

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DEBRA BUSH,)	
)	
Plaintiff)	
)	
v.)	Civil No. 92-259 B
)	
DONNA E. SHALALA,)	
Secretary of Health)	
and Human Services,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION ¹

This Social Security Supplemental Security Income and Disability appeal raises the question whether substantial evidence supports the Secretary's finding that the plaintiff retains the residual functional capacity to do other work in the national economy. In particular, the plaintiff asserts that the Administrative Law Judge erred in finding that she is able to perform a full or wide range of sedentary work and, further, that he inappropriately applied the Medical-Vocational Guidelines (the "Grid") to find her not disabled inasmuch as there exists an emotional component to her disability.

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

¹ This action is properly brought under 42 U.S.C. 405(g) and 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 July 19, 1993 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.

Administrative Law Judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since January 18, 1991 and met disability insured status requirements as of that date, Findings 1-2, Record p. 19; that she suffers from status post torn right medial meniscus (repaired by means of a partial meniscectomy following an earlier unsuccessful arthroscopy) and an adjustment disorder, but that her impairments do not meet or equal any in Appendix 1 to Subpart P of Social Security Regulations No. 4 (the "Listings"), Findings 3-4, Record p. 19; that she retains the residual functional capacity to perform a full or wide range of work activity at the sedentary exertional level, Finding 7, Record p. 19; that her impairments preclude performance of her past relevant work as a certified nurse's aide and personal care assistant, Finding 8, Record p. 20; that despite her lack of transferable vocational skills, application of Rule 201.28 of the Grid warrants a conclusion that there are other sedentary and unskilled jobs in the national economy that she can do, Findings 9-10, Record p. 20; and that, therefore, she was not disabled at any time prior to the date of the decision, Finding 11, Record p. 20. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final 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 of the evaluative process to show the plaintiff's ability to do other work in the national economy. 20 C.F.R. 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at

7. The record 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 and Human Servs.*, 794 F.2d 14, 16 (1st Cir. 1986).

The plaintiff contends that the Administrative Law Judge incorrectly found her able to perform a full or wide range of other work at the sedentary level, despite her knee problem and accompanying pain. Sedentary work involves lifting no more than ten pounds at a time and occasionally lifting or carrying light articles. 20 C.F.R. 404.1567(a), 416.967(a). Although a sedentary job is defined as one that involves sitting, jobs are sedentary if walking and standing are required occasionally and other sedentary criteria are met. *Id.*

In her testimony, the plaintiff complains of severe pain in her right knee that she rates as ten on a scale of zero to ten and which has continued since her second knee surgery in May 1991 (the first occurred in January 1991). Record pp. 35-36. She took Tylenol No. 3 (Tylenol with codeine) after her surgery but now takes Ansaïd, Naprosyn and Ibuprofen. *Id.* pp. 36, 42. None of these medications totally eliminates the pain. *Id.* p. 36. She keeps her foot elevated most of the day to "try to get some of the swelling down" and because "if [she] keep[s] it down, then it throbs and it starts getting numb and tingly down into [her] foot." *Id.* p. 37, 47. She has relied on a cane or crutches to get around except for "maybe a total of about a month." *Id.* p. 46. She has no idea what her tolerance for walking would be. *Id.* She is no longer able to do household chores and, instead, relies on her sixteen year-old son to prepare meals (although she sometimes prepares breakfast), do laundry, help with cleaning and do shopping. *Id.* pp. 40-41, 43. She spends most of her day on the couch. *Id.* p. 41. She is able to knit and crochet and do crossword puzzles. *Id.* p. 43. She is not limited in the amount of time she can sit, but must keep her leg elevated. *Id.* p. 47. She testified that she is now unable to drive a car, although she had been driving herself to physical therapy using her left foot to operate the pedals. *Id.* p. 32. She feels that her condition is getting worse. *Id.*

p. 46.

