

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

<b>CLAYTON W. MAY,</b>	)	
	)	
<i>Plaintiff</i>	)	
	)	
v.	)	<i>Civil No. 96-145-P-C</i>
	)	
<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”) appeals raises the issue whether there is substantial evidence in the record supporting the Commissioner’s determination that the plaintiff did not have a severe impairment prior to December 31, 1985, the date upon which he was last insured under the applicable statute. The Commissioner also awarded the plaintiff Supplemental Security Income (“SSI”) benefits beginning November 16, 1992; that portion of the determination is not at issue here. I recommend that the court affirm the Commissioner’s decision.

In accordance with the Commissioner’s sequential evaluation process, 20 C.F.R. § 404.1520;

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<sup>1</sup> 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 December 9, 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.

*Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982),<sup>2</sup> the Administrative Law Judge found, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act on November 6, 1979, the date he stated that he became unable to work, and continued to meet them through December 31, 1985, Finding 1, Record p. 49; that he has not engaged in substantial gainful activity since prior to August 31, 1980, Finding 2, Record p. 49; that, based on the medical evidence, he did not have any severe impairment or impairments which significantly limited his ability to perform basic work-related functions before December 31, 1985, Finding 3, Record p. 49; that his testimony and the medical evidence did not credibly support a finding that he would have been unable to perform a full range of work before December 31, 1985, Finding 4, Record p. 49; that he is functionally illiterate, Finding 9, Record p. 50; and that he was not disabled prior to November 6, 1990, Finding 13, Record p. 51. The Appeals Council declined to review the decision, Record pp. 6-7, 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); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported

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<sup>2</sup> The plaintiff applied for benefits, and the hearing was held, while he was a resident of Vermont. The plaintiff presented arguments to the Administrative Law Judge based on case law of the United States Court of Appeals for the Second Circuit. The plaintiff now resides in Maine and brings his appeal in a court that is in the First Circuit. The parties to this appeal appear to agree that the law of the circuit in which the Administrative Law Judge issued his decision is the controlling law for a Social Security appeal. Accordingly, I apply Second Circuit law in my analysis of the issues presented. This notwithstanding, I continue to liberally cite First Circuit precedent, because of my familiarity with it, in circumstances where it is compatible with Second Circuit law.

by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion 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 bases this appeal solely on his claim that he had a severe mental impairment before December 31, 1985. He argues that there is not substantial evidence in the record to support the finding that he did not have a severe impairment before that date. At this stage, the second step of the sequential evaluation process, 20 C.F.R. § 404.1520, the burden of proof is on the plaintiff. *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). This is a *de minimis* burden. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986).

The plaintiff contends that the evidence compels a finding that he had a severe impairment, and indeed that he met Listing 12.08 (“personality disorder”) in 20 C.F.R. § 404, Subpart P, Appendix 1,<sup>3</sup> relying on the reports of Helen Bonchek Schneyer, a social worker with a master’s degree who worked with him as his psychotherapist on a weekly basis from February to July 1987, Record p. 426; Larry J. Karp, a licensed psychologist with a master’s degree, who provided him with weekly psychotherapy from October 13, 1994 to January 2, 1995, *id.* at 428-30; Cheryl D. Dean, Ph.D., the consulting clinical psychologist who evaluated the plaintiff in connection with his application for benefits, *id.* at 46; the definitions of “personality disorder” found in Listing 12.08 and the *Diagnostic Statistical Manual IV (“DSM”)*; and the assertion the “the ALJ in fact found a personality disorder,” Itemized Statement of Errors Pursuant to Local Rule 26 Submitted by Plaintiff

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<sup>3</sup> A finding that a claimant’s impairment meets or equals the requirements of a disability listed in Appendix 1 to Subpart P of 20 C.F.R. § 404 at Step Three of the sequential evaluation process constitutes a finding that the claimant is disabled under the Social Security Act. 20 C.F.R. § 404.1520(d). This appeal deals only with a Step Two finding that the plaintiff did not have a severe impairment before December 31, 1985.

