

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

GAIL WIGGIN,)	
)	
Plaintiff)	
)	
v.)	Civil No. 91-211 B
)	
LOUIS W. SULLIVAN, Secretary))
of Health and Human Services,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION¹

In this Social Security Supplemental Security Income and Disability appeal of the denial of the plaintiff's second application, alleging disability due to back injury and arthritis, the plaintiff asserts that the Secretary failed to show that she has the residual functional capacity to perform the full range of sedentary work, that her pain allegations are not credible and that it was appropriate to rely on the Grid to find her not disabled in light of her asserted nonexertional impairment. The plaintiff also contends that the Appeals Council failed to consider new medical evidence that she presented.

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 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.

In accordance with the Secretary's sequential evaluation process, 20 C.F.R. ' ' 404.1520, 416.920; *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 had not engaged in substantial gainful activity since February 20, 1980 and met disability insured status requirements as of that date through June 30, 1985, Findings 1-2, Record p. 24; that she `` has severe back pain associated with a somatic dysfunction of the lumbo-thoracic area, herniated nucleus pulposus at the L5-S1 level, low back strain, a traumatic ligament sprain, and lumbar spinal stenosis," Finding 3, Record p. 24; that she `` has received treatment for substance abuse and depression, but she currently has no mental impairment which imposes significant vocationally relevant restrictions," *id.*; that she does 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. 24; that her allegations concerning her impairment and its impact on her ability to work are not credible, Finding 5, Record p. 24; that she `` has the residual functional capacity to perform the physical exertion requirements of work except for lifting and carrying heavy objects, performing other strenuous activities, bending or twisting on a repeated basis, and standing or walking for prolonged periods," Finding 6, Record p. 24; that she `` is able to sit for vocationally meaningful periods of time" and that she has `` no significant non-exertional limitations," *id.*; that she is unable to perform her past relevant work, Finding 7, Record p. 25; that she has the residual functional capacity to perform the full range of sedentary work, Finding 8, Record p. 25; that she is not disabled as defined by the Medical-Vocational Guidelines of Appendix 2 to Subpart P, 20 C.F.R. ' 404 (the `` Grid"), Finding 12, Record p. 25; and that, accordingly, she was not disabled during the time of her insured status nor has she been during any time up to the date of the opinion, *id.* The Appeals Council declined to review the decision,² Record pp. 3-4, making it the final

² In doing so, the Appeals Council specifically considered the medical reports of Dr. Thomas C.

determination of the Secretary. 20 C.F.R. ' ' 404.981, 416.1481; *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), 1383(c)(3); *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 to show the plaintiff's ability to do other work available in the national economy. 20 C.F.R. ' ' 404.1520, 416.920; *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).

Residual Functional Capacity

Wiggin stated that her activities include grocery shopping, building things with her hands, playing cards, driving a car and visiting friends. Record pp. 37-38, 88. She also testified that she can lift ten pounds, though not repeatedly, sit for forty-five minutes (longer if she can move around in a chair), drive for one hour in a car and stand for ten minutes which hurts quite a bit if she stands still. *Id.* pp. 37, 42. When asked whether she can play cards steadily `` for hours at a time," she stated: ``No, no. . . . There's always a fifth person there to take over. . . [after sitting h]alf an hour, 3/4 of an

Doolittle who performed an examination of Wiggin in 1991 after the Administrative Law Judge issued his decision. Record p. 3; *see id.* pp. 6-13.

hour at most [W]e do that all evening like that." *Id.* p. 45. She also noted that she cannot stoop over for long. *Id.* p. 38.

The Administrative Law Judge found that "[n]o treating or examining physician has mentioned specific lifting restrictions" affecting the plaintiff. *Id.* p. 21. He also noted the conclusions of Dr. Bruce Sigsbee, who reported in July 1981 that Wiggin should avoid persistent bending and twisting movements and heavy lifting, *id.* p. 21; *see id.* p. 170, and those of Dr. H. Richard Hornberger in 1989, who stated that she cannot engage in prolonged walking, standing and significant bending, *id.* p. 21, *see id.* p. 148. However, the Administrative Law Judge also made reference to Dr. Hornberger's findings that the plaintiff "is intelligent enough to be trained for a variety of sedentary jobs" and that "her back problems are not severe and incapacitating for every day, getting around." *Id.* In determining her residual functional capacity the Administrative Law Judge also relied on the plaintiff's own description of her daily activities. *Id.* pp. 21-22. Based on this information he concluded that she could lift up to ten pounds and "remain seated for vocationally meaningful periods of time sufficient to perform sedentary occupations." *Id.* p. 22.

