

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CAROL GILBERT,)	
)	
Plaintiff)	
)	
v.)	Civil No. 93-185 B
)	
DONNA E. SHALALA,)	
Secretary 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 decision that the plaintiff was not under a disability prior to the expiration of her insured status in December 1990. Specifically, the plaintiff asserts that the Administrative Law Judge erred in holding her to a rigid medical standard requiring conclusive medical evidence of disability produced prior to the date she was last insured. 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 has not engaged in substantial gainful activity since April 15, 1986, the alleged onset date of her disability, Finding 1, Record p. 46; that she met disability insured status requirements as of that date, but continued to meet those requirements only through the end of 1990, Finding 2, Record

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 26, 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 December 14, 1993 pursuant to Local Rule 26(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.

p. 46; that between April 15, 1986 and the close of 1990 she did not suffer from any impairment whose existence was demonstrated by the requisite objective medical data, Finding 3, Record p. 46, and therefore was not disabled prior to the expiration of her insured status, Finding 4, Record p. 46. The Appeals Council declined to review the decision, Record pp. 3-4, 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).

There is no dispute that the plaintiff, age forty-seven, currently suffers from post-polio syndrome stemming from her contraction of polio while a child. Record p. 42. Indeed, though denying her claim for Disability Insurance Benefits, the Secretary did award the plaintiff Supplemental Security Income based on the present disabling effect of her impairment. *Id.* at 45. The only question for this appeal is the onset date of her present disability.

Regardless of the seriousness of her present condition, the plaintiff is not entitled to disability benefits unless she can adequately demonstrate that her disability existed prior to the expiration of her insured status. *Cruz Rivera v. Secretary of Health & Human Servs.*, 818 F.2d 96, 97 (1st Cir. 1986), *cert. denied*, 479 U.S. 1042 (1987); *Deblois v. Secretary of Health & Human Servs.*, 686 F.2d 76, 79 (1st Cir. 1982). Evidence of an impairment that reached a disabling level of severity after the last insured date, or that was exacerbated after this date, cannot be the basis for a disability determination, even though the impairment may have had its roots prior to the date on which insured status expired. *Deblois*, 686 F.2d at 79; *Manzo v. Sullivan*, 784 F. Supp. 1152, 1156

(D.N.J. 1991); *Flint v. Sullivan*, 743 F. Supp. 777, 783 (D. Kan. 1990), *aff'd*, 951 F.2d 264 (10th Cir. 1991). Moreover, the existence of a disability prior to the expiration of insured status must be established by adequate medical evidence. *Manzo*, 784 F. Supp. at 1156-57; *Flint*, 743 F. Supp. at 782; Social Security Ruling 83-20, reprinted in *West's Social Security Reporting Service* at 49-51 (1992). "Plaintiff cannot sustain her burden of proof merely by means of conclusory, self-serving testimony that she was disabled at the crucial time." *Manzo*, 784 F. Supp. at 1157.

The onset of post-polio syndrome is typically gradual rather than traumatic. See Program Operations Manual Systems DI 24580.010I ("POMS"), Record p. 169. The Secretary has recognized the difficulty in establishing the onset date for slowly progressive impairments such as post-polio syndrome. See Social Security Ruling 83-20, at 51. When the onset of an impairment is gradual, Social Security Ruling 83-20 permits the Secretary to infer the onset date from the medical and other evidence. *Id.* at 51. Indeed, the Ruling indicates that in some cases the Secretary may "reasonably infer that the onset of a disabling impairment(s) occurred some time prior to the date of the first recorded medical examination." *Id.* As the plaintiff suggests, an individual is therefore not required to produce medical data generated before the date last insured to establish the onset of her disability before the expiration of her insured status. The Ruling, however, makes one thing perfectly clear -- any onset determination must be based on medical evidence. *Id.* Thus, although the ALJ should consider factors such as the individual's allegations and work history, objective medical evidence, whether from before or after the expiration of insured status, serves as the "primary element" in determining the onset date. *Id.* at 50.

