

*LFAS*

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

CONSTANTINO FIERRO,  
Plaintiff,

CIVIL ACTION

v.

NO. 14-6777

CAROLYN W. COLVIN,  
Acting Commissioner of Social Security  
Defendant.

REPORT AND RECOMMENDATION

LYNNE A. SITARSKI  
UNITED STATES MAGISTRATE JUDGE

**FILED**

APR 22 2016

MICHAEL E. KUNZ, Clerk  
By: *[Signature]* Dep Clerk

April 21, 2016

Constantino Fierro ("Plaintiff") brought this counseled action pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), seeking review of the Commissioner of the Social Security Administration's decision denying his claims for Disability Insurance Benefits ("DIB") and Supplemental Security Income ("SSI") under Titles II and XVI of the Social Security Act, 42 U.S.C. §§ 401–433, 1382–1383 (the "Act"). The Commissioner has filed an uncontested motion for remand pursuant to the fourth sentence of 42 U.S.C. § 405(g), arguing that the case would benefit from additional evaluation. (ECF No. 15). For the reasons set forth below, I recommend that Defendant's unopposed Motion for Remand be **GRANTED**, Plaintiff's request for review be **DENIED AS MOOT**, and that final judgment be **ENTERED**.

**I. PROCEDURAL HISTORY<sup>1</sup>**

On March 13, 2009, Plaintiff protectively filed an application for DBI and SSI, alleging disability since November 27, 2006 due to compressed discs, knee and back problems, a torn

<sup>1</sup> Because this matter involves an uncontested motion for remand, I will omit a summary of the facts.

meniscus, problems sleeping, problems walking, and probable sleep apnea. (R. 339). After Plaintiff's claims were initially denied on October 12, 2010, he timely requested a hearing before an Administrative Law Judge ("ALJ"). (R. 195-96). In a decision issued on March 23, 2012, the ALJ found that Plaintiff suffered from the severe impairment of herniated nucleus pulposus ("HNP") at T8-9, but did not have any other severe impairment. (R. 154). The ALJ further found that Plaintiff's impairments did not meet a listed impairment, and that Plaintiff had the residual functional capacity ("RFC") to perform a full range of light work as defined in 20 C.F.R. 404.1567(b) and 416.967(b), except he had to avoid hazards, such as unprotected heights and moving machinery. (R. 154-55). Based on these limitations, and testimony from a Vocational Expert ("VE"), the ALJ found that Plaintiff could perform other work in the national economy and therefore was not disabled since November 27, 2006. (R. 159).

On May 8, 2012, following Plaintiff's timely appeal, (R. 229-35), the Appeals Council vacated the decision and remanded the case back to the ALJ. (R. 163-67). On August 29, 2013, the ALJ held a second administrative at which a VE and Dr. Donald Goldman, a Medical Expert ("ME"), testified. (R. 36-76). In a decision issued on September 24, 2013, the ALJ again found that Plaintiff's only severe impairment was an HNP, that Plaintiff's impairments did not meet or equal a listed impairment, and that Plaintiff retained the RFC to perform light as defined in 20 CFR 404.1567(b) and 416.967(b) with no exposure to hazards. (R. 24-31). The ALJ further found that Plaintiff was "unable to frequently handle or finger and is precluded from repetitive kneeling, squatting (stooping), and bending. Plaintiff is able to sit, walk, and stand the amounts necessary for light work (at least 6 hours each). Plaintiff is able to lift/carry 10 pounds frequently and 20 pounds occasionally." (R. 27). On October 23, 2014, the Appeals Council denied Plaintiff's request for review, making the ALJ's decision the final decision of the Commissioner. (R. 1-7).

Plaintiff filed the instant civil appeal on November 26, 2014. (Compl., ECF No. 3). The matter was assigned to the Honorable Edward G. Smith, who has referred it to me for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). (Order, ECF No. 11).

## II. DISCUSSION

Plaintiff alleges that the ALJ made multiple factual and legal errors. He contends that the ALJ erred in: rejecting treating and examining medical source opinions that were consistent with a finding of disability in favor of non-treating, non-examining source opinions; relying on extra-record evidence to give no weight to one of Plaintiff's medical sources; rejecting Plaintiff's subjective complaints of debilitating pain; failing adequately explain his determination that none of Plaintiff's impairments met or equaled any listed impairment on the Commissioner's Listing of Impairments; and using a vague or undefined term in the hypothetical to the VE. (Pl.'s Br. 2-18). Plaintiff requested that the matter be remanded for payment of benefits. (*Id.* at 18-19). The Commissioner initially disputed Plaintiff's allegations of error and urged the Court to affirm the decision of the ALJ. (Resp. 4-14). Plaintiff filed a substantive reply. (ECF No. 12). After this Court had expended substantial judicial resources evaluating the parties' respective arguments and reviewing the administrative record, Defendant filed a Motion to Remand for further proceedings pursuant to sentence four of 42 U.S.C. § 405(g). (Def.'s Mot. to Remand 1, ¶ 5).

The exclusive methods by which a district court may remand a case to the Commissioner are set forth in sentence four and sentence six of section 405(g). Pursuant to sentence four, "[t]he court shall have the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the [Commissioner], with or without remanding the case for a hearing." 42 U.S.C. § 405(g); *Melkonyan v. Sullivan*, 501 U.S. 89, 99-100 (1991). Sentence six provides:

[t]he court may, on motion of the [Commissioner] made for good cause shown before the Commissioner files [his] answer, remand the case to the [Commissioner] for further action by the [Commissioner], and it may at any time order additional evidence to be taken before the [Commissioner], but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding . . .

