

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CYNTHIA PATTERSON,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 98-134-B</i>
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Supplemental Security Income (“SSI”) and Social Security Disability (“SSD”) appeal raises the single issue of whether substantial evidence in the record supports the commissioner's determination that the plaintiff is able to return to her past work either as a chambermaid or a clerk in a convenience store and hence is not disabled. The plaintiff contends that the administrative law judge erred in disregarding the opinion of her treating physician and failing to make a factual determination underpinning the hypothetical question posed to a vocational expert.

¹This 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 December 18, 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.

I recommend that the court vacate the decision of the commissioner and remand for further proceedings.

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 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff engaged in substantial gainful activity from May 1993 to October 1993, Finding 1, Record p. 27; that she suffered from Crohn's disease,² status post ileal-ileo fistula repair and right hemicolectomy and distal ileectomy (performed in May 1994), but did not have an impairment or combination of impairments that met or equaled any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Findings 3-4, Record p. 27; that except during intermittent periods of exacerbation of her Crohn's disease, the plaintiff retained the functional capacity to lift and carry up to twenty pounds on a regular basis, with the further qualifications that she required easy access to a restroom on a regular basis and needed to avoid exposure to hazardous machinery and to heights, Finding 7, Record p. 28; that the plaintiff's allegations regarding her symptomology were generally credible, with flareups characterized by abdominal pain, intermittent fever, nausea, cramping, malaise, fatigue and diarrhea, although the objective medical evidence failed to establish that she experienced these flareups as frequently as she maintained, Finding 8, Record p. 28; that except during relatively infrequent flareups of her Crohn's disease, the plaintiff's impairments did not prevent her from returning to the performance of her past jobs as a chambermaid or as a clerk in a convenience store, Finding 9, Record p. 28; and that the plaintiff was therefore not under a disability at any time through the date of the

²Crohn's disease is an inflammatory lesion affecting the lower three-fifths of the small intestines. Taber's Cyclopedic Medical Dictionary 349, 707 (14th ed. 1983).

administrative law judge's decision, Finding 10, Record p. 28. 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); *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 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 administrative law judge's determination that the plaintiff could return to her past relevant work occurred at Step 4 of the sequential evaluation process. At Step 4, the burden is on the plaintiff to show that she cannot perform her past relevant work. *Goodermote*, 690 F.2d at 7; 20 C.F.R. §§ 404.1520(e), 416.920(e). In considering the issue, the commissioner must make a finding of the plaintiff's residual functional capacity, a finding of the physical and mental demands of past work and a finding as to whether the plaintiff's residual functional capacity would permit performance of that work. 20 C.F.R. §§ 1520(e), 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service*, at 813 (1975-1982).

The plaintiff first challenges the adequacy of the findings made pursuant to Ruling 82-62 in view of the administrative law judge's dismissal of the opinion of her treating gastroenterologist,

Philip G. Hunter, M.D., as “unsupported by the objective medical evidence in this record.”³ Record p. 27. As the administrative law judge correctly observed, the weight to which a treating physician’s opinion is entitled depends in part on the nature of the subject at issue. *Id.* at pp. 24-25. A physician’s opinion as to whether a claimant is “disabled” may not be accorded controlling weight, for that ultimate question is reserved to the commissioner. 20 C.F.R. §§ 404.1527(e), 416.927(e). Neither, however, may such an opinion by the treating physician be ignored. It is entitled to consideration on the basis of six enumerated factors: (i) length of the treatment relationship and frequency of examination, (ii) nature and extent of the treatment relationship, (iii) the extent to which the opinion is supported by relevant evidence, (iv) consistency with the record as a whole, (v) whether the treating physician is offering an opinion on a medical issue related to his or her specialty, and (vi) other factors highlighted by the claimant or others. 20 C.F.R. §§ 404.1527(d)(2)-(6), 416.927(d)(2)-(6).