The phrase "vocationally meaningful" -- which is itself not very meaningful -- seems to be the Administrative Law Judge's way of describing the plaintiff's ability, in this case, to sit for the number of hours required to perform sedentary work. Sedentary work requires the ability to lift ten pounds and to sit for about six hours per eight-hour workday. *See* 20 C.F.R. §§ 404.1567(a), 416.967(a); Social Security Ruling 83-10, reprinted in *West's Social Security Reporting Service* at 51 (Supp. 1991). Although the plaintiff's testimony establishes that she has the ability to lift the ten pounds required for sedentary work, the evidence regarding her ability to sit is less conclusive. For a finding that the plaintiff can sit for approximately six hours per workday the "Secretary cannot rely on a presumption of sitting ability sufficient to do sedentary work." *Rosado*, 807 F.2d at 294 (citation omitted). The

plaintiff's own testimony supports only a finding that she can sit for up to one hour at a time while she drives and for up to 3/4 of an hour at a time while playing cards.

The evidence in the record supporting a finding that she can sit for six hours per workday is comprised of Dr. Hornberger's conclusion that she can perform sedentary work and of residual functional capacity assessments conducted in 1989 and 1990 by two nontestifying, nonexamining physicians, Dr. James H. Hall and Dr. John M. Yindra. *See* Record pp. 105-20. Although Dr. Hornberger did not express the plaintiff's ability to sit in terms of hours, his notes clearly reflect an opinion that her back problem is not severe and incapacitating and that she is not limited in her ability to perform work while seated. His conclusion follows on the heels of his listing various restrictions on her activities, none of them involving her ability to sit. *Id.* p. 148. Both nonexamining physicians reviewed Wiggin's medical file after Dr. Hornberger's examination and found her capable of sitting for six hours per eight-hour workday. *Id.* pp. 106, 114. In addition to simply checking the boxes on the assessment form to indicate this finding, both nonexamining physicians included written, albeit brief, remarks explaining the bases for their conclusions. *Id.* pp. 111-112, 114. Dr. Hall also noted that he disagreed with Dr. Hornberger's finding that the plaintiff's ability to walk is limited. *Id.* p. 111.

Although a close question, I conclude that there is substantial evidence in the record based on the combination of medical reports to support the Secretary's finding that the plaintiff can sit for about six hours per workday. *See e.g., Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 329 (1st Cir. 1990). Dr. Hornberger's conclusion was not a bare medical finding from which the Secretary inappropriately extrapolated to determine the plaintiff's residual functional capacity. *See Rosado*, 807 F.2d at 293 (Secretary not qualified to assess claimant's residual functional capacity based on a bare medical record). Instead, his conclusion expressed in lay terms -- albeit general ones -- that the plaintiff has the residual functional capacity to perform sedentary work. The Secretary also had the benefit of the nonexamining physicians' assessments which corroborated Dr. Hornberger's finding and which plainly spelled out, in terms of hours, the plaintiff's residual functional capacity for sitting. Although the weight accorded to reports of nonexamining physicians "will vary with the circumstances, including the nature of the illness and the information provided the expert," *Rodriguez*, 647 F.2d at 223, there is nothing to indicate that these nonexamining physicians had access to less than the plaintiff's complete medical file or that the nature of the impairments discussed therein were not readily susceptible to evaluation by a review of the file. In addition, the report of a nonexamining

physician may be afforded greater evidentiary weight when it contains a careful consideration of the medical reports of an examining physician. *Berrios Lopez v. Secretary of Health & Human Servs.*, 951 F.2d 427, 431 (1st Cir. 1991). Dr. Hall did not merely ratify the medical findings of Dr. Hornberger. Instead, he evaluated the medical file carefully enough to disagree with what appears to be Dr. Hornberger's finding that the plaintiff is limited in her ability to walk, commenting that the evidence presented in her medical history suggests otherwise. The Secretary is justified in concluding that these medical reports together support a finding that Wiggin can perform sedentary work.

Evaluation of Pain Allegations

The plaintiff asserts that the Secretary neglected to properly evaluate her allegations of constant and severe pain under *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19 (1st Cir. 1986) (construing instructions for the Secretary's Program Operations Manual System (POMS) DI T00401.570), by failing to consider her explanations for the lack of medical treatment and medication she received. She claims not to have sought treatment or taken prescription medication for her condition for approximately five years because her physician retired, she knew how to avoid causing the pain, she believed the medication was not "doing [her] body any good," she was "scared of taking high drugs" for fear of addiction based on her history of substance abuse and she was financially unable to pay for treatment. Record pp. 46-48. She did state that she once took pain killers three days per week that left her "pain free" and that although she has been in constant pain she has not taken prescription medication to alleviate this pain for the past several years, but cannot continue in this fashion. *Id.* pp. 38, 41, 46, 48. Wiggin also testified that up until two years before the hearing she had been able to afford medical treatment because she was receiving workers' compensation, but that since that time her only source of support has been food stamps. *Id.* pp. 46-48.

