

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

<i>NELSON FRANCIS,</i>)	
)	
<i>Plaintiff</i>)	
)	
<i>v.</i>)	<i>Civil No. 95-152-B</i>
)	
<i>SHIRLEY S. CHATER,</i>)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant¹</i>)	

REPORT AND RECOMMENDED DECISION²

This Social Security Disability (“SSD”) appeal raises the issue of whether there is substantial evidence in the record supporting the Commissioner’s determination that the plaintiff did not have

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. Although this suit was commenced on July 10, 1995, such substitution is also 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). The Commissioner has admitted that the plaintiff has exhausted his 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 he 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 March 18, 1996 pursuant to Local Rule 26(b) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

a severe impairment before the date his insured status expired. I recommend that the court vacate the decision of the Commissioner and remand for further proceedings.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has engaged in substantial gainful activity since March 30, 1986,³ the alleged onset of disability date, Finding 2, Record p. 19; that his insured status expired on December 31, 1992, Finding 1, Record p. 19; that his statements concerning his impairments and their impact on his ability to work on the date his insured status expired are not supported by the medical evidence of record, Finding 4, Record p. 19; that on the date his insured status ended, the plaintiff did not have a severe impairment, and therefore was not under a disability prior to the date his insured status expired, Findings 5-6, Record p. 19. 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; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

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); *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

³ The Administrative Law Judge appears to have based this finding on the following: "The claimant reported that after the date of alleged onset of disability, March 30, 1986, he worked as a laborer in a papermill until November 1986 (Exhibit 10). His earnings record shows that he earned \$11,872.03 in 1986 and \$3,179.36 in 1987 (Exhibit 9). The work performed after the date of alleged onset of disability appears to be substantial gainful activity within the meaning of the regulations (20 C.F.R. § 404.1571)." Record p. 15. As neither the plaintiff nor the Commissioner have addressed the import of these findings, I have no occasion to do so here.

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).

At the second step of the sequential evaluation process, the burden is on the plaintiff to show that his impairment is severe. 20 C.F.R. §§ 404.1520; *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). This, however, is a *de minimis* burden. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986). The Commissioner may find an impairment nonsevere “only where ‘medical evidence establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual’s ability to work even if the individual’s age, education, or work experience were specifically considered.’” *Barrientos v. Secretary of Health & Human Servs.*, 820 F.2d 1, 2 (1st Cir. 1987) (quoting Social Security Ruling 85-28, reprinted in *West’s Social Security Reporting Service, Rulings 1983-1991*, at 390, 393 (West 1992)). Moreover, if “‘evidence shows that the [claimant] cannot perform his or her past relevant work because of the unique features of that work,’ denial at the not severe stage is inappropriate.” *McDonald*, 795 F.2d at 1125 (quoting Social Security Ruling 85-28, at 394) (footnote omitted).

Social Security Ruling 85-28 explains the factfinding required at Step 2:

A determination that an impairment[] is not severe requires a careful evaluation of the medical findings which describe the impairment[] and an informed judgment about its . . . limiting effects on the individual’s physical and mental ability[] to perform basic work activities

...

Great care should be exercised in applying the not severe impairment concept. If an adjudicator is unable to determine clearly the effect of an impairment or combination of impairments on the individual’s ability to do basic work activities, the sequential evaluation process should not end with the not severe evaluation step.

Social Security Ruling 85-28, at 394.

Social Security Ruling 85-28, however, does not state the only situation in which a nonseverity determination is appropriate. The regulation clearly contemplates that the claimant must first produce medical evidence of an impairment. *See id.* at 393-94. Only after the plaintiff puts such evidence into the record can the Administrative Law Judge determine whether the medical evidence clearly establishes that the impairment has only a minimal effect on the claimant's ability to perform basic work functions. Such a reading comports with the Commissioner's admonition that a claimant may not rely solely on his or her own statements, but must also provide medical signs and laboratory findings showing an impairment which could reasonably be expected to produce the pain or other symptoms alleged. 20 C.F.R. §§ 404.1529(a). If claimants could prevail at Step 2 absent any medical evidence supporting an alleged impairment, Step 2 would be a mere formality rather than a *de minimis* burden. Accordingly, a nonseverity determination is appropriate when a claimant relies solely on subjective allegations and supplies no medical evidence of an impairment that could reasonably be expected to produce the pain or other symptoms alleged.

