

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

LINDA DYER,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 93-138-P-C
)	
SHIRLEY S. CHATER,)	
<i>Commissioner of Social Security,¹</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION²

This Social Security Supplemental Security Income (“SSI”) and Social Security Disability (“SSD”) appeal raises the single issue of whether there is substantial evidence in the record supporting the Commissioner's determination that the plaintiff is able to perform jobs that exist in

¹ Donna E. Shalala, Secretary of Health and Human Services, was originally named as the defendant in this matter. On March 31, 1995 the Social Security Administration ceased to be part of the Department of Health and Human Services and became an independent executive branch agency. See Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1464, §§ 101, 110(a). Concerning suits pending as of that date against officers of the Department of Health and Human Services, sued in an official capacity, Congress has authorized the substitution of parties as necessary to give effect to the change. Such substitution is so ordered here and I will therefore refer to all determinations made by the Social Security Administration in this case as those of the Commissioner.

² This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The Commissioner 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 Commissioner'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, 1995 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, cause authority and page references to the administrative record.

significant numbers in the national economy, and thus that the plaintiff is not under a disability, in light of the medical evidence in the record relative to the limits on the plaintiff's ability to sit and her need for frequent breaks during the workday. I recommend that the court affirm the decision of the Commissioner.

In accordance with the Commissioner'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 has not engaged in substantial gainful activity since December 31, 1989, Finding 1, Record p. 19; that she suffers from (1) obesity, (2) adult-onset diabetes mellitus with mild diabetic neuropathy, (3) degenerative disc disease at the lumbosacral level of the spine with a small focal herniation on the right encroaching on the S1 nerve root and neural exit foramen, associated with some facet joint osteoarthritis, (4) recurrent anxiety, and (5) mild bilateral carpal tunnel syndrome, greater on the right side than the left, without denervation, Finding 3, Record p. 19; that she does not have an impairment or combination of impairments that meets or is equal to any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 4, Record p. 20; that she is unable to perform her past relevant work as a certified nurse's aid or chambermaid, Finding 8, Record p. 20; that she has "better than a high school education," Finding 6, Record p. 20; that her impairments limit her to lifting no more than ten pounds frequently and twenty pounds occasionally, that she has some limitations to her upper extremity dexterity and can do no significant bending, no heavy lifting, and no stooping or crawling, Finding 7, Record p. 20; that, despite these findings, there exists a significant number of jobs in the national economy the plaintiff could perform, including those of dispatcher, self-service cashier, receptionist and clerk, Finding 9, Record p. 20; and that, therefore, the plaintiff was not

under a disability at any time prior to the administrative law judge's decision on July 31, 1993, Finding 10, Record p. 20. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner, 20 C.F.R. §§ 404.981, 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F. 2d 622, 623 (1st Cir. 1989).

The plaintiff filed her complaint in this court on June 3, 1993. On September 23, 1993 the court granted a motion to remand the case to allow the Social Security Administration to locate the claim file or, in the alternative, to reconstruct it. Having located the claim file, the Secretary filed an answer on March 29, 1995. The court has already made known, in a conference of counsel held on the record, its concerns about the damage done to the process of adjudicating SSD and SSI claims when there is a 19-month delay simply to allow the Social Security Administration to locate its records. *See* Transcript of Proceedings (Docket No. 9). I therefore shall not repeat those concerns here.

The standard of review of the Commissioner'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).

The plaintiff contends there is not substantial evidence to support the Commissioner's finding that she is able to perform jobs that exist in significant numbers in the national economy. The administrative law judge made this finding based on the testimony of a vocational expert, who so stated in response to a hypothetical posed by the judge. When the medical evidence of record does

not support the hypothetical posed to a vocational expert, the expert's response cannot become the basis of a finding that the claimant is not disabled. *See Rose v. Shalala*, 34 F.3d 13, 19 (1st Cir. 1994). This is precisely the error claimed by the plaintiff.

The hypothetical posed to the vocational expert asked him to assume that the plaintiff, 43 years old with a high school education, could perform a “wide range” of sedentary work, requiring the lifting of no more than ten pounds at a time, occasional lifting and carrying of small articles, a “limited amount” of walking and standing over an eight-hour shift with the opportunity to get up from a sitting position every 45 minutes to one hour, with some “mild restriction” in the ability to perform repetitive motion in the hands and fingers. Record pp. 104-05. According to the plaintiff, this is inconsistent with her own testimony and that of the medical advisor, Robert O. Kellogg, M.D., concerning the limits on her ability to sit, and her need for frequent breaks during the work day. She asserts that these inconsistencies are fatal because the cited testimony is the only record evidence concerning her capacity for sitting.

To the contrary, an assessment of the plaintiff's residual functional capacity done in 1991 by a non-treating, non-examining physician provides additional record evidence concerning the plaintiff's limitations. *Id.* at 277-84. According to this assessment, the plaintiff was able to lift and carry twenty pounds occasionally and ten pounds frequently, could stand and/or walk with normal breaks for a total of six hours in an eight-hour work day and was able to sit for about six hours in an eight-hour work day. *Id.* at 278. Without citing specific facts, the report also determined that the plaintiff suffered from occasional limits on her ability to climb, balance, stoop, kneel, crouch or crawl. *Id.* at 279. The record also contains a written report by a non-treating physician who examined the plaintiff in 1991. This physician, Pamela Wansker, D.O., found that the plaintiff was

unable to perform repetitive motion involving her low back or hands, was unable “to do any prolonged positioning without stretch” or any lifting greater than twenty pounds. *Id.* at 307. Written evaluations done in 1992 by a neurosurgeon, Joel Franck, M.D., and a neurologist, Douglas Dulli, M.D., appear in the record but do not include findings as to the plaintiff's capacity for work. *See id.* at 338-41.