(Docket No. 3) at 2, in support of his conclusion that the plaintiff was disabled as of November 16, 1992, the date upon which his application was filed, Record p. 51. The plaintiff relies on *Mulave v. Sullivan*, 777 F. Supp. 247 (S.D.N.Y. 1991); *Rivera v. Sullivan*, 923 F.2d 964 (2d Cir. 1991); and *Dousewicz v. Harris*, 646 F.2d 771 (2d Cir. 1981), to support his argument that the uncontradicted evidence of a mental disability existing before December 31, 1985 requires remand in this case.

First, neither the *DSM* definition nor the language of Listing 12.08 supports the argument that the plaintiff had a severe impairment before December 31, 1985. While both definitions may speak of a personality disorder as a long-term disorder, and the *DSM* definition suggests that its onset can be traced back to adolescence or early adulthood, neither definition establishes that this plaintiff, who was 37 years old on December 31, 1985, Record p. 137, was necessarily severely impaired by a personality disorder before that date. Thus, neither Dr. Dean's opinion that the plaintiff suffered from a personality disorder in 1993, *id.* at 369, nor Mr. Karp's opinion that the plaintiff met the *DSM* definition in 1995, *id.* at 428-30, can be used to establish the existence of a severe impairment in 1985 through the application of these definitions. The plaintiff has the burden to establish that his mental impairment was of a disabling level of severity as of December 31, 1985, not merely that his mental impairment had its roots prior to that date. *Deblois v. Secretary of Health & Human Servs.*, 686 F.2d 76, 79 (1st Cir. 1982); *Carnevale v. Gardner*, 393 F.2d 889, 890 (2d Cir. 1968).

Next, the Administrative Law Judge did not find that the plaintiff met the Listing for a personality disorder in 1992; if he had done so, he would have awarded the plaintiff SSI benefits at Step Three of the sequential evaluation process, rather than Step 5. *See* Record pp. 48-51. The fact that the Administrative Law Judge noted that "psychological evaluations and therapy notes do provide significant evidence of a personality disorder as far back as 1987," *id.* at 48, in no way

compels him to find that the plaintiff was severely impaired by a personality disorder before December 31, 1985.

Contrary to plaintiff's characterization of Ms. Schneyer's report, she did not state that he was disabled or severely impaired before she treated him, much less that he was disabled by a personality disorder before December 31, 1985. *Id.* at 426-27. In any event, Ms. Schneyer's two-page handwritten letter is not a report from an "acceptable medical source," 20 C.F.R. § 404.1513(a), and so may not be given any weight beyond that of "information from other sources," *id.* (e). *See Diaz v. Shalala*, 59 F.3d 307, 313 (2d Cir. 1995) (regarding weight to be given to report of practitioner other than "acceptable medical source"). The case law upon which the plaintiff relies speaks only in terms of retrospective medical reports, a category to which Ms. Schneyer's letter does not belong. In addition, Dr. Dean did not discuss the plaintiff's condition before December 31, 1985, and specifically declined the request of the plaintiff's counsel that she do so because "she did not presently have enough information to answer the question." *Id.* at 433.

The plaintiff is thus left with Mr. Karp's report, which provides:

[I]n my opinion Clayton May has suffered from a personality disorder which includes primarily avoidant and dependent behaviors. This disorder has been shown to be inflexible and maladaptive and has caused significant functional impairment and subjective distress in Clayton's life. His functioning has deviated markedly from the expectations of the culture and has manifested in his fearful affectivity, loss of impulse control and mistrustful, distant interpersonal relationships. Clayton May has demonstrated impairment in his social and occupational areas of functioning throughout his adult life.