42 U.S.C. § 405(g); *Melkonian*, 501 U.S. at 100.

The Commissioner's request for remand in this case is not premised upon new and material evidence. Rather, the Commissioner contends that “this case would benefit from additional evaluation by the Agency.” (Def.’s Mot. to Remand ¶ 2). Specifically, the Commissioner’s motion to remand proposes that, upon remand, the Appeals Council will instruct the ALJ to obtain evidence from a medical expert to clarify the nature and severity of Plaintiff’s impairments, reevaluate the opinion evidence of record, reassess the Plaintiff’s RFC, and as warranted, obtain supplemental VE testimony. (*Id.* ¶ 4). A further proposed condition set forth in the motion to remand is that the ALJ may not rely upon the testimony and interrogatories previously solicited from Dr. Goldman, but rather must solicit evidence from a different medical expert (*Id.*). Accordingly, the Commissioner requests a remand for further proceedings pursuant to sentence four of section 405(g). Plaintiff does not oppose the Commissioner’s motion for remand. (Def.’s Mot. to Remand ¶ 3).

Upon careful and independent consideration of the record and the ALJ’s decision, I concur that reevaluation of Plaintiff’s impairments is warranted under the circumstances. In particular, the ALJ failed to set forth good reasons, supported by substantial evidence, for discrediting the opinions of every physician who treated or examined Plaintiff in favor of non-examining, non-treating sources. Therefore, I recommend that the Commissioner’s unopposed motion be granted, that Plaintiff’s motion be denied as moot, and that the matter be remanded to

the Commissioner for further proceedings pursuant to the fourth sentence of 42 U.S.C. § 405(g).

Additionally, final judgment should be entered in this case.

Therefore, I make the following:

**RECOMMENDATION**

AND NOW, this 21ST day of April, 2016, it is **RESPECTFULLY**  
**RECOMMENDED** that the Commissioner's uncontested motion for remand be **GRANTED**  
and the matter be **REMANDED**.

The parties may file objections to the Report and Recommendation. See Loc. R. Civ. P.  
72.1. Failure to file timely objections may constitute a waiver of any appellate rights.

BY THE COURT:

  
\_\_\_\_\_  
LYNNE A. SITARSKI  
UNITED STATES MAGISTRATE JUDGE

ENTERED  
APR 22 2016  
CLERK OF COURT

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

<b>CONSTANTINO FIERRO,</b>	:	<b>CIVIL ACTION</b>
<b>Plaintiff,</b>	:	
	:	
<b>v.</b>	:	<b>NO. 14-6777</b>
	:	
<b>CAROLYN W. COLVIN,</b>	:	
<b>Acting Commissioner of Social Security</b>	:	
<b>Defendant.</b>	:	

**ORDER**

AND NOW, this                      day of                      , 2016, upon careful consideration of the Report and Recommendation filed by United States Magistrate Judge Lynne A. Sitarski, and upon independent review of the briefs filed by the parties, it is hereby ORDERED that:

1. the Report and Recommendation is APPROVED and ADOPTED;
2. Defendant's uncontested Motion for Remand is GRANTED;
3. Plaintiff's request for review be DENIED as moot; and
4. this matter is REMANDED to the Commissioner for further proceedings pursuant to the fourth sentence of 42 U.S.C. § 405(g).

BY THE COURT:

\_\_\_\_\_  
EDWARD G. SMITH,        J.

**CONSTANTINO FIERRO,** : **CIVIL ACTION**  
**Plaintiff,** :  
:   
**v.** : **NO. 14-6777**  
:   
**CAROLYN W. COLVIN,** :   
**Acting Commissioner of Social Security** :   
**Defendant.** :

## EDWARD G. SMITH, J.



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

4/22/2016

RE: Fierro vs Colvin  
CA No. 14-6777

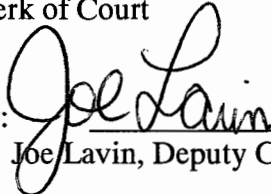
**NOTICE**

Enclosed herewith please find a copy of the Report and Recommendation filed by United States Magistrate Judge Sitarski, on this date in the above captioned matter. You are hereby notified that within fourteen (14) days from the date of service of this Notice of the filing of the Report and Recommendation of the United States Magistrate Judge, any party may file (in duplicate) with the clerk and serve upon all other parties written objections thereto (See Local Civil Rule 72.1 IV (b)). **Failure of a party to file timely objections to the Report & Recommendation shall bar that party, except upon grounds of plain error, from attacking on appeal the unobjected-to factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court Judge.**

In accordance with 28 U.S.C. §636(b)(1)(B), the judge to whom the case is assigned will make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. The judge may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate judge, receive further evidence or recommit the matter to the magistrate judge with instructions.

Where the magistrate judge has been appointed as special master under F.R.Civ.P 53, the procedure under that rule shall be followed.

MICHAEL E. KUNZ  
Clerk of Court

By:   
Joe Lavin, Deputy Clerk

cc: A. Lynch  
N. Schmid  
R. Savoy

Courtroom Deputy to Judge Smith