

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

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| JEANNE FLANNERY, |) | |
| |) | |
| Plaintiff |) | |
| |) | |
| v. |) | Civil No. 90-305 B |
| |) | |
| LOUIS W. SULLIVAN, Secretary |) | |
| of the United States Department |) | |
| of Health and Human Services, |) | |
| |) | |
| Defendant |) | |

REPORT AND RECOMMENDED DECISION ¹

This Social Security Disability appeal raises the question whether substantial evidence supports the Secretary's finding that plaintiff Jeanne Flannery retains the ability to perform a full range of light and sedentary work despite post-surgical residual pain from a number of severe ailments.

The plaintiff has had two hearings before an administrative law judge. In his initial determination the Administrative Law Judge found that she was not disabled and denied her application. The Appeals Council remanded the case for further findings based on the Administrative Law Judge's failure to adequately address the issue of pain and its effect on the claimant's ability to

¹ This action is properly brought under 42 U.S.C. § 405(g). The Secretary has admitted that the plaintiff has exhausted her 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 she 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 February 26, 1992 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.

perform work activities," including any adverse side-effects of pain medication. Record p. 244. Following a second hearing on January 24, 1990 the Administrative Law Judge affirmed his earlier finding that the plaintiff was not disabled and denied her application. At neither hearing did medical experts testify. The plaintiff challenges the final ruling.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff met the special insured disability status requirements from January 1980 through the last day of March 1985, Finding 2, Record p. 20; that prior to March 1985 she suffered from: (1) the status post-surgical residuals of a laminectomy, with excision of a herniated nucleus pulposus at the fourth lumbar interspace, (2) the status post-surgical residuals of an exploratory decompressive laminectomy at the L-4/L-5 level of the spine, with mild residual degenerative osteoarthritis in the lower lumbar spine, (3) status post-coronary artery bypass grafting to the left anterior descending coronary artery, with virtually complete relief of anginal symptoms, (4) the status post-surgical residuals of a first rib resection for thoracic outlet syndrome, (5) obesity and (6) status post-excision of a Morton's neuroma from the left foot, Finding 3, Record p. 20; that she did not suffer from any impairment or combination of impairments that meets or equals any impairment listed in Appendix 1 to Subpart P, 20 C.F.R. ' 404, Finding 4, Record p. 21; that her allegations of incapacity are ``greatly out of proportion to the objective medical evidence" in the record and her testimony not fully credible, Finding 5, Record p. 21; that she ``possessed the residual functional capacity to perform a full range of work activity of both a light and sedentary exertional level," *id.*; that she was unable to perform her past relevant work, Finding 6, Record p. 21; that the Medical-Vocational Guidelines of Appendix 2 to Subpart P, 20 C.F.R. ' 404 (the ``Grid") direct a conclusion that prior to the close of March 1985 the plaintiff possessed the residual functional capacity

to perform other jobs existing in significant numbers in the national economy," Finding 10, Record p. 21; and that the plaintiff was not disabled, Finding 11, Record p. 21. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final determination of the Secretary. 20 C.F.R. ' 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the Secretary's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. ' 405(g); *Lizotte v. Secretary of Health & Human Servs.*, 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 Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Because the Secretary determined that the plaintiff is not capable of performing her past relevant work, the burden of proof shifted to the Secretary at Step Five of the evaluative process to show the plaintiff's ability to do other work available in the national economy. 20 C.F.R. ' 404.1520; *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record therefore must contain positive evidence supporting the Secretary's findings regarding both the plaintiff's residual functional capacity and the relevant vocational factors affecting her ability to perform other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 293-94 (1st Cir. 1986); *Lugo v. Secretary of Health & Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

The plaintiff contends that the Secretary committed reversible error by ignoring the side effects of her medications at Step Five. She testified that before the expiration of her insured status she began taking Flexeril and Tylenol #3 (with codeine) to relieve severe pain. Record pp. 31, 57-58, 60. Asked whether the medication produced side effects, she responded: "Yes. The pain medication makes me drowsy." *Id.* The plaintiff attributed her side-effect fatigue to: "The -- well, the Flexeril. Perhaps the

two of them, the two of them together too might -- " *Id.* pp. 61-62. She also stated that prior to the end of March 1985 she took Tylox two or three times daily which gave her nightmares and caused dizziness. *Id.* pp. 42-43.

