omitted.)

Disposition of Calcek’s Step three argument is controlled by Burnett. As Calcek points out, “the ALJ did not identify the listing and did not compare plaintiff’s diagnosed impairment and medical findings to any listing.” (Dkt. Entry 11, p. 2.) It is not the reviewing court’s function to provide the rationale that could support the ALJ’s decision. That responsibility belongs to the ALJ, and was not fulfilled here. As Calcek argues, “[t]o not remand on this error amounts to the relegation of the requirements of Burnett to a mere suggestion. . . .” (Id. at 2-3.) Burnett compels a remand of this matter in order that the ALJ fulfill his responsibility under the regulations. On remand, the ALJ is directed to more fully develop the record in this regard and to more fully discuss the reasons why claimant’s condition does not meet or equal one of the listed impairments by identifying the pertinent listed impairments and explaining why Calcek’s condition does not meet the criteria of the pertinent listed impairments.

II. Completion of a Psychiatric Review Technique Form

Calcek asserts that the ALJ erred in failing to complete a Psychiatric Review Technique

Form (“PRTF”), arguing that “[a]lthough plaintiff has been diagnosed with depression . . . which is a listed impairment, Appendix, 1, Part A, § 12.04, and has been prescribed Prozac . . . and Celexa . . . no PRTF appears anywhere in the record, nor did the ALJ make the findings required by the current version of 20 C.F.R. § 1520a(e)(2).” (Dkt. Entry 7, p. 12.) In response, the Commissioner argues that “[t]he ALJ was not required to complete a PRTF in this case because there was no evidence that Plaintiff suffered from a severe mental impairment.” (Dkt. Entry 8, p. 8.) Magistrate Mannion accepted this reasoning, explaining:

[A] fair review of the record demonstrates that the plaintiff did not place her mental status into question in any meaningful aspect in the course of these proceedings. For example, in her original application for benefits filed on April 17, 2000, the plaintiff does not indicate in any manner whatsoever that she was claiming disability on the basis of any psychiatric condition. She did not report being on any type of depression medication. (TR. 78-81). Although she claimed short term memory loss on a Disability Report dated March 22, 2001, she did not mention a mental impairment when she filed her request for a hearing before an administrative law judge. (TR. 118-122). Even more to the point, the plaintiff was represented by counsel at the hearing. If the plaintiff intended that her mental condition in some way prevented her from working, it was incumbent on her attorney to so advise the ALJ. There is no indication that he did so. (See e.g. TR. 38). An argument not raised in an administrative hearing cannot be raised on appeal. Chipman v. Shalala, 90 F.3d 421, 423 (10th Cir. 1996). See Dir., Office of Workers’ Compensation Programs v. N. Am. Coal Corp., 626 F.2d 1137, 1143 (3d Cir. 1980)(“[A] court should not consider an argument which has not been raised in the agency proceedings which preceded the appeal, absent unusual circumstances.”).

(Dkt. Entry 9, p. 13.)

The Supreme Court’s decision in Sims v. Apfel, 530 U.S. 103 (2000), compels rejection of this rationale. In Sims, the Court had to resolve a conflict among the Courts of Appeals over

whether a Social Security claimant waives judicial review of an issue if he fails to exhaust that issue by presenting it to the Appeals Council in his request for review. *Id.* at 106. In *Sims*, the claimant contended, *inter alia*, that the ALJ should have ordered a consultative examination, a contention not presented to the Appeals Council. The Commissioner rejoined that the Court “should require issue exhaustion in addition to exhaustion of remedies. That is, he contend[ed] that a Social Security claimant, to obtain judicial review of an issue, not only must obtain a final decision on his claim for benefits, but also must specify that issue in his request for review by the Council.” *Id.* 107. The Supreme Court disagreed, noting that “SSA regulations do not require issue exhaustion.” *Id.* at 108. The Court elaborated:

[C]ourts require administrative issue exhaustion “as a general rule” because it is usually “appropriate under [an agency’s] practice” for “contestants in an adversary proceeding” before it to fully develop all issues there. (citing *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, at 36-37.) . . . But, as *Hormel [v. Helvering]*, 312 U.S. 552] and *L.A. Tucker Truck Lines* suggest, the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding. Cf. *McKart v. United States*, 395 U.S. 185, 193, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969) . . . Where the parties are expected to develop the issues in an adversarial administrative proceeding, it seems to us that the rationale for requiring issue exhaustion is at its greatest. . . . Where, by contrast, an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker. More generally, we have observed that “it is well settled that there are wide differences between administrative agencies and courts,” *Shepard v. NLRB*, 459 U.S. 344, 351, 103 S.Ct. 665, 74 L.Ed.2d 523 (1983), and we have thus warned against reflexively “assimilat[ing] the relationship of . . . administrative bodies and the courts to the relationship between lower and upper courts,” *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 144, 60 S.Ct. 437, 84 L.Ed. 656 (1940). The differences between courts and agencies are nowhere more pronounced

than in Social Security proceedings. Although “[m]any agency systems of adjudication are based to a significant extent on the judicial model of decisionmaking,” 2 K. Davis & R. Pierce, *Administrative Law Treatise* § 9.10, p. 103 (3d ed. 1994), the SSA is “[p]erhaps the best example of an agency” that is not, B.Schwartz, *Administrative Law* 469-470 (4th Ed. 1994). . . . Social Security proceedings are inquisitorial rather than adversarial. It is the ALJ’s duty to investigate the facts and develop the arguments both for and against granting benefits, see *Richardson v. Perales*, 402 U.S. 389, 400-01, 91 S.Ct. 1420, 28 L.Ed.2d 842 (1971), and the Council’s review is similarly broad. . . .

530 U.S. at 109-111. Thus, the Supreme Court agreed “with the Eighth Circuit that ‘the general rule [of issue exhaustion] makes little sense in this particular context.’” *Id.* at 112.

In the case at bar, Calcek was not entitled to Appeals Council Review.⁴ Thus, the first occasion she had to raise the issue was in her appeal to this Court. *Sims* stands for the proposition that the failure to raise the issue during the administrative agency proceedings does not foreclose consideration of the issue now. The more pertinent question here is whether the ALJ had an obligation to complete the PRTF.

The record before the ALJ contained numerous indications of Calcek’s mental

⁴As pointed out by the Commissioner in his brief in opposition:

As part of the agency’s disability process redesign program, the Commissioner tested in randomly selected cases such as this one, a simplified administrative appeals process (Tr. 67). See 20 C.F.R. § 404.966 (“Testing the elimination of the request for Appeals Council Review”). As shown on the notice provided with the ALJ’s decision, Plaintiff was permitted to seek federal court review of the ALJ decision without first seeking Appeals Council review (Tr. 6).

(Dkt. Entry 8, p. 3, fn 3.)

impairments. For example, Dr. Life made a notation of “anxiety/depression” in his treatment notes from August 5, 1997, and he prescribed the anti-depressant Prozac. (R. 201.) In addition, treatment notes from a December 17, 2000 visit with her treating physician, Dr. Somma, indicates, under “Review of Systems,” “Positive for depression.” (R. 249.) Under “Physical Examination,” Dr. Somma noted that “On exam, the patient presents as a depressed middle-aged female Affect is depressed.” (R. 249.) Under “Impression,” Dr. Somma’s notes state, inter alia, “Depression.” (R. 250.) Treatment notes from Dr. Snyder on January 25, 2001 also clearly note “DEPRESSIVE DISORDER NEC.” (R. 271.) After a visit on February 26, 2001, under “Other Visit Diagnosis,” Dr. Life recognized “DEPRESSIVE DISORDER NEC.” (R. 243.) Although Dr. Life noted that “[t]he Celexa definitely helped her depression,” and again that “[h]er depression has improved,” it is clear that the diagnosis of depression was made. (R. 243-44.) In fact, the ALJ even pointed out the fact that Calcek “noted feelings of depression due to personal problems and her physical condition.” (R. 12.) He also observed that Dr. Somma diagnosed her with depression. (R. 14.)

The Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984), and the regulations promulgated thereunder, impose on the Commissioner a burden of gathering and evaluating evidence pertaining to an alleged mental impairment. See e.g., 42 U.S.C. § 421(h); 20 C.F.R. § 404.1520a (1994); Hill v. Sullivan, 924 F.2d 972, 974 (10th Cir. 1991). As explained in Woody v. Secretary of Health & Human Services, 859 F.2d

1156, 1159 (3rd Cir. 1988):

The Secretary has . . . promulgated regulations dealing specifically with the evaluation of mental impairments. The same general procedure described in Section 404.1520 applies, but in addition, the agency must complete a “standard document,” called a “Psychiatric Review Technique Form,” which is essentially a check list that tracks the requirements of the Listings of Mental Disorders. The regulations permit an ALJ to complete the form without the assistance of a medical advisor. However, there must be competent evidence in the record to support the conclusions recorded on the form and the ALJ must discuss in his opinion the evidence that he considered in reaching the conclusions expressed on the form. (Citations omitted.)