Dr. Parker, the plaintiff's treating physician, indicated that although she continues to complain of her knee "giving way" and swelling, there is full range of motion, good stability and only mild effusion and minimal swelling. *Id.* pp. 206, 208. He recommended Ibuprofen, *id.* p. 208, and nonsteroidal medications as needed, *id.* p. 206-07. He also recommended she consider vocational rehabilitation for more sedentary work. *Id.* p. 207. At her latest visit in April 1992, she told him she had experienced pain in her knee while walking and had gone back to crutches, but he noted only some tenderness and minimal swelling on the lateral side of the knee. *Id.* p. 206. As of that visit, Dr. Parker's plan included continued use of crutches or cane. *Id.* There is no instruction in any of the notes for her to elevate her leg.

The physical therapy progress notes indicate that she participated aggressively in physical therapy. *Id.* pp. 178-86. Although she typically ices her knee following a session, *see, e.g., id.* p. 182, and after one session in January 1992 experienced a "very difficult" weekend with knees swelling and "intense pain," *id.* p. 179, the notes overall show an increasing ability to ride a stationary bicycle as much as five to seven miles with minimal or moderate resistance, *id.* pp. 180-81, and, in one instance, two and one-half miles at high resistance, *id.* p. 181. She has also increased the resistance and number of repetitions she performs on the Orthotron. *See generally id.* pp. 179-84. In fact, she has been encouraged to slow down on her physical therapy. *Id.* p. 179. The notes indicate that the physical therapist has been icing the plaintiff's leg following treatments and that "this seems to help with the swelling and pain control." *Id.* p. 183.

The plaintiff's residual functional capacity as determined by Dr. Johnson and another nonexamining, nontestifying agency physician who did not sign his report includes the ability to sit for a total of six out of eight hours in a workday. *Id.* pp. 114, 131. Dr. Johnson limited her walking to four hours out of an eight-hour workday *Id.* p. 131. The only significant limitation both noted was on pushing and pulling using the right lower extremity. *Id.* pp. 114, 131. Both reviewing

physicians noted the history of knee surgery, but also found significant the full range of motion, "excellent" quad tone and lack of redness or swelling. *Id.* pp. 120, 137. Although the reports of nonexamining physicians are relevant, the weight to which they are entitled varies with the circumstances of each case. *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 328 (1st Cir. 1990); *Rodriguez*, 647 F.2d at 223. Here, the physicians had the opportunity to review the record and their comments are consistent with Dr. Parker's findings.

Subjective symptoms must be evaluated with due regard for credibility, motivation and medical evidence of impairment. *Gray v. Heckler*, 760 F.2d 369, 374 (1st Cir. 1985). *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19 (1st Cir. 1986), provides a framework for evaluating pain. In *Avery*, the Court of Appeals for the First Circuit, construing the Secretary's instructions for evaluating pain, stated that they "specifically contemplate a possible finding of disability in a case where the degree of pain alleged is significantly greater than that which can be reasonably anticipated based on the objective medical findings" *Avery*, 797 F.2d at 22-23 (quoting Program Operations Manual Systems ("POMS") DI T00401.570). Thus, both objective and subjective evidence must be considered. Where pain is a factor, the administrative law judge is to "obtain detailed descriptions of daily activities by directing specific inquiries about the pain and its effects to the claimant, his/her physician from whom medical evidence is being requested, and other third parties who would be likely to have such knowledge." *Id.* p. 23 (quoting POMS). The Administrative Law Judge questioned the plaintiff extensively about her daily activities, but specifically stated that her allegations were out of proportion to those reported by Dr. Parker and the physical therapist, as well as to her own written statements concerning her ability to do household chores. Record pp. 18-19, 98.

At oral argument the plaintiff asserted that the Administrative Law Judge had mischaracterized the evidence in the record inasmuch as he specifically found that there was no medical justification for her allegation that she must elevate her leg throughout the day. Although it

does not appear that she ever discussed this particular problem with her treating physician after her second surgery in May 1991, the physical therapist's rehabilitation plan dated May 1, 1991 recommended use of ice and elevation for chronic swelling. *Id.* p. 148. Dr. Parker has noted some tenderness, minimal swelling and mild effusion over the course of post-surgical treatment. *See id.* pp. 206, 208. The plaintiff testified that her leg feels better when it is elevated. *Id.* p. 47. Similarly, her need to use crutches has been documented. *Id.* p. 206. I conclude that the plaintiff's assertions of pain are consistent with medical evidence in the record.

