

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

**LINDA M. MARTIN,** )  
 )  
 **Plaintiff** )  
 )  
 **v.** )  
 )  
 **KENNETH S. APFEL,** )  
 **Commissioner of Social Security,** )  
 )  
 **Defendant** )

**Docket No. 98-275-P-H**

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

This Supplemental Security Income (“SSI”) and Social Security Disability (“SSD”) appeal raises the question whether the commissioner’s decision that the plaintiff is able to return to her past relevant work is supported by substantial evidence in the record. 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, 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 met the disability insured status

---

<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 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 May 7, 1999 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.

requirements of the Social Security Act on August 31, 1995, the date of alleged onset of her disability, and continued to meet those requirements through the date of the decision, Finding 1, Record p. 16; that the plaintiff had not engaged in substantial gainful activity since August 31, 1995, Finding 2, Record p. 16; that she had a severe bilateral hearing loss, but did not have an impairment or combination of impairments that met or equaled the criteria of any of the impairments listed in Appendix I to Subpart P. 20 C.F.R. § 404, Finding 3, Record p. 16; that the plaintiff had the residual functional capacity to perform all work-related activities except for work “involving good hearing,” Finding 5, Record p. 16; that her past relevant work as a dietary aide/dishwasher and housekeeper did not require the performance of work-related activities precluded by her hearing limitations, and that her impairment therefore did not prevent her from performing her past relevant work, Findings 6 & 7, Record p. 17; that the plaintiff’s testimony concerning the degree of her incapacity was not supported by the evidence as a whole and was not credible “to a degree that would preclude the residual functional capacity” to perform the identified past relevant work, Finding 5, Record p. 16; and that the plaintiff had not been under a disability as defined in the Social Security Act at any time through the date of the decision, Finding 8, Record p. 17. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final decision 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.*, 67 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).

### **Analysis**

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 ("RFC"), a finding of the physical and mental demands of the past work and a finding as to whether the plaintiff's residual functional capacity would permit performance of that work. 20 C.F.R. §§ 404.1520(e), 416.920(e); Social Security Ruling 82-62 ("SSR 82-62"), reprinted in *West's Social Security Reporting Service, Rulings 1975-1982*, at 813.

The plaintiff contends that the administrative law judge failed to make the findings required by SSR 82-62. With respect to the first required finding, she asserts that the administrative law judge's statement that she has the RFC to perform all work-related activities "except for work involving good hearing," Record p. 16, is insufficient under SSR 96-8p because it "fails to explain what limits exist on communication," Itemized Statement of Errors, etc. (Docket No. 3) at 2-3. That Social Security Ruling provides that, "[i]n assessing RFC with impairments affecting hearing . . . , the adjudicator must explain how the individual's limitations would affect . . . her ability to communicate in the workplace." Social Security Ruling 96-8p, reprinted in *West's Social Security Reporting Service, Rulings 1983-1991 (Supp. 1997-98)* at 130. In the case of an individual with a "severe" hearing loss, Record p. 15, the ways in which such a limitation would affect her ability to communicate in the workplace are fairly obvious, and the administrative law judge correctly pointed out that hearing impairments do not necessarily prevent communication, *id.* (citing SSR 85-15). The

administrative law judge described ways in which the plaintiff's hearing loss would affect her ability to perform each of her past jobs, *id.* at 15-16, albeit not specifically in terms of her ability to communicate. In any event, it is not necessary to determine in this case whether the administrative law judge's decision complies sufficiently with each of the requirements of SSR 82-62 because the plaintiff, who bears the burden of proof at Step 4, did not establish that her hearing had deteriorated since she performed her past relevant work. *See generally Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5-6 (1st Cir. 1991).

When asked at oral argument to point out the evidence in the record that establishes that the plaintiff's hearing had deteriorated since she last performed her past relevant work, her attorney identified surgery performed after "one of the past jobs," suggesting that deterioration could be presumed from the fact of surgery. He also noted the fact that at the time of the social security hearing the plaintiff did not have hearing aids, on which she depended at the time of her last employment, and that she could not afford new hearing aids. The only medical evidence in the record concerning the surgery on the plaintiff's ears is the January 11, 1996 statement of Frederick C. Holler, M.D., that the surgery was "in the distant past" and unsuccessful, Record p. 108, which does not support either an inference that the surgery took place after August 31, 1995, the date of alleged onset of disability, *id.* at 16, or that the surgery caused further deterioration.<sup>2</sup> The plaintiff herself stated, on a Disability Report filled out in January 1996, that the ear surgery took place in 1989, well before she stopped working in 1995. *Id.* at 65, 70.

---

<sup>2</sup> In fact, the plaintiff testified that when she worked as a housekeeper, one of the jobs included in her past relevant work by the administrative law judge, Record p. 17, "that was before my operation on my ears and that was before the hearing aids. And at that time, I couldn't hear anything then." *Id.* at 31.

In order to rely on the fact that she did not have hearing aids at the time of the social security hearing to support a conclusion that her hearing had deteriorated since she performed her past relevant work, the plaintiff had to offer more evidence than just her testimony that she could not afford hearing aids.<sup>3</sup> An individual who fails to follow prescribed medical treatment without a good reason cannot be found to be under a disability by virtue of that failure. 20 C.F.R. §§ 404.1530(b); 416.930(b); Social Security Ruling 82-59, reprinted in *West's Social Security Reporting Service*, Rulings 1975-1982, at 793. A good reason exists where the individual is unable to afford prescribed treatment *and* free community resources for that treatment are unavailable. SSR 82-59 at 796-97. Here, the plaintiff testified that she had “applied to Human Services” for help in obtaining hearing aids “and they denied me,” *id.* at 25, and that her application to the Lions Club had also been denied, *id.* at 26. She also testified that she had “applied to a few other places,” *id.* at 25, but with one exception these potential sources of assistance are not identified, nor is the outcome of those applications. Significantly, her testimony with regard to the exception, Hear Now, is that she had not “heard to [sic] whether to qualify yet.”<sup>4</sup> *Id.* She also expressed some reluctance to accept hearing aids from Hear Now, because “[t]hey only supply . . . recycled hearing aids and I question that because if [sic] it would [be] enough for my hearing or somebody else’s.” *Id.* Based on this testimony, the plaintiff has not established that free community resources for the hearing aids she needs are not available, nor that she has explored all such possible resources. SSR 82-59 at 797.

---

<sup>3</sup> The only medical evidence in the record on this point is that the plaintiff’s hearing would be improved with the use of hearing aids. Record pp. 95, 103, 108-09.

<sup>4</sup> In the 21 months between her testimony at the hearing and the action of the Appeals Council, the plaintiff made no attempt to supplement the record to show the outcome of this application.

Accordingly, she cannot be considered disabled by her deafness for purposes of the Social Security Act. *See generally* *Murphy v. Sullivan*, 953 F.2d 383, 386-87 (8th Cir. 1992).

### **Conclusion**

For the foregoing reasons, I recommend that the commissioner's decision 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 11th day of May, 1999.*

---

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