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

KIMBERLY FREEMAN, Plaintiff, v. NANCY A. BERRYHILL[1], Acting Commissioner of Social Security, Defendant.	: : : : : : : : : : :	CIVIL ACTION NO. 16-2610

REPORT AND RECOMMENDATION

MARILYN HEFFLEY, U.S.M.J. **March 23, 2017**

Kimberly Freeman ("Freeman" or "Plaintiff") seeks review, pursuant to 42 U.S.C. § 405(g), of the Commissioner of Social Security's ("Commissioner") decision denying her claims for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI"). For the reasons that follow, I recommend that Freeman's Request for Review be granted in part and that this case be remanded for further proceedings consistent with this Report and Recommendation.

I. FACTUAL AND PROCEDURAL BACKGROUND

Freeman was born on May 26, 1978. R. at 175.[2] She has a college education. Id. at 180. Her past relevant work experience was as a home health aide. Id. Freeman filed her applications for DIB and SSI on March 19, 2013, id. at 19, asserting that she was disabled due to asthma, depression, anxiety, neuropathy, tendonitis, "brain scars," "[f]all downs," high blood pressure

[1] On January 23, 2017, Carolyn W. Colvin was succeeded by Nancy A. Berryhill as the Acting Commissioner of the Social Security Administration. See http://www.lb7.uscourts.gov/documents/15-1210.pdf (last visited March 23, 2017). Accordingly, pursuant to Fed. R. Civ. P. 25(d), she is substituted as the named Defendant in this action.

[2] Citations to the administrative record will be indicated by "R." followed by the page number.

and arthritis in the right ankle and foot, id. at 179. The Commissioner denied her applications at the administrative level on July 30, 2013. Id. at 82-91. Freeman requested a hearing, which was held before an Administrative Law Judge ("ALJ") on December 23, 2014. Id. at 31-51. The ALJ denied her applications in an opinion issued on January 30, 2015. Id. at 18-27. Freeman filed a timely appeal with the Appeals Council, which denied her request for review on March 28, 2016, thereby affirming the ALJ's decision as the final decision of the Commissioner. Id. at 1-3. Freeman then commenced this action in federal court.

II. STANDARD OF REVIEW

The role of the court in reviewing an administrative decision denying benefits in a Social Security matter is to uphold any factual determination made by the ALJ that is supported by "substantial evidence." 42 U.S.C. § 405(g); Richardson v. Perales, 402 U.S. 389, 401 (1971); Doak v. Heckler, 790 F.2d 26, 28 (3d Cir. 1986); Newhouse v. Heckler, 753 F.2d 283, 285 (3d Cir. 1985). A reviewing court may not undertake a de novo review of the Commissioner's decision in order to reweigh the evidence. Monsour Med. Ctr. v. Heckler, 806 F.2d 1185, 1190 (3d Cir. 1986). The court's scope of review is "limited to determining whether the Commissioner applied the correct legal standards and whether the record, as a whole, contains substantial evidence to support the Commissioner's finding of fact." Schwartz v. Halter, 134 F. Supp. 2d 640, 647 (E.D. Pa. 2001).

Substantial evidence is a deferential standard of review. See Jones v. Barnhart, 364 F.3d 501, 503 (3d Cir. 2004). Substantial evidence "does not mean a large or considerable amount of evidence, but rather such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Hartranft v. Apfel, 181 F.3d 358, 360 (3d Cir. 1999) (quoting Pierce v. Underwood, 487 U.S. 552, 564-65 (1988)); Kangas v. Bowen, 823 F.2d 775, 777 (3d Cir. 1987).

It 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). The court's review is plenary as to the ALJ's application of legal standards. Krysztoforski v. Chater, 55 F.3d 857, 858 (3d Cir. 1995).

