

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

ANNA KOERNER,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 98-151-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 question whether substantial evidence in the record supports the commissioner's determination that the plaintiff is able to return to her past work as an assembler and hence is not disabled. The plaintiff lists nine specific errors, claiming that the administrative law judge failed to consider complaints of severe pain and other symptoms that would preclude performance of her past relevant work. I recommend that the court vacate the decision of the

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.

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 had not engaged in substantial gainful activity since February 28, 1992, Finding 2, Record p. 20; that she suffered from knee tenderness, right shoulder tendinitis and bursitis, hypertension and obesity, but had no impairment or combination of impairments that met or equaled the criteria listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Findings 3, Record p. 20; that the plaintiff's statements concerning her impairments and their impact on her ability to work were not entirely credible in light of discrepancies between the plaintiff's assertions and information contained in the documentary reports, Finding 4, Record p. 20; that the plaintiff lacked the residual functional capacity to lift and carry more than twenty pounds, climb, balance, stoop, crouch or crawl repeatedly, Finding 5, Record p. 21; that the plaintiff's past relevant work as an assembler required her to sit for an eight-hour workday, lift approximately two pounds and bend frequently, Finding 6, Record p. 21; that the plaintiff's past relevant work as an assembler did not require the performance of work functions precluded by her medically determinable impairments, and thus her impairments did not prevent her from performing past relevant work, Findings 7-8, Record p. 21; and that the plaintiff was therefore not under a disability at any time through the date of the administrative law judge's decision on May 22, 1997, Finding 9, 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); *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 (1983).

Although the plaintiff in this case presents nine statements of error, nearly all can be characterized as variations on the theme that the administrative law judge failed to consider the impact of certain claimed symptoms on the plaintiff's work capacity, thus undermining the basis for the conclusion that the plaintiff retained the residual functional capacity to return to past relevant work.²

²At oral argument, the plaintiff cited two cases for the proposition that an administrative law judge's failure to discuss evidence supporting a contrary conclusion constitutes reversible error. *Taylor v. Schweiker*, 739 F.2d 1240, 1243 (7th Cir. 1984); *Pagan v. Chater*, 923 F. Supp. 547, 556 (S.D.N.Y. 1996). In the Social Security context, however, the test of whether remand is appropriate, as recognized by the Seventh Circuit in *Schweiker*, is whether the administrative law judge's findings are supported by substantial evidence of record. *Schweiker*, 739 F.2d at 1243. *See also Manso-*
(continued...)

The commissioner is required to consider all of a claimant's symptoms, including pain, when determining whether a claimant is disabled. 20 C.F.R. §§ 404.1529(a), 416.929(a). In assessing whether pain or other symptoms restrict a claimant's ability to work, the commissioner must first determine whether there is a medically determinable impairment that could reasonably be expected to produce such symptoms. 42 U.S.C. § 423(d)(5)(A); *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986); Social Security Ruling 96-7p, *reprinted in West's Social Security Reporting Service, Rulings 1983-1991 (Supp. 1997-98)*, at 117. “If there is no medically determinable physical or mental impairment(s), or if there is a medically determinable physical or mental impairment(s) but the impairment(s) could not reasonably be expected to produce the individual’s pain or other symptoms, the symptoms cannot be found to affect the individual’s ability to do basic work activities.” Social Security Ruling 96-7p at 118.

If, on the other hand, a claimant demonstrates the existence of a medically determinable impairment that could reasonably be expected to cause the symptoms alleged, the commissioner must give full consideration to all of the available objective medical evidence that reflects on the impairment to evaluate the degree of functional limitation caused by the symptoms. 42 U.S.C. § 423(d)(5)(A); 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2); *Avery*, 797 F.2d at 21, 23. The commissioner must also, in reaching this second step, consider a claimant’s subjective complaints. 20 C.F.R. §§ 404.1529(c)(3), 416.929(c)(3); Social Security Ruling 96-7p at 118. “Because symptoms, such as pain, sometimes suggest a greater severity of impairment than can be shown by

²(...continued)