In Plummer, supra, the Third Circuit observed:

The ALJ cannot ignore evidence of a mental impairment in the record When there is evidence of a mental impairment that allegedly prevents a claimant from working, the Commissioner must follow the procedure for evaluating mental impairments set forth in 20 C.F.R. § 404.1520a. *Andrade v. Secretary of Health & Human Services*, 985 F.2d 1045, 1048 (10th Cir. 1993). These procedures are intended to ensure a claimant’s mental health impairments are given serious consideration by the Commissioner in determining whether a claimant is disabled.

186 F.3d 432-33.

In Hill, the claimant’s application for supplemental security income specified that she was disabled due to high blood pressure, back pain, and breathing difficulties. 924 F.2d at 973. The record before the ALJ, however, also included evidence of depression. On appeal from the denial of benefits, the claimant argued that the Commissioner had failed to apply the correct legal standard by not conducting the requisite assessment of her mental impairment. As in this case, the Commissioner argued in Hill that there was no duty to complete the PRTF because

“claimant’s potential impairment [for depression] was not related to her claim for disability. . . .”

Id. at 974. The Tenth Circuit disagreed with the Commissioner, holding:

Since the record contained evidence of a mental impairment that allegedly prevented claimant from working, the [Commissioner] was required to follow the procedure for evaluating the potential mental impairment set forth in his regulations and to document the procedure accordingly. See 20 C.F.R. § 404.1520a. The [Commissioner] failed to follow the appropriate procedure, so we must remand the case for proper consideration of claimant’s potential mental impairment.

Id.

As in Hill, the evidence in this case was sufficient to place the ALJ on notice that depression compromised Calcek’s vocational abilities. As in Hill, a remand to require the Commissioner to follow requisite procedures is in order.

III. Remaining Objections

In light of the determination to remand this matter for further proceedings, there is no need to address Calcek’s remaining objections to the Report and Recommendation, all of which pertain to the ALJ’s assessment of the evidence. It is sufficient to note at this time that the ALJ’s assessment of the evidence is entitled to substantial deference, and that the opinions of Calcek’s treating physicians are not entitled to “controlling” weight in light of the absence of confirming objective medical evidence and the existence of contrary medical evidence. See Plummer, 186 F. 3d at 429. Furthermore, as Magistrate Judge Mannion found, the ALJ’s assessment of Calcek’s subjective complaints was not contrary to the applicable regulations or

governing law.

IV. CONCLUSION

For the reasons set forth above, this matter will be remanded to the Commissioner for further proceedings. An appropriate Order follows.⁵

s/ Thomas I. Vanaskie

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

⁵This matter is being remanded pursuant to the fourth sentence of 42 U.S.C. § 405(g), which provides that “[t]he courts shall have power to enter, upon the pleadings and transcripts of the record, a judgment affirming, modifying or reversing the decision of the Commissioner, with or without remanding the cause for a rehearing.” Accordingly, the Clerk of Court will be directed to enter judgment in accordance with this Memorandum. See Kadelski v. Sullivan, 30 F.3d 399 (3d Cir. 1994).

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

MARGARET A. CALCEK,	:	
Plaintiff	:	
	:	3:CV-01-1664
v.	:	
	:	(CHIEF JUDGE VANASKIE)
COMMISSIONER OF SOCIAL	:	
SECURITY,	:	
Defendant	:	

ORDER

NOW, THIS 31st DAY OF JULY, 2003, for the reasons set forth in the foregoing Memorandum, **IT IS HEREBY ORDERED THAT:**

1. This matter is remanded to the Commissioner for proceedings consistent with the foregoing Memorandum.
2. The Clerk of Court is directed to enter judgment in accordance with the foregoing Memorandum.
3. The Clerk of Court is further directed to mark this matter in this Court **CLOSED**, and to forward a copy of this Order and accompanying Memorandum to United States Magistrate Judge Malachy E. Mannion.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania