

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>SUSAN G. WESTBERRY,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
<b>v.</b>	)	<b>Civil No. 95-211-P-C</b>
	)	
<b>SHIRLEY S. CHATER,</b>	)	
<i>Commissioner of Social Security,</i>	)	
	)	
<i>Defendant</i>	)	

**REPORT AND RECOMMENDED DECISION<sup>1</sup>**

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 determinations that the plaintiff is able to perform jobs that exist in significant numbers in the national economy, and that the plaintiff’s digestive problems do not constitute a severe impairment. I recommend that the court vacate the Commissioner’s decision and remand the cause with directions to award benefits to the plaintiff.

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.

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<sup>1</sup> 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.

1982), the Administrative Law Judge found, in relevant part, that the plaintiff has not engaged in substantial gainful activity since June 1, 1991, Finding 2, Record p. 22; that she suffers from back pain and carpal tunnel syndrome, which constitute severe impairments but do not meet or equal any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 3, Record p. 22; that her digestive problems are nonsevere, Finding 3, Record p. 22; that she lacks the residual functional capacity to perform tasks requiring, inter alia, repetitive and consistent use of the hands, or prolonged periods of sitting, standing or walking, Finding 5, Record p. 22; that she is unable to perform her past relevant work, Finding 6, Record p. 22; that her capacity for the full range of sedentary work is diminished by her inability to perform tasks requiring, inter alia, repetitive, consistent use of the hands, Finding 7, Record p. 22; that she has at least a high school education, Finding 9, Record p. 22; that she has skilled work experience but has acquired no transferable work skills, Finding 10, Record p. 22; that, despite these findings, she is capable of making an adjustment to jobs which exist in significant numbers in the national economy, including medical secretary, credit clerk, credit authorizer, order clerk, clerical support staff worker and telemarketer, Finding 12, Record p. 23; and that, therefore, the plaintiff was not under a disability at any time prior to the Administrative Law Judge's decision on September 30, 1994, Finding 13, Record p. 23. The Appeals Council declined to review the decision, Record pp. 5-6, 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).

### **Severe Impairment**

The plaintiff argues that there is not substantial evidence in the record to support the finding that her digestive problems are nonsevere. At this stage, the second step of the sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920, the burden is on the plaintiff to show that her impairment is severe, *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.

I find that the plaintiff has satisfied her *de minimis* Step 2 burden. She testified that her digestive impairment severely incapacitates her for one week per month. Record p. 34. She also supplied medical evidence of her impairment. On November 24, 1993 W. Stephen Gefvert, D.O., reported that the plaintiff complained of "chronic, recurrent episodes of loose stooling with abdominal cramping." *Id.* at 193. After examining the plaintiff on three occasions and performing a flexible sigmoidoscopy, Dr. Gefvert concluded that her symptoms were consistent with irritable bowel syndrome. *Id.* at 191-93. Credible allegations of an impairment that limits one's ability to perform basic work activities, combined with medical evidence confirming the alleged impairment, satisfy the plaintiff's *de minimis* Step 2 burden.<sup>2</sup>

To support a determination of nonseverity, the medical evidence must establish that the plaintiff's impairment has no more than a minimal effect on her ability to perform basic work

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<sup>2</sup> Social Security Ruling 85-28 states that a nonseverity determination is appropriate only if the medical evidence establishes only a slight abnormality. I note, however, that a nonseverity determination would also be appropriate if a claimant relied solely on subjective allegations and supplied no medical evidence. *See* 20 C.F.R. §§ 404.1529(a), 416.929(a) (claimant may not rely solely on her own statements; there must be medical signs and laboratory findings showing medical impairment which could reasonably be expected to produce the pain and/or symptoms alleged). If claimants could prevail at Step 2 absent any medical evidence supporting the alleged impairment, Step 2 would be a mere formality rather than a *de minimis* burden.

activities. Social Security Ruling 85-28, at 393. The Administrative Law Judge found that “the irritable bowel syndrome does not cause more than slight limitation in the claimant’s ability to perform work related activities. Even if the claimant has ten bowel movements in one day once a week . . . , most of them would presumably occur in non working hours or during lunch or break periods.” Record p. 18. However, the medical evidence does not address the physical limitations that her irritable bowel syndrome imposed upon her. Despite the Administrative Law Judge’s *presumption* that ten bowel movements per day would not interfere with her work, there was no evidence that the plaintiff could control when or how often her bowel movements occurred. Absent such evidence, the Administrative Law Judge could not make an “informed judgment about [the condition’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*) (upholding nonseverity determination where medical evidence supported finding that impairments caused only minor physical limitations); *Barrientos*, 820 F.2d at 2 (same). Thus, Social Security Ruling 85-28 required the Administrative Law Judge either to obtain more detailed medical findings or to find the irritable bowel syndrome to be a severe impairment.

