

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
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ISMAEL MARCANO,

Plaintiff,

-against-

NANCY A. BERRYHILL, ACTING
COMMISSIONER OF SOCIAL SECURITY,

Defendant.
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13-cv-3648 (NSR) (LMS)

ORDER ADOPTING REPORT
AND RECOMMENDATION

NELSON S. ROMÁN, United States District Judge

Plaintiff, Ismael Marcano (“Plaintiff” or “Marcano”), commenced this action pursuant to 42 U.S.C. § 405(g) seeking judicial review of the final determination of the Commissioner of Social Security (“Commissioner” or “Defendant”), which denied his application seeking Supplemental Security Income (“SSI”) payments. Each party moved pursuant to FRCP 12(c)1 for judgment on the pleadings. (ECF Nos. 13, 19). This matter was referred to the Honorable Judge Lisa M. Smith, Magistrate Judge (“Judge Smith”). On March 29, 2017, Judge Smith issued a Report and Recommendation (the “R&R”) pursuant to 28 U.S.C. § 636(b) and F. R.C.P. § 72(b) recommending that the Commissioner’s motion (ECF No. 19) be denied and Plaintiff’s motion (ECF No. 13) be granted. For the following reasons, this Court adopts Judge Smith’s R&R and directs that the matter be remanded to the Commission for further administrative proceedings.

BACKGROUND¹

On or about December 2010, Plaintiff applied to the Social Security Administration (“SSA”) seeking disability benefits alleging he was disabled and unable to work. On or about February 25, 2011, Plaintiff’s application was denied. Plaintiff filed a request for a hearing before an Administrative Law Judge (“ALJ”). A hearing was held on November 8, 2011 and subsequently on December 1, 2011, the ALJ issued a

¹ Facts are taken from the R&R, unless otherwise noted.

decision denying Plaintiff's application for benefits. Plaintiff filed a request for review of the ALJ's determination with the Appeals Council, which was denied on April 24, 2013. Thus, the ALJ's determination denying Plaintiff's application for benefits of December 2011 became final.

Plaintiff commenced the instant action on or about May 2011 challenging the Commissioner's denial of disability benefits. In his complaint, Plaintiff asserts the Commissioner's findings are not supported by substantial evidence and are contrary to law and the rules and regulations of the Social Security Act ("SSA"). More specifically, Plaintiff request this Court reverse the Commissioner's determination or, in the alternative, request that the matter be remanded for further proceedings. Now before this Court is Judge Smith's R&R recommending the matter be remanded for further administrative proceedings.

STANDARD OF REVIEW

A magistrate judge may "hear a pretrial matter [that is] dispositive of a claim or defense" if so designated by a district court. Fed. R. Civ. P. 72(b)(1); accord 28 U.S.C. § 636(b)(1)(B). In such a case, the magistrate judge "must enter a recommended disposition, including, if appropriate, proposed findings of fact." Fed. R. Civ. P. 72(b)(1); accord 28 U.S.C. § 636(b)(1). Where a magistrate judge issues a report and recommendation,

[w]ithin fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings or recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.

28 U.S.C. § 636(b) (emphasis added); accord Fed. R. Civ. P. 72(b)(2), (3). However, "[t]o accept the report and recommendation of a magistrate, to which no timely objection has been made, a district court need only satisfy itself that there is no clear error on the face of the record.'" *Wilds v. United Parcel Serv., Inc.*, 262 F. Supp. 2d 163, 169 (S.D.N.Y. 2003) (emphasis added) (quoting *Nelson v. Smith*, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985); accord *Feehan v. Feehan*, No. 09 Civ. 7016 (DAB), 2011 WL 497776, at *1

(S.D.N.Y. Feb. 10, 2011); see also Fed. R. Civ. P. 72 advisory committee note (1983 Addition, Subdivision (b)) (“When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.”).

DISCUSSION

Here, neither party has objected to Judge Smith’s R&R. Therefore, the Court reviews the recommendation for clear error. The Court finds no error on the face of the R&R.

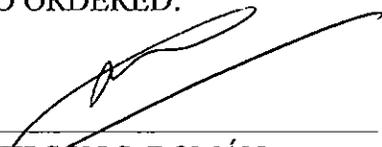
In the R&R, Judge Smith found, *inter alia*, the ALJ misapplied the treating physician rule, failed to delineate why, if appropriate, Plaintiff’s treating physician’s opinions and findings were not entitled to greater deference, and what was the ALJ’s basis for granting greater deference to the consultative examiner’s findings. Based on the foregoing, Judge Smith recommends the matter be remanded for further administrative proceeding.

CONCLUSION

After careful review of the R&R, the Court finds no clear error and adopts the recommendations of Judge Smith. The instant matter is remanded to the administrative agency for further proceeding consistent with the R&R and this Order. The Clerk of the Court is respectfully requested to terminate the motions (Doc. Nos. 13 and 19). The Clerk of Court is directed to close this case.

Dated: June 13, 2017
White Plains, New York

SO ORDERED:



NELSON S. ROMÁN
United States District Judge