“[T]he amount of weight that can properly be given the conclusions of non-testifying, non-examining physicians `will vary with the circumstances, including the nature of the illness and the information provided the expert.” *Rose*, 34 F.3d at 18 (citations omitted). Here, the residual functional capacity assessment completed by the non-testifying, non-examining physician is consistent with the findings of Dr. Wansker and the testimony of the medical advisor. Dr. Kellogg testified that the plaintiff is able to lift twenty pounds occasionally and ten pounds frequently, *id.* at 91, and that she should otherwise refrain from bending, stooping, crawling or heavy lifting, *id.* at 96. Collectively, this evidence is more than sufficient to sustain the administrative law judge's findings as to the plaintiff's limitations.

This is so despite an important inconsistency that appears within the testimony of the medical advisor itself. Dr. Kellogg stated that his findings were not at odds with the plaintiff's assertion that she could work for only four consecutive hours without requiring a significant break of at least a half hour. The actual colloquy with counsel for the plaintiff is illuminating:

[Counsel for plaintiff]: I think [the plaintiff] said that she could go through a cycle of sitting and standing for up to approximately four hours before she needed to recline for a period of time. Is that consistent with the physical findings, in your opinion?

[Dr. Kellogg]: I think so. . . . I think, for example, that in an ordinary work day . . . broken in the middle by a meal, usually a lunch, if you're on the daytime shift, and

your lunch lasts a half hour to an hour. And to rest during that time and change your position would enable an individual with her medical conditions to go on for the next four hours.

Id. at 97. This testimony notwithstanding, the medical advisor did not, as the plaintiff asserts, adopt this view as one of his own findings. In fact, upon later examination by the administrative law judge, Dr. Kellogg stated that he did *not* find a need to lie down after four hours. *Id.* at 109-10.

At oral argument, the Commissioner took the position that the administrative law judge could properly ignore the first of Dr. Kellogg's pronouncements because it was itself based on a premise, *i.e.* the plaintiff's asserted discomfort level, later duly rejected by the administrative law judge. Logically, that makes sense in a case where a vocational expert responds to a series of hypotheticals about a claimant's residual functional capacity, and one of the hypotheticals is later found to be not supported by the medical evidence. *Lizotte*, 654 F.2d at 130-31. Here such an argument smacks of bootstrapping; either the medical advisor's testimony supports the assertions of the plaintiff or it does not.

I share the plaintiff's concern, expressed at oral argument, that the administrative law judge denied her benefits based, in part, on testimony of a medical advisor who, in his quest to remain impartial, may have been willing to tell both the plaintiff and the administrative law judge what he thought each wanted to hear. But it is the function of the Commissioner, and not the court, to resolve conflicts in the evidence. *Irlanda Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991). Dr. Kellogg first gave a very qualified endorsement of the plaintiff's contention that she needed to lie down after four hours, and then repudiated that statement unqualifiedly. In these circumstances the administrative law judge was certainly entitled to credit the latter statement of Dr. Kellogg and not the former.

The findings of the medical expert, as corroborated by the other medical evidence and adopted by the administrative law judge, were duly reflected in the hypothetical posed to the vocational expert. That this view of the plaintiff's residual functional capacity does not coincide with the plaintiff's testimony about the pain and numbness she experiences is not fatal to the Commissioner's findings. The Commissioner may determine that subjective complaints of pain by a claimant are not credible, as long as her decision states "why subjective testimony of limitation of pain is not supported by the evidence." *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 22 (1st Cir. 1986); *see also* Social Security Ruling 88-13, reprinted in *West's Social Security Reporting Service*, at 655 (1992). This the administrative law judge did, observing that the plaintiff's allegations concerning pain and its limitation on her residual functional capacity "are significantly out of proportion to the relatively minimal objective findings in this record." Record p. 17.

At oral argument, the plaintiff placed special emphasis on a progress note made by Dr. Franck on June 30, 1992, stating that she "certainly has a pathologic condition that could account for [her complaints of pain and numbness] and that may be assisted by surgery." *Id.* at 362. Such a recommendation, she contends, is a "red flag" in favor of fully crediting her subjective allegations. She cites no authority for such a proposition, and I am not aware of any. The administrative law judge, after all, did not fully reject the plaintiff's contention that she suffers from some pain and consequent limitation on her residual functional capacity; rather, he found "no basis in this record for concluding that her allegations should be fully believed, to the extent that those allegations suggest she is more functionally limited than I find her to be." *Id.* at 19. In that light, Dr. Franck's arguably qualified recommendation of surgery can be understood to be either consistent with the administrative law judge's findings (because Dr. Frank believed surgery would further reduce the

plaintiff's discomfort below the level found by the administrative law judge), or inconsistent with them. If the latter is the case, it is not fatal to the administrative law judge's findings because they are supported by other medical evidence of record.

Nor can I agree with the plaintiff that there is any outcome-determinative significance to the fact that Dr. Franck's surgical recommendation became part of the record subsequent to the hearing and, therefore, was unknown to the medical advisor or any of the other physicians whose views appear in the record. The only question before the court is whether there is substantial evidence in the record to support the administrative law judge's determination; in that regard it is unnecessary to speculate as to whether the medical advisor, or any of the treating or non-treating physicians, would have had a different opinion if they had been aware of Dr. Franck's suggestion of possible surgery.

The limitations on the plaintiff's residual functional capacity, as stated in the hypothetical posed to the vocational expert, have a substantial basis in the record. I therefore find no basis for disturbing the finding, based on the testimony of the vocational expert, that there is a significant number of jobs in the national economy capable of being performed by the plaintiff.

Accordingly, I recommend that the Commissioner'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 20th day of July, 1995.

*David M. Cohen
United States Magistrate Judge*