At oral argument the Secretary asserted that the plaintiff has not shown that she was taking these medications during the period of her insured status. However, the plaintiff testified that she was taking Flexeril and Tylenol #3 either in March 1984 or March 1985 and that she continues to take them. Record pp. 31, 56-57, 62. Although the plaintiff equivocates between these two dates, both are within the plaintiff's insured status period as determined by the Administrative Law Judge. A medical report by Dr. D.L. Shubert tends to corroborate her testimony. Exh. 48, Record p. 264. In his report Dr. Shubert writes: "I last saw [Flannery] in 1985. At that time, she responded well to Flexeril, Tylox and anti-inflammatories." *Id.* Additionally, a Maine Medical Center report notes that the plaintiff was taking Tylenol #3 in September 1980 which is during her insured period. Exh. 21, Record p. 156. Thus, the Secretary's claim is not supported by the evidence.

Although he noted that Dr. Shubert referred to the plaintiff taking these medications in 1985, the Administrative Law Judge stated in his opinion that Flannery did not complain to her physician of medication side effects, nor did the doctor note such problems himself.² Record p. 17-18. Commenting on her allegation that "she required strong and narcotic analgesic medication for relief of pain" which made her drowsy, the Administrative Law Judge apparently concluded that it was not credible in light of the absence of any such complaints in the medical record, including the lack of

² The Administrative Law Judge actually attributed this statement to Dr. Charles Rogers. *See* Record p. 17. It appears that he did so mistakenly, however, because no such statement appears in Dr. Rogers' report, which is a part of the exhibit cited by the Administrative Law Judge. Exh. 48, Record pp. 268-70. Instead, in a separate report found in the same exhibit, Dr. Shubert states that he examined the plaintiff in 1985. *Id.* p. 264.

comments by her physicians regarding side effects. *Id.* p. 19. He also seemed to find her assertions regarding side effects not credible because he disbelieved her allegations of pain. *Id.*

The Secretary may not ignore the issue of the side effects of medication simply because the claimant's testimony comprises the only evidence of record that such side effects exist. *Figueroa v. Secretary of Health, Educ. & Welfare*, 585 F.2d 551, 553-54 (1st Cir. 1978). The Administrative Law Judge in this case did not seek the assistance of experts in determining the validity, severity and disabling consequences of the asserted side effects, as the court recommended in *Figueroa*, nor did he otherwise inquire about the matter. Instead, he simply discredited her testimony on the basis that nowhere in the medical evidence presented does it appear that she had ever complained to a physician that she was experiencing side effects from these medications. The plaintiff argues that the absence of such complaints cannot by itself constitute substantial evidence. I agree. The plaintiff's testimony on side effects is uncontroverted. The court in *Figueroa* specifically stated that where the plaintiff's testimony constitutes the only evidence of side effects the administrative law judge must either seek further medical evidence or make some further inquiry. *Figueroa*, 585 F.2d at 554. The Administrative Law Judge here did neither. A layman is in no position to make a medical judgment about the disabling consequences of side effects of medication merely by assessing the credibility of the plaintiff as a witness. *Id.*

For the foregoing reasons, I recommend that the Secretary's decision be **VACATED** and the cause **REMANDED** for a proper inquiry into the side effects of the plaintiff's medication and its effect on her residual functional capacity to perform other work in the national economy.

NOTICE

A party may file objections to those specified portions of a magistrate judge'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 2nd day of March, 1992.

*David M. Cohen
United States Magistrate Judge*