To prove disability, a claimant must demonstrate some medically determinable basis for a physical or mental impairment that prevents him or her from engaging in any substantial gainful activity for a 12-month period. 42 U.S.C. § 423(d)(1). As explained in the applicable agency regulation, each case is evaluated by the Commissioner according to a five-step sequential analysis:

> (i) At the first step, we consider your work activity, if any. If you are doing substantial gainful activity, we will find that you are not disabled. (ii) At the second step, we consider the medical severity of your impairment(s). If you do not have a severe medically determinable physical or mental impairment that meets the duration requirements in § 404.1509, or a combination of impairments that is severe and meets the duration requirement, we will find that you are not disabled. (iii) At the third step, we also consider the medical severity of your impairment(s). If you have an impairment(s) that meets or equals one of our listings in appendix 1 of this subpart and meets the duration requirement, we will find that you are disabled. (iv) At the fourth step, we consider our assessment of your residual functional capacity and your past relevant work. If you can still do your past relevant work, we will find that you are not disabled. (v) At the fifth and last step, we consider our assessment of your residual functional capacity and your age, education and work experience to see if you can make an adjustment to other work. If you can make an adjustment to other work, we will find that you are not disabled. If you cannot make an adjustment to other work, we will find that you are disabled.

20 C.F.R. § 404.1520 (references to other regulations omitted).

III. THE ALJ'S DECISION

In her decision, the ALJ found that Freeman suffered from the severe impairments of asthma, obesity, mild facet joint arthropathy involving the lumbar spine, peripheral neuropathy, left rotator cuff tendonitis, depressive disorder and anxiety disorder. R. at 20. The ALJ

concluded, however, that none of Freeman's impairments, nor the combination of those impairments, met or medically equaled a listed impairment. Id. at 20-22. The ALJ found that during the period prior to her last insured date of March 31, 2016, Freeman had the following residual functional capacity ("RFC"):

> [T]he claimant was able to lift and carry up to 10 pounds on a frequent and occasional basis; that she was able to sit for up to 4 hours in 30 minute intervals; that she was able to stand and walk for a total of up to 4 hours in 30 minute intervals; that she was able to use her lower extremities for occasional operation of foot controls; that she was unable to use her left upper extremity for overhead reaching or handling; and that she should avoid exposure to heights, hazards, humidity, vibration, and temperature extremes.
>
> . . . the claimant has been able to perform routine, repetitive job tasks (not involving detailed instructions, or work on assembly lines) in occupations with few changes in the work routine, where she would have less than occasional interaction with coworkers and the general public.

Id. at 22. Relying upon the testimony of the vocational expert ("VE") who appeared at the hearing, the ALJ determined that Freeman was unable to perform her past work as a home health aide, id. at 25, but that there were jobs that existed in significant numbers in the national economy that she was capable of performing, such as assembly, hand packer, and inspector, id. at 26.[3]

IV. FREEMAN'S REQUEST FOR REVIEW

In her Request for Review, Freeman contends that the ALJ erred by: (1) crafting an RFC for her that was not supported by substantial evidence and failing to explain the basis for her RFC determination; and (2) relying on VE testimony that conflicted with the Dictionary of Occupational Titles without obtaining evidence to resolve the conflict. For the reasons that follow, I agree that the ALJ's RFC determination was inadequate.

[3] Because I find that the ALJ erred in formulating Freeman's RFC, it is not necessary to address whether the VE's testimony regarding jobs Freeman could perform consistent with that erroneous RFC conflicted with the Dictionary of Occupational Titles.

V. DISCUSSION

A. The ALJ Failed to Explain the Basis for Her RFC Determination or to Support It with Substantial Evidence

The ALJ found that Freeman suffered from severe impairments, including mild facet-joint arthropathy involving the lumbar spine, peripheral neuropathy and obesity. Id. at 20. The record contains two medical opinions regarding the extent of the limitations these conditions imposed on her: one from a State agency physician and one from Dr. John DeCarlo, who performed a consultative examination of Freeman on June 7, 2013. Id. at 23, 417-35. The ALJ gave little weight to the State agency physician's opinion because evidence received after he rendered his opinion showed that Freeman was subject to more restrictive limitations than he had opined were necessary. Id. at 24. The ALJ gave "great weight" to Dr. DeCarlo's opinion, which she found to be "consistent with the findings on physical examination and diagnostic imaging studies," as well as with "the claimant's self-reported activities of daily living." Id.

