

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**DEBRA E. RUSHING,** )  
 )  
 **Plaintiff,** )  
 )  
 **v.** )  
 )  
 **MICHAEL J. ASTRUE,** )  
 **COMMISSIONER OF** )  
 **SOCIAL SECURITY,** )  
 )  
 **Defendant.** )

**Case No. 09-2256-JAR**

**MEMORANDUM AND ORDER ADOPTING RECOMMENDATION AND REPORT**

The Commissioner of Social Security denied plaintiff Debra Rushing’s application for disability insurance benefits under the Social Security Act. Plaintiff sought review of the Administrative Law Judge’s (“ALJ”) decision and Magistrate Judge Gerald B. Cohn issued a Report and Recommendations (Doc. 15) on August 20, 2010, which recommended the Commissioner’s decision be reversed and remanded. This matter is currently before the Court on plaintiff’s Objection to Report and Recommendations (Doc. 16) in which she seeks reversal and an immediate award of benefits, rather than remand.

The standards the Court must employ when reviewing objections to a recommendation and report are clear.<sup>1</sup> Only those portions of a recommendation and report identified as objectionable will be reviewed.<sup>2</sup> The review of those identified portions is *de novo* and the Court must “consider relevant evidence of record and not merely review the magistrate judge’s

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<sup>1</sup>See 28 U.S.C. § 636(b)(1)(C); Fed. R. Civ. P. 72.

<sup>2</sup>See *Garcia v. City of Albuquerque*, 232 F.3d 760, 767 (10th Cir. 2000); *Gettings v. McKune*, 88 F. Supp. 2d 1205, 1211 (D. Kan. 2000).

recommendation.”<sup>3</sup>

Magistrate Judge Cohn found that this matter should be reversed and remanded to the Commissioner, because the ALJ never mentioned plaintiff’s treating physician, Dr. Ehly, nor addressed or discussed Dr. Ehly’s treatment records. Given that the record discloses that Dr. Ehly prescribed significant pain medication and referred plaintiff to a pain clinic, the ALJ’s findings that plaintiff does not regularly take prescription pain medication warrant explanation, and particular reference to the contrary evidence in Dr. Ehly’s treatment records. But, this Court agrees with Magistrate Judge Cohn, that this is not a situation warranting an immediate award of benefits, as the plaintiff has failed to point to substantial and *uncontradicted* evidence in the records that would render a remand a futile and not useful process.

Plaintiff does not show that substantial and uncontradicted evidence in the record as a whole lends itself to a conclusion that plaintiff is disabled and entitled to benefits. For example, there is evidence supporting the ALJ’s negative credibility assessment of plaintiff’s subjective complaints of pain: plaintiff’s thirty year history of headaches had not precluded her from substantial gainful work for many years; plaintiff actively sought employment for two years after the alleged date of onset; plaintiff failed to take medication without good reason; and a neurologist that Dr. Ehly referred her to thought she needed an analgesic holiday, to ward off analgesic rebound. As Magistrate Cohn noted, the ALJ’s unexplained disregard of Dr. Ehly’s records bears explanation; thus remand is appropriate..

**IT IS THEREFORE ORDERED** that plaintiff’s Objections (Doc. 16) to the Report and Recommendation of Magistrate Judge Cohn (Doc. 15) shall be denied.

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<sup>3</sup>See *Griego v. Padilla*, 64 F.3d 580, 584 (10th Cir. 1995) (citation omitted).

**IT IS FURTHER ORDERED** that the August 20, 2010 Report and Recommendation (Doc. 15) shall be adopted by the Court as its own.

**IT IS THEREFORE ORDERED** that the Commissioner's decision be and hereby is **REVERSED AND REMANDED** for further proceedings consistent with the August 20, 2010 Report and Recommendation (Doc. 15), and in accordance with the fourth sentence of 42 U.S.C. § 405(g).

**IT IS SO ORDERED**

**Dated: September 13, 2010**

**S/ Julie A. Robinson**  
**JULIE A. ROBINSON**  
**UNITED STATES DISTRICT JUDGE**