

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

TRACY GARDNER,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Civil No. 88-0195 P</i>
)	
LOUIS W. SULLIVAN, M.D.,)	
<i>Secretary, United States Department</i>)	
<i>of Health & Human Services,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

¹ This action is properly brought under 42 U.S.C. §§ 405(g), 1383(c)(3). The Secretary has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court, pursuant to Local Rule 12 which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the Secretary's decision, and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on January 23, 1990 pursuant to Local Rule 12(b) requiring the parties to set forth at oral argument their respective positions with citation to relevant statutes, regulations, case authority and page references to the administrative record.

This Social Security Disability and Supplemental Security Income appeal raises two questions:²

(1) whether substantial evidence supports the Secretary's finding that the plaintiff did not suffer from a severe impairment prior to the close of his disability insured date; and (2) whether substantial evidence supports the Secretary's finding that the plaintiff has the residual functional capacity to perform his past relevant work and is therefore not disabled. The plaintiff claims the Secretary erred in finding: (1) that the plaintiff did not suffer from a severe impairment prior to the close of his disability insured period; (2) that the plaintiff's impairments do not meet or equal the criteria of the 12.02 Listing of Impairments;³ and (3) that he can perform his past relevant work as a dishwasher.

² This appeal arises from two separate applications for social security benefits. The plaintiff first filed for Social Security Disability benefits on September 26, 1985. He filed a subsequent application for Supplemental Security Income benefits on March 26, 1986. Both of these claims were denied. Appeals from these denials were consolidated and heard by a single Administrative Law Judge. Record p. 59.

³ The Listing of Impairments, Appendix 1 to Subpart P, 20 C.F.R. ' 404, describes physical and mental impairments in terms of specific medical requirements and functional limitations; if an impairment meets the listing requirements, then it is considered to be disabling regardless of age, education or work experience. 20 C.F.R. ' ' 404.1520(d), 404.1525(c), 416.920(d), 416.925(c).

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' ' 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Services*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff alleged onset of disability on July 15, 1979 and met the disability insured status requirements through December 31, 1981, Finding 1, Record p. 71; that the plaintiff has not engaged in substantial gainful activity since July 15, 1979, Finding 2, Record p. 71; that the plaintiff `` suffers from (1) the status post-surgical residuals of a craniotomy with resection of a portion of the frontal lobe, as treatment for a traumatic depressed right frontal skull fracture, producing mild left hemiparesis, (2) the status post-surgical residuals of facial plastic surgery, (3) essential loss of vision of the left eye, (4) mild to moderate sensory neural hearing loss in the left ear, [and] (5) organic brain syndrome,"⁴ but does not suffer from an antisocial personality disorder, other personality disorder or other mental impairment, Finding 3, Record pp. 71-72; that the plaintiff does not suffer from any impairment or combination of impairments which meets or equals any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. ' 404, Finding 4, Record p. 72; that between the alleged disability onset date and the close of 1981 the plaintiff did not suffer from an impairment that met the duration requirements of the applicable regulations, Findings 5-6, Record p. 72; that in consequence of his impairments the plaintiff has `` a moderate degree of restriction of his activities of daily living, a marked degree of difficulty in maintaining social functioning, and no more than two episodes of deterioration or decompensation in worklike settings," and that he often experiences deficiencies of concentration, Finding 7, Record p. 72; and that the plaintiff retains the residual functional capacity to perform the simple unskilled jobs of his past relevant work as a janitor, dishwasher and kitchen helper and therefore is not disabled, Findings 8-9, Record p. 72. The

⁴ The plaintiff's injuries are a result of an automobile accident which took place on February 3, 1979.

Appeals Council declined to review the decision,⁵ Record pp. 3-4, making it the final decision of the Secretary. 20 C.F.R. ' ' 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Services*, 869 F.2d 622, 623 (1st Cir. 1989).

In reviewing the decision of the Secretary, the standard is whether the determination made is supported by substantial evidence. 42 U.S.C. ' ' 405(g), 1383(c)(3); *Lizotte v. Secretary of Health & Human Services*, 654 F.2d 127, 128 (1st Cir. 1981). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Services*, 647 F.2d 218, 222 (1st Cir. 1981).