Pizarro, 76 F.3d at 16. While poor explication of the grounds for a decision, including failure to discuss conflicting evidence, may well contribute to a finding that the decision is not supported by substantial evidence, *see, e.g., Schweiker*, 739 F.2d at 1243, it is not *per se* reversible error.

objective medical evidence alone, the adjudicator must carefully consider the individual's statements about symptoms with the rest of the relevant evidence in the case record in reaching a conclusion about the credibility of the individual's statements" Social Security Ruling 96-7p at 117.³ The adjudicator is free to determine that a claimant's testimony regarding his pain or other symptomology is not credible. *Da Rosa v. Secretary of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986). This determination, however, must be supported by substantial evidence, and the administrative law judge must make specific findings as to the relevant evidence in determining that the plaintiff's testimony is not credible. *Id.* When supported with specific findings, an administrative law judge's determination that a claimant's subjective complaints of pain or other symptoms are not credible is entitled to deference. *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987).

In this case, I agree with the plaintiff that the commissioner failed to adhere to the foregoing precepts in the following ways claimed in these particular statements of errors:

1. **Third Statement of Error:** that the administrative law judge failed to consider the limitations imposed by the plaintiff's neck pain. The plaintiff testified that she has neck pain when she turns her head from side to side. Record p. 32. Diane J. Herrle, a vocational expert, testified that such a condition would limit the number of jobs a person could perform. *Id.* at pp. 44-45. James S. Smith, D.O., a medical consultant who examined the plaintiff, noted his impression (after testing the range of motion in the plaintiff's neck) that the plaintiff suffered from "cervical somatic dysfunction,"

³Evidence that bears on the credibility of a claimant's subjective complaints includes (i) the claimant's activities of daily living, (ii) the location, duration, frequency and intensity of the pain or other symptoms, (iii) factors that precipitate and aggravate the symptoms, and (iv) treatments and their side effects. 20 C.F.R. §§ 404.1529(c)(3) and 416.929(c)(3).

in other words, a type of neck dysfunction.⁴ *Id.* at pp. 176-77; Taber’s Cyclopedic Medical Dictionary at 264 (14th ed. 1983) (hereinafter “Taber’s”). Findings in two residual functional capacity assessment forms are equivocal. Medical consultants Paul Brinkman, M.D., and James Hall, M.D., determined that the plaintiff, among other things, could sit for about six hours of an eight-hour work day and retained unlimited ability to push and/or pull — findings that arguably are consistent with adequate range of motion in the neck. Record pp. 127, 135. Yet, neither the assessment form itself nor the consultants’ responses to it address whether or to what degree the plaintiff retains the capacity to turn her head from side to side. In addition, as the commissioner acknowledged at oral argument, neither Dr. Brinkman nor Dr. Hall examined the plaintiff nor had the benefit of her testimony at hearing. On balance, substantial evidence does not support the cursory dismissal of the plaintiff’s claims of neck pain and resulting functional limitations. These claims were entitled to fuller consideration in accordance with Social Security Ruling 96-7p.

2. **Fourth Statement of Error:** that although the administrative law judge accurately determined that the plaintiff suffered from right shoulder tendinitis and bursitis, the judge failed to consider the impact of these conditions on the lifting and repetitive arm motions required in her past relevant work as an assembler. The plaintiff testified that she experienced sharp pain in her shoulder, exacerbated by activities such as knitting and crocheting. *Id.* at pp. 36-37. The administrative law judge found that, as a result of the plaintiff’s tendinitis, bursitis and tenderness in her knees, her capacity for the full range of light work was “slightly diminished by non-exertional limitations which

⁴The administrative law judge characterized Dr. Smith as finding that “[t]he range of motion of her cervical spine was normal with full extension and flexion.” Record p. 19. Dr. Smith, however, actually noted that “range of motion to the cervical spine was 45 degrees to the right and 65 degrees to the left, full extension and flexion.” *Id.* at p. 176. One cannot help but question how a twenty-degree difference in range of motion from left to right could be described as “normal.”

limit her to occasional climbing, balancing, stooping, crouching or crawling.”⁵ *Id.* at p. 19. Inasmuch as appears, however, none of the cited limitations relates to tendinitis or bursitis; all apparently relate to the plaintiff’s knee condition. There is no reasoned consideration of the extent to which the pain of bursitis and tendinitis would affect the plaintiff’s performance of work as an assembler.