³At oral argument, the plaintiff for the first time raised two additional issues: (i) that her previous job as a chambermaid did not qualify as past relevant work inasmuch as she did not earn sufficient wages therefrom, and (ii) that the administrative law judge erroneously determined that her past relevant work as a convenience-store clerk required lifting up to ten pounds frequently, when in fact it required lifting up to twenty-five pounds frequently. The commissioner objected, contending that because these issues were not raised in the plaintiff’s statement of errors they were waived. The commissioner has the better of that argument. It is a firmly rooted canon of appellate practice that an issue raised for the first time at oral argument will be deemed to have been waived except in extraordinary circumstances. *Piazza v. Aponte Roque*, 909 F.2d 35, 37 (1st Cir. 1990). The waiver doctrine set forth in *Piazza* is grounded in Federal Rule of Appellate Procedure 28(a), which requires an appellant to provide a written statement of the issues presented for review. Unlike that rule, Local Rule 16(a)(2) does not obligate Social Security appellants appearing here to brief their arguments fully prior to oral argument, but the Local Rule does require an “itemized statement of . . . specific errors.” Loc. R. 16(a)(2)(A). This requirement is designed to inform the commissioner, as the appellee, “of the scope of the appeal and enables him or her to prepare . . . arguments accordingly.” *Piazza*, 909 F.2d at 37; *see also James v. Chater*, 96 F.3d 1341, 1344 (10th Cir. 1996) (waiver principles developed in other contexts applicable to Social Security cases). Inasmuch as the plaintiff has waived arguments not presented in her itemized statement of error, I will not address them.

As regards the question of the “nature and severity” of a claimant’s impairments, on the other hand, the opinion of a treating physician controls to the extent it is determined to be “well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in [the] case record[.]” 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2).

Regardless of the subject matter as to which the treating physician’s opinion is offered, the commissioner must “always give good reasons in our notice of determination or decision for the weight we give your treating source’s opinion.” *Id.*

The record contains two letters from Dr. Hunter, dated July 20, 1995 and January 27, 1997, concerning both the nature of the plaintiff’s disease and its impact on her ability to work. Record pp. 260, 292. In his 1995 letter, after outlining the course of the plaintiff’s Crohn’s disease and his treatment relationship with her, Dr. Hunter concluded:

This patient has rather significant Crohn disease which has been somewhat refractory to medical therapy, only slowly improving with the treatment described above and having had surgery within the last year for this disease only to have recurrent disease shortly thereafter. Her prognosis is guarded. I would anticipate continued, ongoing disease and required medical therapy for the indefinite future. I consider this patient to be disabled on the basis of this disease, and I would anticipate continued disability for the foreseeable future.

Id. at pp. 261-62.

In his 1997 letter Dr. Hunter noted:

The clinical course that Cynthia has followed over the years is consistent with the natural history of Crohn’s disease. Commonly the disease waxes and wanes, goes into remission, and then relapses. Her disease will flare from time to time requiring increasing medical therapy to bring it under control. Unfortunately the patient has been experiencing more bad times than good times and I believe that this significantly interferes with not only her physical health but also her ability to perform not only household functions but also work related issues.

I believe that as far as the future is concerned, one must consider that Cynthia will continue to be susceptible to the flares and remissions of her Crohn's disease and that ongoing treatment will be required. There is no question in my mind that the symptoms of pain and diarrhea which she experiences from her disease effectively prevents [sic] her from functioning adequately in the work place. I suspect that this pattern will continue for the foreseeable future.

Id. at p. 292.

Dr. Hunter's letters touch partly on the nature and severity of the plaintiff's disease and partly on the question whether she is disabled. Yet, the administrative law judge neither explicitly addresses Dr. Hunter's opinions as to the nature and severity of the disease nor explains why she concludes that his opinion as to disability is unsupported by the objective medical evidence. Such a lack of explanation hampers a reviewing court's ability to determine that the administrative law judge's decision was based on substantial evidence. *Schonewolf v. Callahan*, 972 F. Supp. 277, 286 (D.N.J. 1997). *See also Goatcher v. United States Dep't of Health & Human Servs.*, 52 F.3d 288, 290 (10th Cir. 1995) (failure to give report of treating physician detailed and specific review required by regulation necessitates remand).

The absence of detailed explanation is particularly troubling in this case in view of the fact that one of the judge's key findings appears to clash not only with the opinion of Dr. Hunter but also with the objective medical evidence: her conclusion that the plaintiff's flareups are "relatively infrequent." Finding 9, Record p. 28. The administrative law judge, in simply listing the months during which the plaintiff sought treatment, understated the extent and continuity of her flareups during that period of time. Record p. 23.

