

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

WANDA J. MILLS,)	
)	
<i>Plaintiff</i>)	
)	
v.)	<i>Docket No. 99-27-P-H</i>
)	
KENNETH S. APFEL,)	
<i>Commissioner of Social Security,</i>)	
)	
<i>Defendant</i>)	

REPORT AND RECOMMENDED DECISION¹

This Supplemental Security Income (“SSI”) appeal raises the issue whether the commissioner erred in determining that the plaintiff, who alleges that she suffers from a combination of mental and physical disorders, can return to past relevant work as either an assembly-line factory worker or a laundry worker in a motel. I recommend that the court vacate the commissioner’s decision and remand for further proceedings.

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

¹This action is properly brought under 42 U.S.C. § 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 November 17, 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 and case authority and page references to the administrative record.

law judge found, in relevant part, that the plaintiff suffered from a dysthymic disorder² as well as a mixed personality disorder with avoidant and dependent traits, a history of alcoholism in remission since November 1996 and a right knee pain syndrome status post fracture of her right patella in 1979, Finding 3, Record p. 34; that her history of alcoholism and knee-pain syndrome, considered either separately or in combination with her other impairments, were not severe, Finding 3, Record p. 34; that the objective medical evidence of record failed to establish the existence of any other impairment, Finding 4, Record p. 35; that none of the plaintiff's impairments, singly or in combination, met or equalled the criteria for any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404, Finding 5, Record p. 35; that in consequences of her impairments the plaintiff was functionally limited only as follows: moderate limitation in her ability to interact with the general public, to travel to unfamiliar places, to use public transportation, to set realistic goals, to make plans independently of others, to understand and remember detailed instructions, to carry out detailed instructions and to maintain attention and concentration for extended periods, Finding 8, Record pp. 35-36; that to the extent they were inconsistent with the proposition that the plaintiff was functionally limited only as described in Finding 8, her allegations regarding her pain, general symptomology and functional limitations were found to be not fully credible, Finding 9, Record p. 36; that the plaintiff could return to past unskilled jobs as an assembly-line factory worker or as a laundry worker in a motel, both of which had essentially low mental demands that were not inconsistent with her residual functional capacity, Finding 10, Record p. 36; and that accordingly the

²Dysthymia is “a mood disorder characterized by a depressed feeling and loss of interest or pleasure in one’s usual activities that persists for more than two years but is not severe enough to meet the criteria for major depression.” *Kisling v. Chater*, 105 F.3d 1255, 1256 n.2 (8th Cir. 1997) (citing Richard Sloane, *The Sloane-Dorland Annotated Medical-Legal Dictionary* (1992 Supp.) at 204).

plaintiff was not under a qualifying disability, Finding 11, Record p. 36. The Appeals Council declined to review the decision, Record pp. 5-6, making it the final determination 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. § 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 administrative law judge in this case reached Step 4 of the sequential process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. § 416.920(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). At this step the commissioner must make findings of the plaintiff's residual functional capacity and the physical and mental demands of past work and determine whether the plaintiff's residual functional capacity would permit performance of that work. 20 C.F.R. § 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service Rulings 1975-1982* ("SSR 82-62"), at 813.

The plaintiff identifies two overarching errors: (i) improper determination that she had past relevant work and (ii) failure to follow correct procedure in evaluation of her mental disabilities and complaints of pain. Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 7) at 5-18. As part of the latter claim, the plaintiff contends that the Appeals Council erred in failing to remand this case upon presentation of new evidence revealing a diagnosis of panic

disorder with a strong agoraphobic quality.³ *Id.* at 9. I agree.

I. Analysis

The administrative law judge in this case discounted the plaintiff's claim of panic attacks, associated with tachycardia, palpitations, diaphoresis and increasing reclusiveness, on the basis of lack of objective medical evidence that such a disorder existed.⁴ Record pp. 29-30. He adopted the mental residual functional capacity ("RFC") assessment of Scott Hoch, Ph.D., who likewise had found no evidence of the existence of an anxiety-related disorder. *Id.* at 30-31, 173. Subsequent to the date of the administrative law judge's decision (April 7, 1998) the plaintiff submitted progress notes of psychiatrist Michael Garnett, M.D., dated October 8, 1998, assessing her as suffering *inter alia* from panic disorder with agoraphobia. *Id.* at 11-12. This assessment was consistent with lay testimony previously of record presented by the plaintiff, her roommate and her daughter. *Id.* at 46-47, 95-98.⁵

The Appeals Council declined to disturb the decision of the administrative law judge, deeming Dr. Garnett's findings consistent with those previously of record. *Id.* at 4. To the contrary, the Garnett assessment clashes with the administrative law judge's determination, and Dr. Hoch's implicit finding, that the plaintiff's claimed panic disorder was unworthy of consideration because

³"Agoraphobia" is "[m]orbid dread of open spaces. Patients with this condition may also have a fear of speaking in public." Taber's Cyclopedic Medical Dictionary at 46 (14th ed. 1983) ("Taber's").

⁴"Tachycardia" is "[a]bnormal rapidity of heart action, usually defined as a heart rate over 100 per minute." Taber's at 1420. "Diaphoresis" is "[p]rofuse sweating." *Id.* at 400.