3. **Ninth Statement of Error:** that the finding that the plaintiff can lift up to twenty pounds and up to ten pounds frequently, *id.* at p. 19, is unsupported by substantial record evidence. The plaintiff testified that she could lift a gallon of milk (weighing approximately eight pounds) one time but could not do so repeatedly. *Id.* at p. 40. She also testified that she could not lift two gallons of milk. *Id.* Although there is support in the record for the lifting capacity found by the administrative law judge,⁶ her failure to consider the impact of the plaintiff’s tendinitis and bursitis (discussed above) calls into question the validity of her finding as to lifting capacity.

Although remand is warranted on these bases, I will, for the benefit of the parties on remand, briefly address the remaining six statements of error, all of which I find to be without merit:

1. **First Statement of Error:** that the administrative law judge failed to consider the impact of the plaintiff’s urinary frequency on her capacity to return to work. The plaintiff testified that she must urinate more than thirty times a day. *Id.* at p. 36. She asserted in her itemized statement of specific errors that this allegation was borne out by the medical reports of the examining

⁵In setting forth the plaintiff’s non-exertional limitations, the administrative law judge apparently simply adopted the postural limitations set forth in Dr. Hall’s residual functional capacity assessment. *See* Record p. 136. Dr. Hall’s comments do not indicate any consideration of the plaintiff’s tendinitis or bursitis. *Id.* at p. 140.

⁶Both Drs. Brinkman and Hall, in their residual functional capacity assessments, indicated that the plaintiff was capable of lifting up to twenty pounds occasionally and up to ten pounds frequently. Record pp. 127, 135.

consultant, Dr. Smith, and a treating physician, Dorothy Thayer, M.D. These reports, however, describe stress incontinence,⁷ not urinary frequency. *Id.* at pp. 177, 210-11. Dr. Thayer, moreover, notes that she made no clinical findings related to stress incontinence and that no interventions were explored. *Id.* at p. 210. Inasmuch as the record is barren of any data demonstrating the existence of a medically determinable impairment that could cause the plaintiff's urinary frequency, the administrative law judge permissibly disregarded its impact on her functional capacity.

2. **Second Statement of Error:** that the administrative law judge failed to consider the impact of the plaintiff's frequent, severe headaches (accompanied by blurred vision) on her capacity to return to work. Apart from the plaintiff's own reports, *id.* at pp. 32, 34-35, 55, 114, the record evidence concerning headaches consists of (i) Dr. Smith's impression, in his report dated July 16, 1996, that the plaintiff suffered from muscle-tension headaches, *id.* at p. 177, and (ii) Dr. Thayer's report that the plaintiff's headaches had improved by August 1996 with control of her blood pressure, with "no complaints since," *id.* at p. 173. The record thus, as a whole, contains substantial support for the administrative law judge's implicit finding that, as of the date of the hearing on April 9, 1997, the plaintiff's headaches did not occur with such frequency or severity as to impact functioning at work.

3. **Fifth Statement of Error:** that the administrative law judge failed to consider the plaintiff's claim that she could not sit for periods of greater than fifteen or twenty minutes without pain. As of the date of the administrative law judge's decision herein, the record was devoid of any evidence of a medically determinable impairment that might cause the hip pain that the plaintiff

⁷Urinary stress incontinence is an "[i]nability to prevent escape of urine during stress such as laughing, coughing, sneezing, lifting, or sudden movement." Taber's at 715.

claimed impeded her ability to sit. *See id.* at p. 37. The plaintiff submitted new evidence to the Appeals Council purporting to establish such a link — a questionnaire completed by the office of her treating physician, Dr. Thayer, dated July 15, 1997, and the medical records of James St. Jean, physical therapist, covering the period from June 12, 1997 through August 7, 1997. *Id.* at pp. 196-216. In her medical questionnaire, Dr. Thayer reported that on June 1, 1997 the plaintiff suffered a “reexacerbation” of a condition that she diagnosed (with the aid of an x-ray) as mild degenerative disc disease, status post L3 discectomy 1973. *Id.* at pp. 208-09, 216. This condition, according to Dr. Thayer, caused pain in the low back, right hip and upper right leg, with the “worst position sitting.” *Id.* at p. 208. Dr. Thayer noted that she expected improvement with medications and a course of physical therapy treatment, *id.* at p. 210, which is reflected in St. Jean’s notes, *id.* at pp. 196-206.