Wiggin has complained of constant, sometime terrible, pain in her back and hip which makes her stiff and which she claims is getting worse. *Id.* pp. 37-38, 42, 48-49, 85. She also has stated that this pain affects her ability to concentrate. *Id.* pp. 47-48.

The Administrative Law Judge found that "the claimant has discomfort and that the pain interferes with her inability [sic] to work." *Id.* p. 23. However, after discussing Wiggin's descriptions of her daily activities he rejected her assertions of severe pain and incapacity as "out of proportion with the degree to which she has received medical treatment" and medication and "not credible in light of the . . . discrepancies between the claimant's assertions and information contained in the written statements, the claimant's own description of her activities, and the actual functional restrictions established on examination." *Id.* pp. 22-23; Finding 5, Record p. 24. The Administrative Law Judge based his opinion, in part, on a 1983 inpatient medical examination, which included x-rays, that revealed "no positive findings" regarding Wiggin's complaints of "chronic backache." Record p. 23; *see id.* p. 146. He also noted that, although she received emergency room care in October 1984 for right hip discomfort, "there is no evidence of any follow-up care needed," and that x-rays taken in December of that year showed no significant abnormalities. *Id.* p. 23; *see id.* pp. 180-83. The Administrative Law Judge went on to place great emphasis on the fact that the record is devoid of any evidence that the plaintiff sought medical treatment from 1985 until November 1989 or that she ever complained to a physician of an inability to concentrate due to pain. *Id.* p. 23. The Administrative Law Judge did find that Wiggin had a substance abuse problem at one time, but that she had since recovered. *Id.* p. 20; *see id.* p. 121.

Failure to seek medical treatment or secure a prescription for such treatment is relevant in evaluating the credibility of a claimant's pain allegations. *Irlanda Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991). In addition, if a claimant fails to follow prescribed treatment "without a good reason," she will not be found disabled. 20 C.F.R. ' ' 404.1530(b), 416.930(b).

In conformity with the first step of the procedure for evaluating pain set forth in *Avery*, 797 F.2d at 21, and Social Security Ruling 88-13, the Secretary found that Wiggin suffered from a back impairment that could reasonably be expected to result in pain. The second step of *Avery* requires the Secretary to carefully consider the plaintiff's subjective complaints of pain. *Avery*, 797 F.2d at 23. His inquiry at the hearing into her daily activities and her pain complaints as well as his evaluation of the medical evidence indicates that he clearly complied with this step as well. Although a fuller discussion of the Secretary's reasons for discrediting the plaintiff's explanations for her failure to seek treatment would have been appropriate, the lack of it does not in and of itself compel a remand; it simply requires the court to determine whether there is substantial evidence in the record to support the Secretary's conclusion. The Secretary, not the court, is entrusted with determining the credibility of the claimant's allegations of pain and exertional limitations. *Da Rosa v. Secretary of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986).

The plaintiff's asserted reasons are inconsistent with each other and not compelling overall. The retirement of Wiggin's physician is an inadequate reason for her failure to seek treatment for five years. Her claims that she knew how to avoid causing herself pain and that the medication did not benefit her are inconsistent with her allegations that she has been in constant pain and that she once took pain killers that left her pain free. In addition, although her fear of addiction may be a valid explanation for not taking prescription medication, it falls short of adequately explaining her failure to even consult a doctor for nearly five years in the face of what she contends is constant debilitating pain. In any event, this explanation is inconsistent with her assertion that she did not visit a physician due to her limited financial status because it implies that she would not have sought treatment even if she had the resources. Additionally, as the Secretary pointed-out at oral argument, Wiggin concedes that she was financially capable of pursuing medical treatment until the last two of the five years prior to her

application for benefits -- during which time she sought no treatment. In light of her asserted financial difficulties, an explanation accounting for her ability to summon the resources to obtain Dr. Doolittle's services to present new medical evidence to the Appeals Council is conspicuously absent. In short, Wiggin's explanations are insufficient to upset the Secretary's legitimate finding that her failure to seek medical assistance during the entire five year period leading up to her application for benefits indicates that she has exaggerated the degree to which she experiences pain and the extent of her inability to concentrate as a result of this pain. The Secretary's conclusion is further supported by the x-rays taken in 1983 and 1984 which disclosed no basis for the plaintiff's pain complaints.

If follows from the Secretary's finding that the plaintiff has no significant nonexertional impairments that the Secretary's application of the Grid was appropriate.