Dr. DeCarlo rendered his opinion on the Commissioner's form entitled "Medical Source Statement of Ability to Do Work-Related Activities (Physical)" ("Medical Source Statement"). Id. at 417-22. On the form, Dr. DeCarlo checked boxes indicating that Freeman was able to lift and/or carry up to 10 pounds occasionally. Id. at 417. He determined that she was limited in her ability to sit, stand or walk "at one time without interruption" to 30 minutes each. Id. The form provided boxes numbered one to eight to check for the total number of hours the claimant could perform an activity in an eight-hour day and provided three separate sets of boxes; one for each of sitting, standing and walking. Dr. DeCarlo checked boxes indicating that Freeman was limited to sitting for a total of four hours, to standing for a total of two hours and to walking for a total of two hours. Id. at 23, 418. In a narrative statement submitted along with the form, Dr.

DeCarlo stated that her diagnoses included neuropathy of both legs and feet and tendonitis of both ankles. Id. at 432.

In summarizing the evidence in her decision, the ALJ slightly altered Dr. DeCarlo's opinion, finding that Freeman had "an inability to sit for more than 4 hours; an inability to stand or walk for more than 2 hours; [and] an inability to sit, stand, or walk continuously for more than 30 minutes." Id. at 23. In formulating Freeman's RFC, despite her statement that she gave "great weight" to Dr. DeCarlo's opinion, the ALJ again slightly altered the limitations he had assigned to Freeman, determining that Freeman was able to: "sit for a total of up to 4 hours in 30 minute intervals" and "stand and walk for a total of up to 4 hours in 30 minute intervals." Id. at 22.

The distinction between the opinion Dr. DeCarlo provided on the Medical Source Statement and the two slightly different versions of it that the ALJ stated in her description of his opinion and in her RFC determination becomes material because of the VE's testimony in which he emphasized the distinction and testified that it was outcome determinative of Freeman's ability to perform sedentary work. "A claimant who is unable to satisfy the minimum requirements for sedentary activity is deemed disabled." Harris v. Sullivan, 770 F. Supp. 935, 940 (D. Del. 1991); see Holmes v. Astrue, No. 07-2356, 2008 WL 564865, at *7 (E.D. Pa. Feb. 28, 2008). Thus, in light of the evidence of record, the change in the RFC from Dr. DeCarlo's suggested limitations altered the result from an award of benefits to a denial.

At the December 23, 2014 hearing, the ALJ and the VE had the following colloquy:

> Q: Let's propose a hypothetical. I'd like you to assume we're talking about an individual of the claimant's age, education, and past work history. Further assume the individual is capable of lifting and carrying . . . 10 pounds frequently and 10 pounds occasionally; capable of sitting up to four hours in 30 minute intervals; standing up to two hours in 30 minute intervals; [and] walking up to two

> hours in 30 minute intervals . . . ." Could an individual limited in this fashion do the work that this claimant has done?
>
> A: No, they could not.
>
> Q: Are there other jobs that could be performed with these limitations?
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> A: That describes a range of sedentary work. However, the sitting it [sic] limited to four hours, standing and walking two hours each. A requirement—to make it an eight-hour day[4] would require two hours of walking and that would eliminate the sedentary work as well.
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> Q: Four hours of sitting, two hours of standing, and two hours of walking.
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> A: Two hours of walking, yeah. You can sit and stand to perform a job, but you can't walk away from the work station. That's the problem.
>
> Q: Okay. So, four hours of either standing or walking.
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> A: [T]hat would allow for sedentary work; that would allow for a sit/stand option. That would include a bench assembler . . . a sedentary hand packager . . . [and] a visual inspector . . . ."

R. at 47-48.

Thus, when the ALJ presented a hypothetical to the VE that matched the limitations Dr. DeCarlo stated on the Medical Source Statement, the VE testified that those limitations would preclude sedentary work because of the two hours walking that it required, which would mean that Freeman was disabled. When the ALJ recast the hypothetical to allow for four hours of either standing or walking—removing the requirement that a sedentary worker be required to walk away from her work station for two hours—the VE changed his opinion and testified that such a worker could perform sedentary work, which supported a finding that Freeman was not disabled. After having