*Id.* at 430. Mr. Karp, a licensed psychologist, qualifies as an acceptable medical source under section 1513. The plaintiff contends that Mr. Karp's retrospective opinion is uncontroverted and that

he has therefore met his Step Two burden.<sup>4</sup>

The plaintiff urges remand based on *Malave*, in which the District Court for the Southern District of New York reiterates the Second Circuit rule that, “[e]ven if rendered retrospectively, an uncontradicted opinion by the treating physician is binding where it is the only medical evidence as to disability in the record.” 777 F. Supp. at 252, citing *Dousewicz*, 646 F.2d at 774-75. *But see Schisler v. Sullivan*, 3 F.3d 563, 567-68 (2d Cir. 1993) (indicating that Second Circuit’s “treating physician rule” requires modification after 1991 amendment of regulations). *Malave* also requires that a retrospective opinion concern disability, not diagnosis. 777 F. Supp. at 253. Even if Mr. Karp’s opinion can be construed to provide medical evidence that the plaintiff was disabled, or severely impaired, by a personality disorder before December 31, 1985,<sup>5</sup> that opinion is not uncontradicted in the record.

Mark Lichtenstein, M.D., the plaintiff’s treating family practitioner, stated in a GA/Reach Up/Employment Exemption Medical Report form dated February 23, 1994 that the plaintiff’s “conditions which preclude employment or training at this time” are “1) ASCVD -- s/p inf MI; 2) Chronic back pa -- w/ Rt leg radiculopathy s/p MVA 1990; 3) Insomnia; 4) Acute prostatitis; 5) illiterate; 6) HTN.” Record p. 378. He also stated: “Expect Permanent Disability --unable to work

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<sup>4</sup> The plaintiff also cites as authority on this point Social Security Ruling 83-15, which has been rescinded. *West’s Social Security Reporting Service Rulings 1983-1991* at 982.

<sup>5</sup> The Second Circuit also requires that retrospective medical opinions concerning disability be based on “medically accepted clinical diagnostic technique” and that “in light of the entire record” they establish the existence of an impairment during the alleged period of disability. *Rivera*, 923 F.2d at 968 & n.4. Mr. Karp makes no reference in his report to his diagnostic technique and there is no other evidence in the record concerning this point. The claimant has the burden of proof on this issue. *Dousewicz*, 646 F.2d at 774; *Jones v. Heckler*, 614 F. Supp. 277, 280 (D.Vt. 1985). See also 20 C.F.R. § 404, Subpart P, Appendix 1, § 12.00(B), setting forth the elements of the medical evidence required to establish a mental disorder impairment.

since 1990!” *Id.* In his office note from the same date, Dr. Lichtenstein noted: “Major problems are ASCVD, inadequately treated, HCVD inadequately treated, rt. inguinal hernia which is mildly symptomatic, chronic prostatitis a marked BPH, anxiety disorder and chronic pain related to back and rt. knee.” *Id.* at 386. On the previous day, Dr. Lichtenstein filled out a dispensing form for the plaintiff on which he wrote: “Disabled since 1990. 1) chronic Back Pain w/ Radiculopathy; 2) ASCVD -- angina; 3) Anxiety Disorder -- Generalized.” *Id.* at 391. This medical evidence does contradict Mr. Karp’s opinion concerning the onset of disability, and it is substantial evidence in the record to support the finding of the Administrative Law Judge in his retrospective review at Step Two.

The plaintiff also contends that the evidence of his sporadic work history, the testimony and affidavit of his wife, the affidavit of his step-daughter, and his own testimony, wrongly characterized by the Administrative Law Judge as not credible, all support Mr. Karp’s opinion. However, the Administrative Law Judge’s reference to credibility -- “[t]he claimant’s testimony and medical evidence in the record do not credibly support a finding that the claimant would be unable to perform a full range of work prior to December 31, 1985,” Finding 4, Record p. 49 -- appears to be limited to the issue of pain rather than the mental disability that forms the sole basis of this appeal. The Administrative Law Judge refers in this Finding to Social Security Ruling 88-13, which deals with evaluation of pain. To the extent that the finding may be construed to refer to the plaintiff’s mental disability, the following analysis is necessary.

The plaintiff’s entire testimony concerning mental problems before 1985 was that he, his wife and some of their children saw a counselor in Maine two or three times; that this counselor prescribed amitriptyline for him; and that he has “always been nervous.” Record, pp. 108-09, 116.

The Administrative Law Judge mentioned the plaintiff's work history only in connection with an evaluation of his involvement in substantial gainful activity between 1980 and 1990 and actually found in the plaintiff's favor on that issue, since he proceeded to Step Two of the sequential review process. *Id.* at 46, 47.