The Administrative Law Judge sought the testimony of a vocational expert, Ms. Greenleaf, concerning the plaintiff's ability to do other work. Hypothetical questions must, of course, accurately reflect evidence in the record. *See Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982). The Administrative Law Judge included in his hypothetical question the plaintiff's asserted need to sit with her knee elevated and leg extended for a substantial part of the work day. Record p. 54. Ms. Greenleaf stated that the plaintiff's need to elevate her leg for four to six hours of an eight-hour day would result in a severe erosion of the sedentary job base, emphasizing comfort and difficulty in getting close enough to the work area with this postural restriction. *Id.* pp. 54-55. In addition, she stated that the use of crutches would compromise the ability to stand and walk in a vocationally meaningful way. *Id.* p. 55. Considering the plaintiff's physical limitations only, I conclude that the Administrative Law Judge's finding that she retains the capacity for a full range of sedentary work is not supported by substantial evidence.

The plaintiff also asserts that her impairment has nonexertional emotional components as well. She testified that she was being treated for depression and anxiety. Record p. 37. She suffers from uncontrollable crying and shaking, sometimes to the point of being unable to answer the phone. *Id.* Although she is taking Xanax 0.5 mg. three times a day, she is still unable to tolerate stress when she is having an anxiety attack and she still has "crying spells." *Id.* p. 38. She has no particular difficulty relating to people, but she does have problems going out in public places. *Id.* p.

39.

Dr. Bixler, a psychologist, has been treating the plaintiff for emotional problems. His notes emphasize her anger and frustration concerning her physical limitations, *id.* p. 158, and her ongoing workers' compensation claim in which she is apparently having some difficulty proving which knee was injured, *id.* pp. 159-60. She also reported conflicts with her present husband from whom she is separated and other family members, *id.* pp. 158-60, a history of parental alcoholism, *id.* p. 163, and an abusive first husband, *id.* p. 164.

Dr. Hemm, a family physician who originally prescribed the Xanax in December 1990 (before the knee surgery), described her condition as anxious and minimally depressed, with more anxiety than depression. *Id.* pp. 166-67. The assessment done by Peter Allen, Ph.D., who reviewed the file at the agency's request, indicates a nonsevere affective disorder, specifically an adjustment disorder. *Id.* pp. 121-22, 124.

The plaintiff asserts that once the Administrative Law Judge determined her capable of sedentary work, he erroneously applied Rule 201.28 of the Grid to produce a conclusion that she was not disabled, despite his acknowledgement of the existence of an adjustment disorder. Record pp. 18-19. Use of the Grid is appropriate when a rule accurately describes an individual's capabilities and vocational profile. *Heckler v. Campbell*, 461 U.S. 458, 462 and n.5 (1983). When a claimant's impairments involve only limitations related to the exertional requirements of work, the Grid provides a "streamlined" method by which the Secretary can meet her burden of showing there is other work the claimant can perform. *Heggarty v. Sullivan*, 947 F.2d 990, 995 (1st Cir. 1991). However, if the claimant has nonexertional impairments in addition to exertional impairments, the Grid may not accurately reflect the availability of other work he or she can do. *Id.* at 996; *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). Whether the Secretary may rely on the Grid in these circumstances depends on whether a nonexertional impairment "significantly affects [a] claimant's ability to perform the full range of jobs" at the

appropriate exertional level. *Id.* (citation omitted). If a nonexertional impairment significantly limits the occupational base, the Secretary may not rely on the Grid to meet her Step Five burden but must rely on other means, typically a vocational expert. *Id.*