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[4] "To qualify for sedentary work, an individual must be capable of working an eight hour workday." Sylvester v. Comm'r of Soc. Sec., No. CIV. A. 10-1012, 2011 WL 470257, at *12 (W.D. Pa. Feb. 4, 2011). The section of the Commissioner's Medical Source Statement that asks for the limits of the claimant's abilities to sit, stand or walk also asks physicians "[i]f the total time for sitting, standing and walking does not equal or exceed 8 hours, what activity is the individual performing for the rest of the 8 hours?"

this exchange at the hearing, the ALJ decided to craft Freeman's RFC so that it matched the limitations that the VE had testified would allow Freeman to work rather than to match the limitations stated in Dr. DeCarlo's opinion; an opinion she otherwise based her decision upon. She did not, however, provide any explanation for her decision to alter Dr. DeCarlo's stated limitations in that fashion. Although the ALJ described some of the evidence regarding Freeman's condition, she failed to explain why any of that evidence justified the change in Freeman's RFC from the limitations stated in Dr. DeCarlo's opinion. Id. at 23-24.

The Commissioner correctly states that the fact the ALJ gave great weight to Dr. DeCarlo's opinion did not require her to include every degree of limitation from the opinion in Freeman's RFC. Def.'s Br. (Doc. No. 10) at 6-7. "[N]o rule or regulation compels an ALJ to incorporate into an RFC every finding made by a medical source simply because the ALJ gives the source's opinion as a whole 'significant weight.'" Wilkinson v. Comm'r of Soc. Sec., 558 F. App'x 254, 256 (3d Cir. 2016). "There is no legal requirement that a physician have made the particular findings than an ALJ adopts in the course of determining an RFC. Surveying the medical evidence to craft an RFC is part of the ALJ's duties." Titterington v. Barnhart, 174 F. App'x 6, 11 (3d Cir. 2006). Nevertheless, although an ALJ may craft an RFC that does not specifically match any medical opinion in the record, he or she is required to provide a "clear and satisfactory explication of the basis on which [he or she] rests" a decision. Cotter v. Harris, 642 F.2d 700, 704-05 (3d Cir. 1981). "It is axiomatic in social security cases, that although the ALJ may weigh the credibility of the evidence, he [or she] must give some indication of the evidence that he [or she] rejects and the reasons for discounting that evidence."

Melius v. Colvin, No. Civ. A. 12–848, 2013 WL 5467071, at *3 (W.D. Pa. Sept. 30, 2013) (citing Fargnoli v. Massanari, 247 F.3d 34, 43 (3d Cir. 2001)). An "ALJ must provide a 'discussion of the evidence' and an 'explanation of reasoning' for his [or her] conclusion sufficient to enable meaningful judicial review." Diaz v. Comm'r of Soc. Sec., 577 F.3d 500, 504 (3d Cir. 2009) (quoting Burnett v. Comm'r of Soc. Sec., 220 F.3d 112, 119-20 (3d Cir. 2000)).

This requirement is especially necessary here, where the ALJ rejected the only other medical opinion of record and stated that she gave great weight to Dr. DeCarlo's opinion. See Neiswonger v. Colvin, No. CV 15-1243, 2016 WL 4429452, at *3 (W.D. Pa. Aug. 22, 2016) (holding that the ALJ "was not require[d] to accept [the physician's] opinions wholesale" but if he rejected physician's specified limitation, the ALJ "must then discuss or explain why he rejected such opinion evidence to which he assigned 'significant weight'"); Von v. Colvin, No. 2:14-CV-00177-TFM, 2015 WL 539924, at *6 (W.D. Pa. Feb. 10, 2015) (holding that, where the ALJ gave doctors' opinions "some weight" but rejected their limitation of the claimant's ability to sit up to four hours per day, he was required to point to some medical evidence to support his conclusion that claimant could sit for a longer period); Hayes v. Comm'r of Soc. Sec., No. CIV. A. 11-281, 2012 WL 954635, at *5 (W.D. Pa. Mar. 20, 2012) ("It [wa]s unclear as to how great weight could have been given to a medical opinion that directly conflicted with the ALJ's RFC finding . . . . If the ALJ rejected [the physician's] opinion on the basis that the limitations he found were inconsistent with . . . the evidentiary record, then she was required to state as much."); Coleman v. Apfel, No. CIV. A. 99-1414, 2000 WL 633004, at *8 (E.D. Pa. May 4, 2000) (remanding where "ALJ failed to explain how he

determined that the Plaintiff ha[d] an exertional capacity for sedentary work . . . since he has included within the "Rationale" for his Decision, uncontradicted medical reports stating that the Plaintiff is not capable of walking and standing 2 hours a day and sitting for six hours of an eight hour day").