### **Work that Exists in the National Economy**

The plaintiff next challenges the Step 5 determination that, despite her back pain and carpal tunnel syndrome, she is able to perform work that exists in the national economy. The

Administrative Law Judge based this determination on testimony by a vocational expert.<sup>3</sup> See Record p. 21. The vocational expert cited jobs which, according to the *Dictionary of Occupational Titles* (“DOT”) (U.S. Dep’t of Labor, 4th ed. rev. 1991), exceed the plaintiff’s residual functional capacity (“RFC”). Thus, the plaintiff argues, there is not substantial evidence to support the Commissioner’s Step 5 determination.

The Administrative Law Judge found that the plaintiff cannot perform tasks requiring “repetitive, consistent use of the hands.” Finding 7, Record p. 22. The Commissioner conceded at oral argument that, according to the *DOT*, the jobs cited by the vocational expert exceed the plaintiff’s RFC due to limitations on repetitive arm and hand use. Accordingly, unless the Administrative Law Judge was entitled to accept the vocational expert’s testimony over the *DOT* descriptions, the Commissioner’s determination is not supported by substantial evidence.

The United States Courts of Appeals for the Second and Seventh Circuits have held that when vocational expert testimony conflicts with the *DOT*, the *DOT* controls. *Tom v. Heckler*, 779 F.2d 1250, 1255-56 (7th Cir. 1985) (where vocational expert testified that claimant could perform jobs that, according to *DOT*, exceeded claimant’s RFC, Commissioner failed to show claimant could perform those jobs); *Mimms v. Heckler*, 750 F.2d 180, 186 (2d Cir. 1984) (same).

The Eighth and Ninth Circuits have held that *DOT* job classifications create a rebuttable presumption, which may be overcome by detailed expert testimony that particular jobs fall within

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<sup>3</sup> Specifically, the vocational expert testified that the plaintiff could perform the following jobs: credit clerk, credit authorizer, telephone order filler and medical secretary. Record pp. 45-46. In addition to these positions, the Administrative Law Judge found that the plaintiff could work as a clerical support staff worker and a telemarketer. Finding 12, Record p. 23. The vocational expert never testified that these two positions exist in the national economy, and thus the Administrative Law Judge erred in relying on them at Step 5.

a claimant's RFC. *Montgomery v. Chater*, 69 F.3d 273, 276-77 (8th Cir. 1995) (*DOT* presumption not rebutted where vocational expert "did not testify that the job traits of the positions identified varied from the way the *DOT* described them"); *Johnson v. Shalala*, 60 F.3d 1428, 1435 (9th Cir. 1995). In *Johnson* the vocational expert "testified specifically about the characteristics of local jobs" based on his knowledge of the jobs available in the local market. *Id.* at 1435-36. Rather than simply opine that the claimant could perform certain jobs, the expert explained that the jobs were "low stress occupations with sit/stand options which require lifting of objects weighing mostly from one to five pounds." *Id.* at 1436. The court reasoned that, "in light of the *DOT*'s own disclaimer<sup>4</sup> and the administratively recognized validity of expert testimony by qualified individuals, the expert testimony may properly be used to show that the particular jobs, whether classified as light or sedentary, may be ones that a particular claimant can perform." *Id.* at 1435.

Only the Sixth Circuit has held that an Administrative Law Judge may freely accept vocational expert testimony that conflicts with the *DOT*. *Conn v. Secretary of Health & Human Servs.*, 51 F.3d 607, 610 (6th Cir. 1995) (citing *Barker v. Shalala*, 40 F.3d 789 (6th Cir. 1994)). The Sixth Circuit reasoned that: the Commissioner takes notice of job information from publications other than the *DOT*; the regulations contemplate use of vocational experts to determine complex issues regarding specific occupational characteristics; the *DOT* admits to providing only general descriptions that may not coincide with a specific job in an particular establishment or industry; and the vocational expert was subjected to cross-examination on the difference between his assessment and the *DOT*'s. *Barker*, 40 F.3d at 795. The Sixth Circuit, however, did not purport to limit its