Where a mental impairment is asserted, an administrative law judge must assess its severity following the special procedure outlined in the regulations. 20 C.F.R. 404.1520a(a), 416.920a(a). These steps are reflected in the "Psychiatric Review Technique Form" which must be completed by the administrative law judge and appended to the hearing-level decision.² *See* 20 C.F.R. 404.1520a(d), 416.920a(d). Pertinent signs, symptoms, findings, functional limitations and the effects of treatment must be considered. 20 C.F.R. 404.1520a(b)(1), 416.920a(b)(1). The administrative law judge must indicate whether certain medical findings that have been found especially relevant to the ability to work are present or absent. 20 C.F.R. 404.1520a(b)(2), 416.920a(b)(2). These medical findings are summarized in the "Medical Summary" portion of the Psychiatric Review Technique Form and mirror the "A" criteria of the Listings for mental impairments. Then, functional loss must be rated in four areas considered essential to the ability to work, *i.e.*, activities of daily living; social functioning; concentration and persistence or pace; and deterioration or decompensation in work or work-like settings. 20 C.F.R. 404.1520a(b)(3), 416.920a(b)(3). The "Rating of Impairment Severity" portion of the Psychiatric Review Technique Form reflects the "B" criteria of the Listings. The ratings determine whether a mental impairment is severe.³ If severe, the characteristics of the impairment are compared to the "A" and "B" criteria of the Listings. 20 C.F.R. 404.1520a(c)(2), 416.920a(c)(2). If a severe impairment does not

² The Psychiatric Review Technique Form may be completed at the hearing level by an administrative law judge without the assistance of a medical adviser. 20 C.F.R. 404.1520a(d), 416.920a(d).

³ The Psychiatric Review Technique Form is somewhat confusing when used to assess severity because it incorporates from the Listings used at Step Three of the evaluative process both the diagnostic categories ("A" criteria) and the "B" criteria for rating the degree of mental limitation. Although the categories used to rate functional limitations are the same at both steps, a lesser degree of limitation is required to establish severity than to establish that an impairment meets or equals one in the Listings.

meet or equal one in the Listings, a residual functional capacity assessment must be done. 20 C.F.R. 404.1520a(c)(3), 416.920a(c)(3). Only after these steps have been completed may use of the Grid be considered.

In this case, the Administrative Law Judge indicated on the Psychiatric Review Technique Form the presence of an adjustment disorder within the scope of Rule 12.04⁴ of the Listings, Record pp. 21-22, but did not complete the "Rating of Impairment Severity" section. By failing to do so, the Administrative Law Judge may have made an implicit finding that the plaintiff's mental impairment was not severe. Dr. Allen's psychiatric assessment would support such a finding. *See id.* pp. 121-29. However, such an implicit finding would defeat the purpose of the special procedure which includes the identification of additional evidence necessary for the determination of impairment severity, the evaluation of aspects of the mental disorder that are relevant to the ability to work and the presentation of the findings in a clear, concise and consistent manner. 20 C.F.R. 404.1520(a), 416.920(a). At oral argument the Secretary conceded that the regulations require the administrative law judge to complete the "B" part of the form. As he failed to do so, remand is required on this basis alone.

The plaintiff also testified that the medications she was taking were making her drowsy. Record p. 42. Although he was put on notice of the possibility of another nonexertional limitation, the Administrative Law Judge did not pursue the topic then or at any other time during the hearing. He apparently concluded that her complaint was not credible in that he commented that "[s]he has complained of no medication side-effects to her treating physicians, at least according to her medical records." *Id.* p. 18.

The Secretary may not ignore the issue of side effects of medication simply because the

⁴ Rule 12.04 (affective disorders) explicitly includes depressive syndrome, manic syndrome and bipolar syndrome. Although the rule does not specifically include adjustment disorders, the Secretary explained at oral argument that the rule includes complaints that do not coincide exactly with those particular syndromes but are equivalent to them.

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 plaintiff contended at oral argument that the absence of complaints to her physicians that she was experiencing side effects cannot by itself constitute substantial evidence. I agree. The plaintiff's testimony concerning side effects is uncontroverted. The court in *Figueroa* specifically stated that where the plaintiff's testimony is the only evidence of side effects, the administrative law judge must seek further evidence or make some further inquiry. *Id.* at 554. The Administrative Law Judge here did neither. Since the work-related implications of side effects remained unexplored, for this reason alone it was inappropriate for the Administrative Law Judge to find the plaintiff not disabled by simply applying the Grid.

For the foregoing reasons, I recommend that the Secretary's decision be **VACATED** and the cause **REMANDED** for further proceedings consistent herewith.

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 5th day of August, 1993.

David M. Cohen

United States Magistrate Judge