The requirement that an ALJ explain his or her rejection of a physician's opinion as to a claimant's limitations also is especially important when the opinion would suggest a different result than the ALJ has reached; the ALJ "must always 'provide some explanation for a rejection of probative evidence which would suggest a contrary disposition.'" Lovette v. Astrue, No. 10-1099, 2010 WL 5257666, at *2 (E.D. Pa. Dec. 22, 2010) (quoting Dobrowolsky v. Califano, 606 F.2d 403, 407 (3d Cir. 1979)); see also Adorno v. Shalala, 40 F.3d 43, 48 (3d Cir. 1994) (same); Brewster, 786 F.2d at 585 (same); see also Berrios–Vasquez, No. 00-CV-2713, 2001 WL 868666, at *6 (E.D. Pa. May 10, 2001) ("Although the ALJ need not explicitly weigh every item of medical evidence in the file, he must explain his rejection of competent evidence supporting the Plaintiff's claims."). Here, the VE testified that, if Dr. DeCarlo's opinion regarding Freeman's limitations were accepted, Freeman would be unable to perform sedentary work. She would therefore be found disabled. Yet, although the ALJ adjusted Dr. DeCarlo's proposed limitations in a way that fit the VE's testimony to change the result from a grant of benefits to a denial of benefits, she provided no explanation of her reasons for doing so. Consequently, without such explanation, I cannot properly review the ALJ's decision nor conclude that her RFC determination was supported by substantial evidence.

B. The ALJ's Conclusion that Freeman Could Perform Other Jobs Available in the National Economy Is Not Supported by Substantial Evidence on the Current Record[5]

Although, in formulating Freeman's RFC, the ALJ did not state the category of work, as defined by Social Security regulations, that she found Freeman capable of performing, it is evident that the most strenuous category consistent with Freeman's RFC was sedentary work.[6] See R. at 47 (VE responding to ALJ's hypothetical RFC inquiry by stating "[t]hat describes a range of sedentary work"); compare id. at 22 (ALJ's RFC finding) with 20 C.F.R. § 416.967 (defining categories of work). Social Security regulations define sedentary work as follows:

> Sedentary work involves lifting no more than 10 pounds at a time and occasionally lifting or carrying articles like docket files, ledgers, and small tools. Although a sedentary job is defined as one which involves sitting, a certain amount of walking and standing is often necessary in carrying out job duties. Jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met.

20 C.F.R. § 416.967(a).

This definition is further clarified in Social Security regulations as follows:

> "Occasionally" means occurring from very little up to one-third of the time. Since being on one's feet is required "occasionally" at the sedentary level of exertion, periods of standing or walking should generally total no more than about 2 hours of an 8-hour workday, and sitting should generally total approximately 6 hours of an 8-hour workday. Work processes in specific jobs will dictate how often and how long a person will need to be on his or her feet to obtain or return small articles.

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[5] Freeman has not raised this error in the ALJ's decision. Nevertheless, because "Social Security proceedings are inquisitorial rather than adversarial," Sims v. Apfel, 530 U.S. 103, 110-11 (2000), and given that the same issue will arise on remand, I will address it here.

[6] Social Security regulations divide the types of available jobs into the following categories based on their exertional requirements: "sedentary, light, medium, heavy or very heavy." 20 C.F.R. § 416.967. "These terms have the same meaning as they have in the Dictionary of Occupation Titles, published by the Department of Labor." Id. The definitions establish three major criteria separating the categories, namely, the ability to stand or walk, the ability to lift or carry, and the ability to push or pull. Id. § 404.1569a(a).

SSR 83-10, 1983 WL 31251, at *5 (1983).