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<sup>4</sup> The *DOT* notes that it provides only "composite descriptions of occupations as they may typically occur."

holding to cases where the vocational expert testifies about specific characteristics of jobs in the local market. *See id.*

I reject the Sixth Circuit's position. The Commissioner "will take administrative notice of reliable job information available from various governmental and other publications," including the *DOT*. 20 C.F.R. §§ 404.1566(d)(1), 416.966(d)(1). Allowing an Administrative Law Judge to disregard *DOT* classifications based on nonspecific allegations by a vocational expert would undermine the Commissioner's decision, in sections 404.1566(d) and 416.966(d), to take administrative notice of reliable job information from such publications. By contrast, a rebuttable presumption that the *DOT* controls appears to accommodate the Commissioner's decision. When the vocational expert's testimony is sufficient to overcome the presumption, the *DOT*'s general classifications are arguably no longer reliable as to the particular jobs at issue.

I need not decide whether the *DOT* controls in all cases or merely creates a rebuttable presumption, for the expert testimony in this case does not provide persuasive evidence to overcome such a presumption. The testimony was not based on the vocational expert's knowledge of the local market, nor did it deal specifically with the local geographic market.<sup>5</sup> Moreover, the following cross-examination is the vocational expert's only reference to the functional requirements of the jobs he cited:

[Plaintiff's Representative] . . . You're saying that she can do all those jobs with no repetitive use of the hands and arms?

[Vocational Expert] No, I don't know exactly all of them as far as --

[Representative] Well, that's what we're talking about --

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<sup>5</sup> The vocational expert's only reference to the local market was his statement of the number of each job type available in Maine. Record pp. 45-46.

[Vocational Expert] I mean --

[Representative] With this hypothetical.

[Vocational Expert] A particular job might or might not.

Record pp. 46-47. The vocational expert made no attempt to detail the requirements of the cited jobs *vis-a-vis* repetitive hand use.<sup>6</sup> This testimony is far too vague to rebut a presumption favoring *DOT* classifications. Accordingly, the Administrative Law Judge erred in finding that the plaintiff could perform the jobs cited by the vocational expert.

The plaintiff seeks a remand “for payment.” Itemized Statement of Errors Pursuant to Local Rule 26 Submitted by Plaintiff (Docket No. 3) at 6. The Commissioner had a full and fair opportunity to develop the record and meet her burden at Step 5. The Social Security Act authorizes the court to enter a judgment “affirming, modifying, or reversing the decision of the Commissioner of Social Security, with or without remanding the cause for a rehearing.” 42 U.S.C. § 405(g). The court may “at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding.” *Id.* As the Second Circuit noted more than a decade ago, Congress added this language to the Social Security Act in 1980 as a “mandate to foreshorten the often painfully slow process by which disability determinations are made.” *Carroll v. Secretary of Health & Human Servs.*, 705 F.2d 638, 644 (2d Cir. 1983). To remand in these circumstances would be to countenance the notion that the

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<sup>6</sup> At one point he discussed the requirements of all clerical positions in general: “It sounded to me like occasional light typing, for instance making notes, the way, say, a receptionist might. . . . [T]here certainly is a lot of striking motion, but there’s frequent pauses in that, too. It’s not absolutely continuous . . . .” Record p. 47. This vague description cannot overcome a presumption favoring *DOT* classifications

Commissioner may have as many chances as she needs, *ad infinitum*, to meet her burden at Step 5. Such a possibility cannot be what Congress envisioned in light of the quoted language from section 405(g). A claimant who seeks disability benefits from the Social Security Administration, and then does all that is expected of her pursuant to the sequential evaluation process, deserves an answer from the system. In circumstances where the claimant has made out a prima facie case for benefits and the Commissioner's vocational expert does not present the required evidence of the claimant's ability to perform work that exists in the national economy, the appropriate relief is an award of benefits absent some good cause for the evidentiary gap. Finding no such cause, I recommend that the Commissioner's decision be **VACATED** and the cause **REMANDED** with directions to award benefits to the plaintiff.<sup>7</sup>

#### **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 21st day of March, 1996.*

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<sup>7</sup> Accordingly, I need not consider the plaintiff's further arguments that: (1) the jobs cited by the vocational expert exceed her skill level; (2) the vocational expert did not specify how many of the cited jobs would accommodate the plaintiff's inability to sit, stand or walk for prolonged periods; and (3) the clerical support staff worker position exceeds the plaintiff's RFC for sedentary work.

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