The record reveals that, despite enjoying lengthy periods of remission, the plaintiff also has been susceptible to lengthy periods of recurrent relapse. Medical evidence of record demonstrates

a series of acute flareups from November 1993 through November 1995. *Id.* at pp. 156 (hospital admittance from November 17-19, 1993, citing Crohn’s diagnosis), 234 (emergency-room treatment on January 5, 1994 for flareup), 162-64 (hospital admittance from January 19-24, 1994, noting prior three-month history of intermittent crampy pain), 177 (hospital admittance from May 19-25, 1994 for surgery related to Crohn’s disease, noting history of recent persistent discomfort), 192 (hospital admittance from July 8-13, 1994 following flareup of five days’ duration), 228 (emergency-room treatment on August 18, 1994 for flareup over previous week), 203 (emergency-room treatment on October 10, 1994 for flareup over previous twenty-four to forty-eight hours), 220 (emergency-room treatment on April 5, 1995 for flareup eighteen hours earlier), 216 (emergency-room treatment on April 9, 1995 for flareup), 212 (emergency-room treatment on May 29, 1995 for flareup), 263 (hospital admittance from November 9-11, 1995 for flareup, with pain described by the plaintiff as “the worst abdominal pain I have ever had”), 283 (emergency-room treatment on October 3, 1996 for flareup over previous four to five days). At oral argument, the commissioner was asked whether, assuming *arguendo* that the record demonstrated that the plaintiff had both lengthy periods of remission and lengthy periods of severe relapse, with the latter being unpredictable, the plaintiff should be found disabled. While not conceding that such a plaintiff would be disabled, the commissioner acknowledged that such a scenario was “problematic” and that the plaintiff might be considered disabled. I find that scenario to be established by uncontroverted evidence in this case.⁴

In a related vein, the record is not clear as to the extent of vocational expert Sharon

⁴This is so even setting aside the plaintiff’s assertions at oral argument that (i) her flareups can be triggered by attempts to return to work, and (ii) the medical evidence alone does not present a complete picture of the extent of her flareups, for which she does not always seek medical treatment.

Greenleaf’s understanding of the frequency of the plaintiff’s flareups in framing the response upon which the administrative law judge relied in finding that the plaintiff could return to her past relevant work. The responses of a vocational expert are relevant only to the extent offered in response to hypotheticals that correspond to medical evidence of record. *Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982). “To guarantee that correspondence, the Administrative Law Judge must both clarify the outputs (deciding what testimony will be credited and resolving ambiguities), and accurately transmit the clarified output to the expert in the form of assumptions.” *Id.*

At the plaintiff’s hearing, the administrative law judge asked Greenleaf whether a 30-year-old person with an eight-year history of Crohn’s disease and a high school diploma, capable of lifting no more than twenty pounds regularly and needing to avoid hazards such as machinery and heights and to have easy access to restrooms, would be capable of performing the plaintiff’s past relevant work. *Id.* at p. 48. The judge did not clarify, however, the extent to which Greenleaf should assume flareups from Crohn’s. This was a material omission inasmuch as there was no question that the plaintiff’s symptoms when in the grip of a flareup — including abdominal pain, intermittent fever, nausea, cramping, malaise, fatigue and diarrhea — would preclude the performance of work.⁵ Findings 7, 8, Record p. 28. *See also Dix v. Sullivan*, 900 F.2d 135, 138 (8th Cir. 1990) (noting, in

⁵Nor were the factual scenarios posed to the vocational expert by the plaintiff helpful. The plaintiff’s representative posited two scenarios, one in which a person with Crohn’s disease experiences flareups lasting approximately two weeks an average of every three to five weeks, and another in which the person would need to absent herself from work an average of three to five days per month and be tardy or leave early five days per month. Record pp. 49-50. Neither scenario accurately reflected the record evidence. The medical evidence does not reflect that the plaintiff continuously suffered flareups at the rate suggested in the hypothetical. In addition, there is no evidence that the plaintiff would need to be absent or tardy for the particular periods posited.

finding Crohn's sufferer disabled, that despite periods of reprieve claimant was not capable of holding job for significant period of time).

The plaintiff finally complains that, although the administrative law judge included her need for easy access to a restroom in her hypothetical to the vocational expert, the judge erred in failing to determine that the plaintiff did in fact have easy access to a restroom in performing past relevant work. The plaintiff notes her testimony that she did not have easy access to a restroom at the workplace. *See* Record pp. 42-43. The job at issue there, however, was a phone-center job, which was not one of the two prior jobs that the administrative law judge found the plaintiff was capable of resuming. At this Step 4 stage of the sequential evaluation, the burden remained on the plaintiff to adduce evidence that she could not perform past relevant work because she lacked easy access to a restroom at either her chambermaid or convenience-store jobs.

Because the commissioner has not adequately determined the extent to which the plaintiff's Crohn's disease prevents the performance of her past relevant work, I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.

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 23rd day of December, 1998.

David M. Cohen
United States Magistrate Judge