The plaintiff contends that she first started feeling the effects of what later came to be diagnosed as post-polio syndrome in 1984-85. Record p. 145, 147. In April 1986 her physical condition forced her to leave her job. *Id.* at 61-62. By 1988 the pain and limitations from her condition became constant. *Id.* at 148. Since then the progression of the disease has increasingly restricted her daily activities. *Id.* By the time of the administrative hearing, the plaintiff was

significantly limited in her functional capacity. *See id.* at 44-45.

The overall record of the plaintiff's condition indicates a gradual increase in severity since 1984-85. The question for this court is whether the record contains substantial evidence to support the ALJ's determination that her condition, though gradual, had not reached a disabling level of severity before the end of December 1990. Keeping in mind that the plaintiff must present adequate medical evidence to establish the existence of her disability before the expiration of her insured status, I conclude that the record contains substantial evidence to support the ALJ's determination of the onset of her disability.

First, medical records relating to the plaintiff's condition do not appear until December 27, 1991, almost one year after her date last insured. Record p. 145. In light of the lack of medical evidence before December 1990, the Administrative Law Judge surmised that her symptoms were apparently not sufficiently severe at that point to cause her to seek medical attention. *Id.* at 44. Because the plaintiff bears the burden of producing medical evidence on the onset of her disability, the Administrative Law Judge could rely on the absence of medical evidence to draw such a conclusion.²

In addition, there is nothing in the medical records generated after December 27, 1991 that indicates that the plaintiff's post-polio condition had become disabling before December 1990. On December 27, 1991 the plaintiff complained that she had *recently* noticed increased fatigue after

² In a letter submitted to the Appeals Council, but not part of the record before the Administrative Law Judge, the plaintiff's sister, Sandra Larlee, indicated that their father, Dr. Clifford B. Larlee, provided the plaintiff with her initial health care for post-polio syndrome, beginning around 1988. Record p. 12. Ms. Larlee stated that she witnessed "several instances in which my father advised Carol not to seek additional medical opinion." *Id.* However, Ms. Larlee also stated that "[t]his situation continued until December 1991 when her worsening symptoms led her to consult Dr. Gary Ross." *Id.* (emphasis added). Although apparently presented as an attempt to explain the lack of documentary medical evidence before December 27, 1991, Ms. Larlee's statements actually bolster the position that the plaintiff's condition became disablingly severe after December 1990. Additionally, I note that the record contains no evidence, testimonial or otherwise, regarding the treatment or diagnosis provided by her father. The Administrative Law Judge was permitted to rely on this lack of evidence in making his onset determination. Finally, because Ms. Larlee's letter was not submitted as evidence for the Administrative Law Judge to consider, I need not consider it in the scope of the issues raised in this appeal. I note that the plaintiff does not raise any issue about the Appeals Council's handling of the letter. *See id.* at 3.

five to six hours of activity. *Id.* p. 145 (emphasis added). She also reported the development of a foot drop that had become “progressively worse over the last 6 months.” *Id.* The plaintiff’s regular treating physician, Gary Ross, D.O., noted that she walked with an abnormal gait. *Id.* Dr. Ross conjectured at that point that the plaintiff might have post-polio syndrome. *Id.* On January 6, 1992 Dr. Ross reported that she was walking better and her range of motion had improved. *Id.* at 144. He also noted that she displayed no real atrophy and only mild degenerative changes. *Id.* However, she did display a one to one-and-a-half inch difference in the length of her left leg which did not correct while laying prone. *Id.* On January 20, 1992 the plaintiff was referred for an electromyographic study to examine her “progressive leg weakness.” *Id.* at 142. The medical report from the EMG noted that she has “a history of slowly progressive weakness.” *Id.* at 143. On March 1, 1992 Dr. Ross reported that the plaintiff had “a significant short leg as well as some relative atrophy and a foot drop as well. Coordination involving the left leg is also extremely questionable.” *Id.* at 146. At that time, Dr. Ross felt that the plaintiff was disabled. *Id.*

