

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

EARL S. DANIELS,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Civil No. 95-215-B
)	
SHIRLEY S. CHATER,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant¹</i>)	

REPORT AND RECOMMENDED DECISION²

This Social Security Supplemental Security Income (“SSI”) appeal raises the issue of whether there is substantial evidence in the record supporting the Commissioner’s determination that the

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 September 29, 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. § 1383(c)(3). 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.

plaintiff is capable of performing his past relevant work.³ I recommend that the court affirm the Commissioner's decision.

In accordance with the Commissioner's sequential evaluation process, 20 C.F.R. § 416.920; *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 claimant may or may not have engaged in substantial gainful activity since January 1, 1992, Finding 1, Record p. 24; that he has a substance addiction disorder, a severe impairment which does not meet or equal any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 2, Record p. 25; that his statements concerning his impairment and its impact on his ability to work are not entirely credible in light of the medical history, his own description of his activities and lifestyle, and his assertions concerning his ability to work, Finding 3, Record p. 25; that his residual functional capacity has no exertional limitations but he has a history of inadequate work attendance, Finding 4, Record p. 25; that he is able to perform his past relevant work as a car cleaner, Finding 5, Record p. 25; and that, therefore, the plaintiff was not under a disability at any time prior to the Administrative Law Judge's decision on November 21, 1994. The Appeals Council declined to review the decision, Record pp. 4-5, making it the final determination of the Commissioner, 20 C.F.R. § 416.1481; *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. § 1383(c)(3); *Lizotte v. Secretary of Health &*

³ The plaintiff initially claimed that the Administrative Law Judge made insufficient findings regarding the plaintiff's mental functional capacity and mental health impairments, and that the Appeals Council improperly disregarded the opinion of his treating psychologist. Statement of Itemized Errors (Docket No. 4) ¶¶ 4-6. However, at oral argument he abandoned these arguments and represented that his appeal was based solely on the Step 4 determination concerning alcoholism.

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 Administrative Law Judge's determination that the plaintiff could return to his past relevant work as a car washer occurred at Step 4 of the sequential evaluation process. At Step 4, the burden is on the plaintiff to describe the physical and mental demands of his past work and the impairments which he claims to have, thus making a "reasonable threshold showing" of how his current functional capacity precludes the performance of his past work. *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991). Once the plaintiff has done so, the Administrative Law Judge has the obligation to measure the requirements of his former work against his capabilities. *Id.* at 7.

When alcoholism does not meet or equal a listed impairment, it cannot constitute a disabling impairment unless the Administrative Law Judge determines that the claimant is addicted to alcohol and has lost the ability to control his drinking. *Arroyo v. Secretary of Health & Human Servs.*, 932 F.2d 82, 87 (1st Cir. 1991). Mere diagnosis of chronic alcoholism does not establish such loss of control. *Id.* The justification for finding alcoholism to be disabling is not simply that intoxication prevents one from performing substantial gainful activity; that much is obvious. Rather, the disability lies in one's inability to limit alcohol intake to a level that permits substantial gainful activity. Thus, where alcoholism is the claimed disability, the plaintiff's reasonable threshold showing necessarily includes a reasonable showing that he cannot control his drinking. This recognizes the reality that many alcoholics can and do work. *See id.* at 88.

The Administrative Law Judge found that “the claimant is living the life style that he has chosen and not one forced upon him by uncontrolled substance addiction.” Record p. 23. The plaintiff “does household cleaning and small repairs, prepares three meals per day, goes shopping, and drives.” *Id.*; *see id.* at 221, 223-24. Asked if he was still drinking every day, the plaintiff answered: “If I had the money and the opportunity, probably I would. But where I -- you know, where I’m at now, you know, I’d be thrown out in a minute if I was drinking to any extent.” *Id.* at 42. Rather than a loss of control, this testimony suggests that the plaintiff can and does control his drinking when sufficiently motivated.

The Administrative Law Judge further noted that the plaintiff’s counselors gave no indication that the plaintiff has demonstrated a strong desire to stop drinking. *Id.* at 23; *see, e.g., id.* at 158 (plaintiff not motivated for treatment at present); *id.* at 171 (plaintiff terminated from inpatient rehabilitation program after seven weeks for noncompliance with program agreement; “[f]rom beginning he did not appear to be ‘in program’ and seemed to give top priority to a relationship w/ female”). The plaintiff’s ability to keep his driver’s license for the last five or six years, despite having lost it three times earlier, plus his “stable relationship [with the woman with whom he has lived] for the last four years and his ability to obtain jobs, indicates he has learned to control his behavior.” *Id.* at 23. Thus, the Administrative Law Judge found that, “[a]lthough he may have lost many jobs due to drinking, there is nothing in the record to indicate he seriously wants to stop drinking so that he could maintain employment.” *Id.*

Although he could have more clearly explained the reason for his determination, the Administrative Law Judge was justified in finding against the plaintiff at Step 4 because the plaintiff

made no reasonable threshold showing that he could not control his drinking. 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 22nd day of March, 1996.

*David M. Cohen
United States Magistrate Judge*