The Appeals Council may consider new evidence “only where it relates to the period on or before the date of the administrative law judge hearing decision.” 20 C.F.R. §§ 404.970(b), 416.1470(b). At oral argument, the plaintiff conceded that the newly offered medical evidence, to the extent relevant to the claimed degenerative disc disease, did not relate to a condition that predated the hearing. There thus is neither evidence of record that the plaintiff’s claimed sitting impairments stemmed from a medically determinable impairment, nor error on the part of the administrative law judge in failing to take them into consideration in determining her functional capacity.

4. **Sixth Statement of Error:** that the administrative law judge failed to consider the unreliability of Dr. Smith’s opinions as to the plaintiff’s apparent physical capacities (*e.g.*, sitting without difficulty, walking without a limp) in view of the brevity of his observations. The plaintiff testified at her hearing that Dr. Smith was not able to see her the entire time she was waiting and that he observed her taking relatively few steps. Record pp. 37-38. The administrative law judge found

the plaintiff not entirely credible in view of the inconsistency of some of her statements with objective medical evidence. *Id.* at p. 19. Because, as discussed herein, some of the plaintiff's claimed symptomology is in fact unsupported by the medical evidence of record, the administrative law judge was not clearly out of bounds in implicitly resolving this particular evidentiary conflict against the plaintiff on that basis.

5. **Seventh Statement of Error:** that the administrative law judge misstated the contents of Dr. Smith's report in stating that "Dr. Smith notes that the claimant . . . was able to ride to the examination without any resultant complaints of pain." *Id.* at p. 19. Dr. Smith noted that the plaintiff "sat in the car driving to the examination." *Id.* at p. 176. While, as the plaintiff points out, Dr. Smith's report reflects no inquiry into how the plaintiff felt after her drive or whether she drove there without stopping along the way, it also reflects no complaints of pain from the plaintiff as a result of the car ride.

6. **Eighth Statement of Error:** that the administrative law judge failed to consider the limitations imposed by the plaintiff's chest pains and shortness of breath in determining that she could return to work as an assembler. While I find no evidence of the etiology of the claimed shortness of breath (and thus no medically determinable impairment), there is substantial evidence — and the administrative law judge so found — that the plaintiff suffered from hypertension.⁸ *Id.* at p. 17. Hypertension was, in turn, linked to the plaintiff's complaint of chest pains.⁹ *Id.* at pp. 173-74. Nonetheless, there is evidence from the plaintiff's treating physician, Dr. Thayer, that with control

⁸Hypertension is abnormally high blood pressure. Taber's at 691.

⁹Dr. Smith also noted that he suspected coronary artery disease. Record p. 177. There is no evidence, however, that such a diagnosis was made.

of the plaintiff's blood pressure, the symptomology of chest pains subsided. *Id.* at p. 173. There thus is substantial evidence for the administrative law judge's implicit finding that chest pain did not cause a significant impairment of the plaintiff's ability to work.¹⁰

Because the commissioner has not adequately determined the extent to which the plaintiff's neck pain, tendinitis and bursitis prevent the performance of her past relevant work, I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** for proceedings consistent herewith.¹¹

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

¹⁰The administrative law judge's actual reason for dismissing the plaintiff's complaints of chest pain — that she sought no treatment for them — was erroneous. Notes from Dr. Thayer, which were in evidence at the time of the hearing, reveal that the plaintiff sought treatment for chest pain in 1996. Record pp. 173-74.

¹¹Although, at oral argument, the plaintiff sought remand with instruction to award benefits, such an instruction is not appropriate at Step 4 of the sequential-evaluation process, at which point the burden remains on the claimant to demonstrate inability to perform past relevant work.