⁵Dr. Garnett's findings do not necessarily conflict with those of an examining consultant, Ann H. Crockett, Ph.D., who found that "the panic attacks that [the plaintiff] describes do not meet the criteria for panic disorder." Record p. 216.

unsupported by objective medical evidence. The new evidence accordingly warrants remand for analysis of whether symptoms flowing from panic disorder should be factored into evaluation of the plaintiff's mental RFC, possibly altering the commissioner's ultimate conclusions regarding the plaintiff's ability to work.⁶

Although this flaw alone necessitates remand, I will comment briefly for the benefit of the parties on other identified errors, one of which has merit.

The plaintiff complains that in assessing the impact of her right-knee pain syndrome the administrative law judge improperly discounted the sole physical RFC findings of record, relying on raw medical data to bolster his finding that the knee condition imposed no functional limitations. Statement of Errors at 16-17. I agree. Stephen H. Doane, M.D., an examining consultant, concluded that the plaintiff "may have problems standing for more than several hours at a time . . . [and] walking more than a block without stopping." Record p. 220. The administrative law judge found no physical functional limitations whatsoever, apparently relying at least in part on Dr. Doane's clinical findings of lack of right-knee tenderness or effusion coupled with good knee stability. *Id.* at 28, 35-36. The administrative law judge went on to find that the plaintiff could return to past relevant work as an assembly-line factory worker or a laundry worker in a motel. *Id.* at 36. Both jobs required substantial amounts of standing or walking. *Id.* at 114, 117 (six hours per day of standing for assembly-line job; two hours per day of walking and three hours per day of standing for laundry job).

⁶Remand presents an opportunity for the commissioner to correct another error identified by the plaintiff — the failure of the administrative law judge to fill in all relevant boxes in his Psychiatric Review Technique Form. Statement of Errors at 7; Record p. 40 (nothing checked as to third and fourth categories).

The administrative law judge erred in rejecting Dr. Doane’s RFC conclusions — however equivocal or even questionable — without any competing RFC evaluation from another medical source. *See, e.g., Manso-Pizarro*, 76 F.3d at 17 (“With a few exceptions (not relevant here), an ALJ, as a lay person, is not qualified to interpret raw data in a medical record.”). In view of the substantial walking and standing requirements of the plaintiff’s past relevant work, the error cannot be excused as harmless.⁷

The plaintiff next contends that “[g]iven her extremely sporadic work history which included only part-time work, none of which reached the SGA [substantial gainful activity] level, the ALJ erred by assuming that Ms. Mills had ‘past relevant work’ to which he could consider her ability to return.” Statement of Errors at 6. The commissioner protested at oral argument that the plaintiff had waived this issue by failing to raise it before the administrative law judge. The record reveals that, although the plaintiff testified at hearing that her work was of short duration, she did not argue before either the administrative law judge or the Appeals Council that such work should not have constituted past relevant work. Record pp. 7-12 (letter to Appeals Council), 13-17 (request for Appeals Council review), 45-46, 56 (testimony related to past work). Failure to raise an issue before the Appeals Council ordinarily constitutes waiver of court review of that issue. *James v. Chater*, 96 F.3d 1341, 1343 (10th Cir. 1996); *Avol v. Secretary of Health & Human Servs.*, 883 F.2d 659, 661

⁷The plaintiff also challenges the administrative law judge’s finding that her knee impairment was not severe. Statement of Errors at 10-12. This finding is supported by substantial evidence of record. *See, e.g.*, Record pp. 215 (plaintiff told Dr. Crockett that she could perform all activities of daily living although she preferred not to do them); 220 (report of Dr. Doane that knee disability “only mild”). The administrative law judge was nonetheless required to consider the functional limitations of even a non-severe impairment in assessing the plaintiff’s physical capacity to work. *See, e.g.*, 20 C.F.R. § 416.945(e) (“we will consider the limiting effects of all your impairment(s), even those that are not severe, in determining your residual functional capacity”).

(9th Cir. 1989); *Gonzalez-Ayala v. Secretary of Health & Human Servs.*, 807 F.2d 255, 256 (1st Cir. 1986) (failure to raise issue in request for review by Appeals Council or before district court constitutes waiver). The plaintiff accordingly is not entitled to pursue this issue here.

The following additional contentions are without merit:

1. That, despite his statement that he was relying on Dr. Hoch's evaluation, the administrative law judge failed to explain why he deviated from some of the Hoch findings; he also did not discuss his implicit rejection of certain conflicting evidence from non-examining consultant David R. Houston, Ph.D., and Dr. Crockett, the consultant who examined the plaintiff. Statement of Errors at 8-9. Although careful explanation would have been preferable, the administrative law judge committed no reversible error in resolving conflicts in the medical evidence of record. *See, e.g., Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.").

2. That the administrative law judge erred in rejecting out of hand the plaintiff's complaints of back pain, singly or in combination with her other impairments. Statement of Errors at 10-18. 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. 1999-2000), at 136. "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." *Id.*

In this case, the only medical evidence of record regarding the plaintiff's claimed lower back pain was the statement of examining consultant Dr. Doane that "[s]he may have a mild low back syndrome . . . though there is nothing objective." Record p. 220. This is not a diagnosis; the administrative law judge was justified in concluding that there was no evidence of a medically determinable physical impairment of the plaintiff's lower back. The claimed back pain hence could not have been found to affect the plaintiff's ability to work.

II. Conclusion

For the foregoing reasons, 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 24th day of November, 1999.

*David M. Cohen
United States Magistrate Judge*