The Secretary terminated the plaintiff's Social Security Disability claim at Step Two of the evaluative process. At this step the plaintiff bears the burden of proving that his impairment is severe. 20 C.F.R. ' 404.1520(c), *Bowen v. Yuckert*, 482 U.S. 137, 145 (1987). This means that the Secretary may rely on an absence of evidence to support his findings. In addition, since the plaintiff met the disability insured status only through the end of 1981 it is his burden to establish that he was disabled prior to that date. *Cruz Rivera v. Secretary of Health & Human Services*, 818 F.2d 96, 97 (1st Cir. 1986).

⁵ The Appeals Council did consider additional evidence in the form of records from the Maine Medical Center relating to the plaintiff's hospitalization for meningitis in November and December of 1987. It found that the additional information did not warrant a change in the Administrative Law Judge's decision.

The plaintiff argues that the Administrative Law Judge erred when he found that the plaintiff did not have an impairment which met the duration requirements set forth in the regulations.⁶ He also alleges that it is incongruous for the Administrative Law Judge to have found that although the plaintiff's impairments were severe in August, 1987 they were not severe as of the end of 1981. The plaintiff contends that his mental impairment is a result of organic brain damage caused by his original head injuries and that this impairment existed from the alleged onset date forward.

The Administrative Law Judge found that the plaintiff recovered from his physical injuries within twelve months of July 15, 1979, the alleged onset date. Record p. 62. In doing so he relied on the following two statements of the plaintiff's treating physician: "The patient has made a very uneventful recovery, and should hopefully become fully incorporated into society in all respects in the very near future." Record p. 197 (discharge summary dated March 6, 1979). "The remainder of the neurological examination was surprisingly normal. I think that he is employable, and should be able to drive a car and do all normal activities. I do not think that he should engage in any sports which might chance a head trauma, such as football or hockey." Record p. 209 (progress note dated Feb. 25, 1980). *See also* Record pp. 60-62. The Administrative Law Judge also noted that the plaintiff did not require additional medical treatment for more than two years after February 25, 1980. Record p. 62. In the absence of medical evidence which showed that the plaintiff suffered from an impairment or combination of impairments imposing significant limitations on his ability to perform basic work activities for a continuous period of at least twelve months commencing prior to the end of 1981, the

⁶ The applicable regulations provide in relevant part: "Unless your impairment is expected to result in death, it must have lasted or must be expected to last for a continuous period of at least 12 months." 20 C.F.R. ' 404.1509.

Administrative Law Judge found that the plaintiff's impairments were not severe for the purpose of his disability claim.

Although the showing of severity has been characterized as a *de minimis* requirement, the plaintiff must still establish that his impairment significantly limits his physical or mental ability to do basic work activities. *Bowen v. Yuckert*, 482 U.S. at 145-46; 20 C.F.R. ' 404.1520(c). Here the plaintiff has failed to sustain that burden. Nothing in the record contradicts the treating physician's assessment that the plaintiff was fully recovered and capable of work by February, 1980. Although several of the physicians who examined the plaintiff after 1985 stated that the plaintiff's mental impairment was severe at the time of their examination, they offered no opinion as to the plaintiff's mental state at the end of 1981. Thus, substantial evidence supports the Secretary's decision that the plaintiff did not suffer from a severe impairment as of the close of the insured period.

The plaintiff's second argument is that the Administrative Law Judge, in determining the plaintiff's Supplemental Security Income claim, erred when he failed to find that the plaintiff's impairment met Listing 12.02. Listing 12.02 states in relevant part:

Organic Mental Disorders: Psychological or behavioral abnormalities associated with a dysfunction of the brain. History and physical examination or laboratory tests demonstrate the presence of a specific organic factor judged to be etiologically related to the abnormal mental state and loss of previously acquired functional abilities.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Demonstration of a loss of specific cognitive abilities or affective changes and the medically documented persistence of at least one of the following:

.....

4. Change in personality; or

....

6. Emotional lability (e.g., explosive temper outbursts, sudden crying, etc.) and impairment in impulse control;

....