The plaintiff does not specify what portions of the testimony and affidavit of his wife and the affidavit of his step-daughter support a finding of severe mental impairment before December 1985. His wife testified that they moved to Vermont in 1984 because the plaintiff "wanted me to move completely away from everybody because he -- they made him nervous if they were around," *id.* at 118; that, if he had a frustrating day at work, the plaintiff would go into the bedroom upon his return home from work and shut the door, *id.* at 124; and that she would sell the clams he dug in 1979 because "he can't talk to people because it makes him upset," *id.* at 126. In her affidavit, the plaintiff's wife stated that he saw a counselor in Maine "[p]rior to February of 1987" a few times, that he tried to commit suicide twice in the late 1970s, that "he has not been able to participate in continuous employment in a regular work week"<sup>6</sup> at least since 1975, that he has always complained that he was afraid he was being watched while he worked and "this would stress and frustrate him," and that since 1975 they have moved "every two or three months because Clayton could not stand to stay in one place for any period of time." *Id.* at 489-92. The plaintiff's step-daughter stated in her affidavit that she has known the plaintiff since 1971 and that he "has been a very nervous person" who "needed to move around alot because he could not seem to 'sit still' long enough," and who

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<sup>6</sup> The fact that the plaintiff has had 30 or more jobs over the past 20 years is not itself a factor necessarily demonstrating any element of a mental impairment or the lack thereof. Information concerning the circumstances surrounding the termination of these employments would be particularly useful, 20 C.F.R. § 404, Subpart P, Appendix 1, § 12.00(D), but, contrary to the position taken by the Commissioner at oral argument, is not required.

“seemed very nervous to be around people.” *Id.* at 495. The plaintiff cites 20 C.F.R. § 404, Subpart P, Appendix 1, § 12.00(D) in support of his argument that the Administrative Law Judge was required to discuss or rule on this evidence, but section 12.00(D) merely states that secondary documentation of a mental disorder may be obtained from family members. In addition, the evidence supplied by the plaintiff’s wife and step-daughter does not address all of the elements required by section 12.08 to demonstrate the existence of a personality disorder as of December 31, 1985.

Assuming without deciding that Mr. Karp’s report constitutes medical evidence of a severe impairment existing before December 31, 1985, so that the report of Ms. Schneyer may be considered as other evidence on this point, as may the testimony and evidence given by the plaintiff<sup>7</sup> and his relatives, the Commissioner remains entitled to resolve contradictory evidence. *E.g., Irlanda Ortiz v. Secretary of Health & Human Servs.*, 955 F.2d 765, 769 (1st Cir. 1991); *Aponte v. Secretary, Dep’t of Health & Human Servs.*, 728 F.2d 588, 591 (2d Cir. 1984). Symptoms alone are not enough to establish an impairment. 20 C.F.R. §§ 404.1528(a), 404.1529. Even though Step Two of the sequential evaluation process imposes a *de minimis* burden of proof on the plaintiff, he must still establish that his impairment significantly limited his mental ability to do basic work activity before December 31, 1985. *Bowen*, 482 U.S. at 145-46; 20 C.F.R. § 404.1520(c). Dr. Lichtenstein’s medical opinion is substantial evidence in the record to support the Commissioner’s conclusion that no such impairment existed at that time. *See Keating v. Secretary of Health & Human Servs.*, 848

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<sup>7</sup> This analysis also assumes, without deciding, that the plaintiff’s testimony was credible. In fact, the plaintiff would probably not be able to overcome the deference that must be afforded to the credibility determination of an administrative law judge who has observed the claimant, evaluated his testimony, and considered how the testimony fits with other evidence. *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987).

F.2d 271, 275 (1st Cir. 1988) (Administrative Law Judge may disregard report of treating physician as to disability and accept contrary medical evidence).

Because the Commissioner's decision is supported by substantial evidence, I recommend that it 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 17th day of December, 1996.*

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*David M. Cohen  
United States Magistrate Judge*