

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SHERYL WILEY,)	
)	
<i>Plaintiff</i>)	
)	
v.)	Docket No. 98-2-B
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

In this Supplemental Security Income (“SSI”) appeal, the plaintiff contends that the Commissioner has failed to comply with Social Security Ruling 82-62, based primarily on an MRI study performed after the hearing before the administrative law judge and submitted to the Appeals Council. 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 plaintiff had not engaged in substantial gainful activity

¹ 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 16.3(a)(2)(A), 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 June 12, 1998 pursuant to Local Rule 16.3(a)(2)(C) 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.

since December 1, 1994, Finding 1, Record p. 18; that she suffered from low back pain, an impairment which was severe but did not meet or equal any of those listed in Appendix 1, Subpart P. 20 C.F.R. § 404, Finding 2, Record p. 18; that her statements concerning her impairments and their impact on her ability to work were not entirely credible in light of her description of her activities and life style, the degree of medical treatment required, discrepancies between her assertions and information in the reports in the record, and the reports of treating and examining practitioners, Finding 3, Record p. 18; that she lacked the residual functional capacity to lift and carry more than 20 pounds, Finding 4, Record p. 18; that in her past work as a chambermaid, cashier and machine operator the plaintiff was not required to lift more than 20 pounds, Finding 5, Record p. 18; that her impairment did not prevent her from performing her past relevant work, Finding 6, Record p. 18; and that she had not been under a disability as defined in the Social Security Act as any time through the date of the decision, Finding 8, Record p. 18. After accepting three additional exhibits, Record p. 8, the Appeals Council declined to review the decision, *id.* at pp. 6-7, making it the final decision 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. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). 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 Appeals Council is obligated to consider evidence submitted after the hearing before the

administrative law judge if it “relates to the period on or before the date of the administrative law judge hearing decision.” 20 C.F.R. § 416.1470(b). The court also considers such new and material evidence in reviewing the Commissioner’s decision. *Perez v. Chater*, 77 F.3d 41, 45 (2d Cir. 1996); *O’Dell v. Shalala*, 44 F.3d 855, 859 (10th Cir. 1994). The material submitted to the Appeals Council is found at pages 354-63 of the record. The plaintiff relies only on the report from Magnetic Resonance Imaging Associates dated June 12, 1997 (“MRI report”). Record pp. 362-63. This document reports a “new finding” in comparison with a CAT scan performed in February 1995, *id.* at p. 363, but there is no discussion of the significance of the finding and no way to tell whether it relates to the period on or before August 26, 1996, the date of the administrative law judge’s decision, *id.* at p. 19.

The “new finding” to which the MRI report refers is apparently “prominent central disc bulging at the L4-5 level which in association with facet joint and ligamentous hypertrophy results in a moderate relative spinal stenosis.” *Id.* at p. 362. The plaintiff notes that a bulging disc and spinal stenosis “are both listing level impairments at 1.05c [sic] in the Commissioner’s listing of impairments at Appendix 1.” Statement of Specific Errors (Docket No. 3) at 3. Since this information was not and could not have been presented to the administrative law judge at the hearing, an argument that he failed to comply with SSR 82-62 by not including consideration of this information in evaluating the plaintiff’s residual functional capacity is not a conceptually sound basis for an order of remand.

If the plaintiff means to argue that the Commissioner must now consider the possibility that

her back impairment meets or equals the listing at section 1.05(C)² of Appendix 1, Subpart P, 20 C.F.R. § 404, that outcome depends upon a determination of the question whether the MRI report relates to the relevant period, and, in the words of the report itself, what the significance of the report is when correlated with the plaintiff's clinical picture. Neither of these questions can be resolved without expert medical review, whether by Dr. Badeen, who performed the consultative examination of the plaintiff, Record pp. 324-25, or by another consultant or advisor. Similarly, if the plaintiff means to argue that the administrative law judge's assessment of her residual functional capacity as limited only by the ability to lift and carry no more than 20 pounds is incorrect in light of the MRI report, such a determination cannot be made without review by a medical professional. *See Perez v. Secretary of Health & Human Servs.*, 958 F.2d 445, 446 (1st Cir. 1991) (administrative law judge not qualified to interpret raw medical data in functional terms).

The MRI report in this case may raise questions about the conclusions of Dr. Badeen, a consulting physician who saw the plaintiff once and did not have the benefit of the MRI report, which contained a finding of moderate stenosis not present in the earlier CAT scan available to Dr. Badeen. The stenosis may have been present or developing when Dr. Badeen saw the plaintiff, eight months before the administrative law judge issued his opinion and eighteen months before the MRI at issue was performed, but it is not possible to determine that fact from the present record.

² That section defines, under the heading "Disorders of the spine," [o]ther vertebrogenic disorders (e.g., herniated nucleus puplosus, spinal stenosis) with the following persisting for at least 3 months despite prescribed therapy and expected to last 12 months. With both 1 and 2:

1. Pain, muscle spasm, and significant limitation of motion in the spine; and
2. Appropriate radicular distribution of significant motor loss with muscle weakness and sensory and reflex loss.

In many reported cases, evidence presented for the first time to the Appeals Council has been determined to be cumulative, not relevant to the period before the decision of the administrative law judge was issued or otherwise not to provide a basis for remand. *E.g., Perez*, 77 F.3d at 47; *O'Dell*, 44 F.3d at 859. Information submitted after the administrative law judge issues a decision is material if there is a reasonable possibility that it would change the outcome. *Yousif v. Chater*, 901 F. Supp. 1377, 1382 (N.D. Ill. 1995). Here, the MRI at issue was performed ten months after the administrative law judge issued his opinion. The MRI report does not contain any medical history, does not relate back to the alleged disability onset date and does not contain any opinion as to plaintiff's disability. It therefore does not contradict the ALJ's finding that the plaintiff was capable of performing her past relevant work. *Hughes v. Apfel*, 992 F. Supp. 243, 249 (W.D.N.Y. 1997) (same where CAT scan performed ten months after ALJ decision issued revealed disc bulging and narrowing of lateral recesses at L4-5 level and physician reviewing scan concluded that disc bulging "may cause significant symptoms in this kind of patient"). Thus, there is not a reasonable possibility that the MRI alone would change the outcome.³ Under these circumstances, the Appeals Council did not err in concluding that "this additional evidence does not provide a basis for changing the Administrative Law Judge's decision." Record p. 6.

³ Counsel for the plaintiff contended at oral argument that the MRI findings support the findings of Dr. Askanazi, who stated in summary fashion in a one-page report dated September 8, 1995 that the plaintiff "has a diagnosis of chronic arachnoiditis" and that she was unable to work due to this condition. Record p. 323. Arachnoiditis is inflammation of the arachnoid membrane, which is the intermediate membrane enclosing the brain and spinal cord. *Taber's Cyclopedic Medical Dictionary* 114 (14th ed. 1983). There is no mention of arachnoiditis in the MRI report, *id.* at 362-63, and nothing to indicate that such a diagnosis and "moderate relative spinal stenosis," *id.* at 362, are necessarily related. Nothing in the record, therefore, indicates that the condition found by the MRI existed before the decision was issued. *See Box v. Shalala*, 52 F.3d 168, 172 (8th Cir. 1995).

For the foregoing reasons, I recommend that the decision of the Commissioner 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 this 19th day of June, 1998.

*David M. Cohen
United States Magistrate Judge*