Spinal Impairment

On March 25, 1986 x-rays of the plaintiff's lumbar spine showed "mild narrowing of the L4-5 intervertebral disc space with minimal anterior and lateral osteophyte formation at several levels." Record p. 108. The radiologist characterized these as "degenerative changes." *Id.* On July 16, 1994 a lumbar spine CT scan showed "fairly diffuse but significant posterior disc bulging" at L2-3, "minimal diffuse posterior disc bulging" at L3-4, and "focal right paramedian bulging of the disc [at L4-5] suggestive of a herniation." *Id.* at 128.

The Administrative Law Judge heard testimony from a medical expert, Edward B. Babcock, M.D., concerning the plaintiff's spinal condition. Dr. Babcock testified that, other than the plaintiff's subjective complaints of pain, there is no medical information in the record suggesting that the plaintiff had a herniated disc before December 31, 1992. *Id.* at 46-47. "One has to have other findings to document the diagnosis of radiculopathy and . . . I don't think we have this. I think that's absent at the present time." *Id.* at 47. Dr. Babcock further testified that, had the plaintiff's doctors suspected radiculopathy before December 31, 1992, they would not have followed it for very long without performing further tests. *Id.* Finally, Dr. Babcock testified that the 1986 x-ray findings would not account for the degree of pain of which the plaintiff complained. *Id.* at 50. He explained that "degenerative changes are so common that . . . you can't say that the presence of those in themselves would be enough to cause the amount of pain he's described over all these years." *Id.* Thus, the plaintiff failed to produce medical evidence that, during the insured period, he had a medical impairment which could reasonably be expected to produce the pain and other symptoms

he alleged.⁴ This failure supports the Administrative Law Judge’s determination that the plaintiff’s spinal condition was not a severe impairment before his insured status expired.

Alcoholism

“At the hearing, the impartial medical expert . . . concurred with [the] assessment that the claimant has a significant alcohol problem.” Record p. 18. Although the plaintiff testified that he did not think his drinking “interferes with [his] ability to function on a daily basis,” Record pp. 40-41, this is not an admission that alcoholism has only a minimal effect on his ability to do basic work functions. Nor did the medical evidence suggest the extent to which alcoholism affected his ability to do basic work functions. Absent such evidence, the Administrative Law Judge could not make an “informed judgment about [alcoholism’s] limiting effect on the [plaintiff]’s physical and mental abilit[y] to perform basic work activities.” Social Security Ruling 85-28, at 394; *cf. Gonzalez Garcia v. Secretary of Health & Human Servs.*, 835 F.2d 1, 2-3 (1st Cir. 1987) (per curiam)

⁴ The plaintiff suggests that there is other medical evidence of a spinal impairment during the insured period. In June 1989 Patrick Kamm, M.D., stated that the plaintiff “has a psychological problem due to the work related injury as evidenced by his inability to adjust to pain and his abuse of alcohol to try to help him handle the pain.” Record p. 151. Ken Nadeau, a physician’s assistant, saw the plaintiff for lower back and shoulder pain from January 1989 to May 1990. *Id.* at 123-27. Mr. Nadeau’s notes reflect the plaintiff’s “chronic” back pain, but provide no description of its cause or treatment. *Id.* As stated above, the plaintiff must provide more than his own statements of pain; he must provide medical signs and/or laboratory findings. “*Signs* are anatomical, physiological, or psychological abnormalities which can be observed, apart from [the plaintiff’s] statements (symptoms). . . . *Laboratory findings* are anatomical, physiological, or psychological phenomena which can be shown by the use of medically acceptable laboratory diagnostic techniques.” 20 C.F.R. § 404.1528(b), (c). The evidence from Dr. Kamm and Mr. Nadeau constitutes neither signs nor laboratory findings of a spinal impairment, but merely their memorialization of the plaintiff’s subjective complaints. Even assuming that Mr. Nadeau’s finding of “chronic” back pain is based on observable anatomical or physiological abnormalities that could constitute medical signs, I note that the Commissioner does not include certified physicians’ assistants in the listing of medical sources from which she will accept reports about claimants’ impairments. 20 C.F.R. § 404.1513(a).

(upholding nonseverity determination where medical evidence supported finding that impairments caused only minor physical limitations); *Barrientos*, 820 F.2d at 2 (same). Social Security Ruling 85-28 required the Administrative Law Judge either to obtain more detailed medical findings as to what limitations alcoholism imposed, or to find alcoholism to be a severe impairment.

For the foregoing reasons, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** for 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 22nd day of March, 1996.

David M. Cohen
United States Magistrate Judge