New Evidence

The plaintiff asserts that the Appeals Council should have addressed the impact of the evidence adduced from medical examinations performed by Dr. Thomas C. Doolittle, *see* Record pp. 6-13, following the Administrative Law Judge's opinion. Contending that the physician's findings lend credibility to her complaints of pain, Wiggin argues that the case should be remanded for a review of the total record including this new evidence.³

³ The question for the court is whether the Appeals Council erred by not reviewing the plaintiff's case in light of the new evidence presented. Because the evidence was presented prior to the Secretary's final decision, there is no issue as to whether the court should remand for the Secretary to *receive* new evidence. *See Novak v. Schweiker*, 524 F. Supp. 795, 799 (N.D. Ill. 1981) (quoting 42 U.S.C. ' 405(g)) (when Appeals Council declines a review in which new evidence is presented, the

evidence is ``taken before the Secretary' in the statutory sense").

The Appeals Council will review a case if the evidence presented is new and material and relates to the period on or before the date of the administrative law judge's decision. 42 C.F.R. §§ 404.970(b), 416.1470(b). In such circumstances the Appeals Council will grant a review only if it finds that the administrative law judge's decision is contrary to the weight of the evidence in the current record. *Id.* In the case at bar, the Appeals Council considered Dr. Doolittle's report and, finding that there was no basis for changing the Administrative Law Judge's decision, rejected the plaintiff's request for a review.⁴ Record p. 3.

It is undisputed that Dr. Doolittle's examination of the plaintiff was conducted after the date of the Administrative Law Judge's decision and, therefore, constitutes new evidence. Whether his findings are material and whether they sufficiently tip the balance of the evidence in the plaintiff's favor is a more difficult question. Dr. Doolittle's medical report states that Wiggin has "unilateral spondylolysis on the left and pars sclerosis on the right" but that "no evidence of disk or stenosis is evident." Record p. 13. The physician also noted: "Her significant right hip, posterior thigh pain complaints may be all related to her trochanteric bursitis for which she has undergone previous

⁴ At oral argument the plaintiff asserted that because the new evidence related to the credibility of her pain allegations it was material and thus must be evaluated on review by the Appeals Council. The fact that evidence is relevant, however, does not mean that it is persuasive. The Appeals Council conducted such an evaluation and, short of finding an absence of substantial evidence to support the Appeals Council's conclusion, the court will not order a remand. *See Evangelista v. Secretary of Health & Human Servs.*, 826 F.2d 136, 139, 141 (1st Cir. 1987) (Remand "is appropriate only where the court determines that further evidence is necessary to develop the facts of the case fully" and there is no substantial evidence supporting the Secretary's decision).

deposteroid placement Our own examination did show evidence of bilateral trochanteric bursa inflammation." *Id.* These conclusions tend to support the plaintiff's complaints of pain in her hip. By the same token, the absence of discussion by Dr. Doolittle about any back pain may be read to reduce the credibility of her allegations as to a serious back condition thereby supporting the findings of Dr. Hornberger.

Dr. Doolittle's findings do not establish that the Administrative Law Judge's decision is contrary to the weight of the evidence. Dr. Hornberger examined the plaintiff in 1989 and found some injury to the plaintiff's back, ``probably . . . L4-5 disc and spinal stenosis." *Id.* p. 148. Concluding that she was restricted to sedentary work, he also mentioned that she complained of hip pain but he noted no injury to her hip and his report shows that ``[n]o degenerative changes" were found when looking for arthritis in her pelvis and hips. *Id.* p. 149. As mentioned earlier, two nonexamining, nontestifying physicians came to the same conclusion with regard to her ability to sit. Although Dr. Doolittle indicated that the plaintiff suffers from trochanteric bursitis, which might explain her complaints of hip pain, he found no evidence of disk or stenosis problems in her back and he did not specify the plaintiff's residual functional capacity or any related restrictions or limitations. *Id.* p. 13. Therefore, it is not at all clear that his findings conflict with Dr. Hornberger's assessment that she can perform sedentary work. Dr. Doolittle's findings are also insufficient to cast doubt on the Secretary's finding that Wiggin exaggerated the extent of her pain. The Secretary found that she experienced pain but not to the degree alleged, and the new evidence does not mar this conclusion. In short, the medical report of Dr. Doolittle does not compel acceptance of an alternative conclusion as to the plaintiff's physical limitations; nor does it require further findings or factual inquiry. To the extent that Dr. Doolittle's findings are inconsistent with those of Dr. Hornberger, the Secretary was entitled to rely on the

findings of Dr. Hornberger -- who also examined the plaintiff -- in order to resolve such conflicts in the evidence. *E.g., Irlanda Ortiz*, 955 F.2d at 769. Thus, the Appeals Council properly found that the Administrative Law Judge's opinion was not contrary to the weight of the evidence.

For the foregoing reasons, I recommend that the Secretary's decision be ***AFFIRMED***.

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 8th day of June, 1992.

David M. Cohen
United States Magistrate Judge