AND

B. Resulting in at least two of the following:

1. Marked restriction of activities of daily living; or

2. Marked difficulties in maintaining social functioning;

or

3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or

4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behaviors).

The plaintiff has the burden of proving that his impairment or combined impairments meet or equal a listed impairment. 20 C.F.R. ' 416.920(d); *Dudley v. Secretary of Health & Human Services*, 816 F.2d 792, 793 (1st Cir. 1987). To meet a listed impairment, the plaintiff must have the specific medical findings, which consist of symptoms, signs and laboratory findings, shown in the listing for that impairment. 20 C.F.R. ' ' 416.925(d), 416.928.

The plaintiff contends that he established that he suffers from changes in personality and emotional lability, Listing 12.02(A)(4) and (6), which have resulted in marked difficulties in maintaining social functioning, deficiencies of concentration and repeated episodes of deterioration, Listing 12.02(B)(2),(3) and (4).

The Secretary concedes that the plaintiff has an organic mental impairment and that he has marked difficulties in maintaining social functioning, but he rejects the plaintiff's argument that he meets the necessary criteria of 12.02(B). Record p. 71. The Administrative Law Judge found that, while the plaintiff often experienced deficiencies in concentration, persistence or pace that would result in failure to complete tasks in a timely manner in work settings or elsewhere, he experienced episodes of deterioration once or twice, rather than repeatedly, and only moderate, rather than marked, restrictions of activities of daily living. Record pp. 70-71, 75. From these findings he concluded that the plaintiff's impairment does not meet the listings. Record p. 72.

The Administrative Law Judge "is responsible for deciding the ultimate legal question of whether the listing is met or equaled." Social Security Ruling 83-19, reprinted in *West's Social Security Rulings*, at 93 (Supp. 1989). Usually by comparing the clinical signs, symptoms and laboratory findings with those in the listing the Administrative Law Judge can determine whether the listing is met. *Id.* The record contains several evaluations which deal with the plaintiff's ability to function in a work situation. A report submitted by an examining psychologist, Elmo G. Hall, found that, although the plaintiff may have a tendency to test limits and act out, he is capable of performing significant gainful activity including skilled and semi-skilled work. Record pp. 214, 216. A neurologist, John M. Boothby, M.D., concluded that the plaintiff's neurological deficits should not render him totally disabled. Record p. 218. A psychiatrist, Ray Ketcham, M.D., found that the plaintiff exhibits a history of poor judgment and antisocial labile behavior, but that he is capable of performing simple work-specific tasks, such as dishwashing. Record pp. 226-28. In addition, the record contains only two reports of decompensation in a work setting. Record pp. 171-74. Thus, the medical, psychological and employment reports in this record fully support the Secretary's finding that the plaintiff does not meet Listing 12.02.

Finally, the plaintiff argues that the Administrative Law Judge erred when he found that the plaintiff had the residual functional capacity to perform his past relevant work. He contends that he is unable to perform any work or, in the alternative, if he is able to perform some work the Administrative Law Judge erred when he did not employ a vocational expert to testify to the effect the plaintiff's mental impairment has on the work he may perform.

The Secretary's finding that the plaintiff may return to his past relevant work is clearly supported by the record. As noted above, none of the medical evidence suggests that the plaintiff is unfit for work. Rather, the examining doctors all concluded that the plaintiff is capable of working. Furthermore, Dr. Ketcham, whose findings indicate the most severe mental impairments, specifically stated that the plaintiff is capable of accomplishing simple tasks, such as dishwashing. Record p. 228. The Secretary is not required to employ a vocational expert to determine the requirements of the plaintiff's past relevant work. Indeed, the plaintiff is the primary source of that information. Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service*, at p. 811 (1983).

I conclude that there is substantial evidence to support the Secretary's decision that the plaintiff failed to satisfy the duration requirements applicable to his Social Security Disability claim, that he did not meet the listings and that he has the residual functional capacity to perform his past relevant work. Accordingly, I recommend that the Secretary's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 29th day of January, 1990.

David M. Cohen
United States Magistrate