Nothing in these medical records suggests that the plaintiff’s condition, despite its gradual progression, had reached a level of disabling severity before December 1990.³ Indeed, to the contrary, the overall evidence suggests that the plaintiff’s condition deteriorated significantly after the expiration of her insured status. *See, e.g.,* Record p. 10, 12, 128, 151. Moreover, contrary to the plaintiff’s assertions, I conclude that the Administrative Law Judge considered the appropriate evidence in determining the onset of her disability. In compliance with Social Security Ruling 83-

³ In a letter submitted to the Appeals Council, Dr. Gary Ross, the plaintiff’s regular treating physician, indicated his belief that the plaintiff “did sustain problems with her leg related to December 31, 1990.” Record p. 10. Dr. Ross also stated that he “doubt[s] very much that the amount of flaccidity [sic] and weakness that she has had with this leg could have been something which has just progressed over the past year or so *but I do believe it could have intensified over that period.*” *Id.* (emphasis added). The plaintiff cites the first portion of this statement as evidence that the onset of her disability occurred while she still had insured status. *See* Statement of Specific Errors at 3. Read in its entirety, however, this statement in fact supports the position that the plaintiff’s condition, though it may have had its roots during the period of insured status, did not reach a disabling level of severity until after her insured status expired. Additionally, because Dr. Ross’s letter was not submitted to the Administrative Law Judge, I need not address it in the scope of the issues raised in this appeal. *See* Footnote 2. The same is also true for the letter from her previous employer, Dr. Joseph M. Constantine, concerning her job performance. *See* Record p. 11.

20, the Administrative Law Judge concluded that "there is insufficient objective medical data to support a conclusion that the [plaintiff] suffered from post-polio syndrome prior to the close of 1990." *Id.* at 44. Although the plaintiff need not produce evidence of medical treatment obtained before the expiration of her insured status, Social Security Ruling 83-20 nevertheless requires proof of onset to be made through medical evidence. As the Administrative Law Judge noted, the record was devoid of any objective medical evidence, either before or after her date last insured, that would support the plaintiff's allegations relating to the period of time preceding the expiration of her insured status. *Id.* ("[O]bjective evidence to support her allegations, at least her allegations relating to the period of time prior to the close of 1990, are absent from the this record.") There is no error in this ruling.

Finally, I note that the plaintiff was not conclusively diagnosed with post-polio syndrome until December 1992, after the administrative hearing, when a repetitive activity test was performed. *See id.* at 185-87, 188-89, 190-91. Indeed, as of September 15, 1992 the testifying medical adviser, Carl Irwin, M.D., was unconvinced, based on the plaintiff's then existing medical history and the absence of any testing, that the plaintiff was suffering from post-polio syndrome. *Id.* at 77-79, 84-85. I note that prior to Dr. Irwin's testimony two treating physicians, James Sears, M.D. and Gary Ross, D.O., had concluded that the plaintiff's condition was suggestive of and compatible with post-polio syndrome. *Id.* at 143, 144. Nevertheless, Dr. Irwin's doubts about the diagnosis of post-polio syndrome, given the lack of testing and an adequate medical history, indicate that medical minds could disagree, as late as September 15, 1992, over the proper diagnosis of the plaintiff's impairment. Such medical uncertainty as of September 15, 1992 provides further support for the conclusion that the plaintiff's post-polio syndrome, gradual as it may have been, had not reached a level of disabling severity by December 1990.

In sum, I find that the Administrative Law Judge's determination that the plaintiff had failed to provide sufficient medical evidence to prove the existence of her disability prior to the expiration

of her insured status is supported by substantial evidence. Accordingly, 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 16th day of December, 1993.

**David M. Cohen
United States Magistrate Judge**