

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MEGAN BARKER,)
)
 Plaintiff)
)
 v.) **Civil No. 95-86-B**
)
 SHIRLEY S. CHATER,)
 Commissioner of Social Security,)
)
 Defendant¹)

REPORT AND RECOMMENDED DECISION²

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

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 April 20, 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) 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 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.

determination that the plaintiff's patellofemoral pain syndrome is not a severe impairment. 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, 6 (1st Cir. 1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since August 1, 1991, Finding 2, Record p. 21; that she has patellofemoral pain syndrome, Finding 3, Record p. 21; that her statements concerning her impairments and their impact on her ability to work are not entirely credible in light of discrepancies between her statements and information contained in the documentary reports, and the degree of medical treatment required, Finding 4, Record p. 21; that she has not had any impairment that significantly limits her ability to perform basic work-related functions for a continuous period of at least twelve months and thus does not have a severe impairment, Finding 5, Record p. 21; and that, therefore, the plaintiff was not under a disability at any time prior to the Administrative Law Judge's decision on September 23, 1994, Finding 6, Record p. 21. 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 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).

At the second step of the sequential evaluation process, the burden is on the plaintiff to show that her impairment is severe. 20 C.F.R. §§ 404.1520, 416.920; *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), 416.929(a). If claimants could prevail at Step 2 absent 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 fails to supply medical evidence of an impairment that could reasonably be expected to produce the pain or other symptoms alleged.

Albert Pepe, M.D, examined the plaintiff and reported the following findings on December 18, 1992:

Examination reveals no effusion. The knee is entirely stable. Patellofemoral tracking is entirely stable. There is tenderness of both jointlines. There is no evidence of instability, either in the patellofemoral mechanism or in the collateral ligaments. There is no Lachman sign and no evidence of a drawers sign. X-rays taken before were reviewed and were entirely normal. The patient was sent for further x-rays, including a skyline view and an interchondral notch view, and additionally, P and lateral views were taken at this time. They are entirely normal.

Record p. 153. In a note dated October 9, 1993, Dr. Pepe wrote: "[The plaintiff] says she has pain in her legs that precludes sitting or standing at work. Would recommend no sitting or standing in order to help the pain." *Id.* at 186.

The circumstances surrounding this note, however, reduce its evidentiary value. The plaintiff testified that she saw Dr. Pepe in the hall and asked for his opinion about her going back to work. *Id.* at 48. She then asked him to put it in writing, which he did. *Id.* She did not have an appointment with Dr. Pepe, nor did he examine her before writing the note. *Id.* at 47-48. The Administrative Law

Judge justifiably observed that “Dr. Pepe’s assessment is of limited persuasive value as it is based principally on the claimant’s subjective allegations and not on objective findings.” *Id.* at 17.

Edward B. Babcock, M.D., provided testimony that contradicted Dr. Pepe’s October 9, 1993 note. While Dr. Babcock credited the diagnosis of patellofemoral pain syndrome, he stated: “[T]his is an extraordinary situation, in my opinion. You have a knee that has no swelling, is stable on examination, with totally negative x-rays would cause this much pain, it just, I’m not familiar with the situation that would do that.” *Id.* at 50. Dr. Babcock, who reviewed the medical evidence of record, *id.* at 44, further testified that he saw no sufficient medical basis for the pain that the plaintiff alleged, *id.* at 51.

It is the Commissioner’s responsibility to determine issues of credibility, to draw inferences from the evidence of record and to resolve conflicts in the evidence. *Irlanda Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991). In the First Circuit, an Administrative Law Judge is not necessarily required to give more weight to a treating physician’s report than to others. *Keating v. Secretary of Health & Human Servs.*, 848 F.2d 271, 275-76 (1st Cir. 1988). The weight to which medical testimony is entitled varies with the circumstances of each case, including the nature of the illness and the information provided to the expert. *Gordils v. Secretary of Health & Human Servs.*, 921 F.2d 327, 328 (1st Cir. 1990). Given that Dr. Pepe had last examined the plaintiff nearly ten months before writing the October 9, 1993 note, that he had no advance notice of her visit (and thus no opportunity to review her file), and that he wrote the note at the plaintiff’s request and without examining her anew, the Administrative Law Judge was entitled to disregard

it and accept Dr. Babcock's opinion that there was no sufficient medical basis for the pain that the plaintiff alleged.³

The medical evidence credited by the Administrative Law Judge does not show an impairment that could reasonably be expected to produce the pain and other symptoms that the plaintiff alleged. Failing to demonstrate such an impairment, the plaintiff did not meet her Step 2 burden. 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 1st day of April, 1996.

*David M. Cohen
United States Magistrate Judge*

³ The plaintiff also notes that the Department of Veterans Affairs rated her impairment as a thirty-percent service-connected disability. See Record pp. 165-66. However, as the plaintiff concedes and the Administrative Law Judge noted, the Social Security Administration is not bound by the disability determinations of other agencies. 20 C.F.R. §§ 404.1504, 416.903.