Thus, to be able to perform sedentary work, a claimant must be able to sit for approximately six hours in an eight-hour workday. Mason v. Shalala, 994 F.2d 1058, 1065 (3d Cir. 1993); see also SSR 96-9p, 1996 WL 374185, at *6 (July 2, 1996). A finding that a person who cannot sit approximately six hours in a day is capable of performing sedentary work is erroneous. See Von, 2015 WL 539924, at * 5; Ortiz v. Astrue, No. CIV. A. 06-373-GMS, 2009 WL 1348205, at *7 (D. Del. May 14, 2009); Carter v. Apfel, No. CIV. A. 99-2066, 2000 WL 538562, at *2 (E.D. Pa. May 3, 2000). Here, Dr. DeCarlo's opinion, R. at 418, as well as each version of Freeman's RFC that the ALJ stated, either in her decision, id. at 22, 23, or in her hypotheticals to the VE, id. at 46-47, provided that Freeman could not sit for more than four hours. Thus, she could not meet the regulatory definition for sedentary work, and the ALJ's finding that she could perform such work was erroneous.[7]

VI. RECOMMENDED RELIEF

Freeman contends that she is entitled to an award of benefits and a remand limited to the calculation of those benefits. Pl.'s Br. at 8-9. An award of benefits only is appropriate, "when no evidentiary questions remain and the outcome of the case is dictated as a legal matter." Monagle v. Astrue, No. 06-CV-3911, 2007 WL 2571453, at *4 (E.D. Pa. Aug. 24, 2007); accord Hoff v. Astrue, No. 08-cv-00218, 2009 WL 229764,

[7] Under applicable regulations, it is possible that a claimant who cannot sit for six hours in a day could still perform sedentary work if he or she were given the option to alternate between sitting and standing. See SSR 96-9p, 1996 WL 374185 at *7; SSR 83-12, 1983 WL 31253, at *4 (1983). Here, however, Dr. DeCarlo, on whom the ALJ relied, did not provide evidence to support that Freeman could function with such an option, and the ALJ did not mention any such evidence. Nor did the ALJ obtain any testimony from the VE regarding how such an option would erode the sedentary work base available to Freeman.

at *13 (E.D. Pa. Jan. 30, 2009). In this case, although I find that, the ALJ's decision was not supported by substantial evidence, I am unable to conclude that no evidentiary questions remain.[8]

Accordingly, I make the following:

[8] For example, although, as described supra in Section V(A), the ALJ altered the precise language of Dr. DeCarlo's stated limitations for Freeman, it is not clear whether she made an inadvertent misstatement or instead meant to reach her own slightly different conclusion about the extent of Freeman's limitations in the RFC—as she was permitted to do, see Titterington, 174 F. App'x at 11—but simply failed to explain her reasoning for doing so. Moreover, although Dr. DeCarlo expressed Freeman's physical limitations as four hours sitting, two hours standing, and two hours walking, he was somewhat constrained in doing so because the form required him to enter separate numbers for each of those categories and indicated that he was to account for eight hours in a day. See supra n.3; R. at 418. Dr. DeCarlo did not specify whether he actually considered it necessary that Freeman walk away from her workstation for two hours a day as the VE assumed that he meant. See R. at 47. He did not address whether a sit/stand option would have been adequate. The other medical opinion in the record, supplied by the State agency physician, indicated that Freeman could sit for up six hours in a day. Id. at 72. Although, the ALJ discounted that opinion because of evidence submitted subsequently, if she had been conscious of the specific issues involved and the ambiguity created by the form, she may have obtained an updated opinion from the State agency physician incorporating the later-submitted evidence. In the alternative, she might have requested clarification from Dr. DeCarlo. This Court does not make de novo factual findings in its review, Monsour Med. Ctr., 806 F.2d at 1190, and it is not this Court's role to predict how the ALJ's fact finding may have come out if she had focused on these issues.

RECOMMENDATION

AND NOW, this 23rd day of March, 2017, IT IS RESPECTFULLY RECOMMENDED that Plaintiff's Request for Review be GRANTED IN PART, and that this matter be REMANDED to the Commissioner for further proceedings consistent with this Report and Recommendation. The Commissioner may file objections to this Report and Recommendation within 14 days after receiving a copy thereof. See Local Civ. Rule 72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

/s/ Marilyn Heffley
MARILYN HEFFLEY
UNITED STATES MAGISTRATE JUDGE

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