



vocational expert; and whether the decision 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. § 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 a substance addiction disorder, an impairment that meets the criteria of the impairment listed at section 12.09 in Appendix I to Subpart P, 20 C.F.R. § 404, Finding 2, Record at 17; that the plaintiff's statements concerning her impairments not related to substance addiction and their impact on her ability to work were not entirely credible, Finding 3, *id.*; that without considering the effects of substance abuse, the plaintiff had no severe impairment, Finding 4, *id.*; and that the plaintiff's drug and alcohol abuse were a contributing factor material to a determination that she is disabled and accordingly she is not eligible for SSI payments, Finding 5, *id.* After the hearing, the plaintiff was referred to a physician by the administrative law judge for a psychiatric examination, *id.* at 40, and that physician's report is in the record, *id.* at 363-70. The plaintiff submitted additional medical records to the administrative law judge after the hearing, *id.* at 379-84, and apparently submitted other medical records to the Appeals Council after the administrative law judge had issued his decision, *id.* at 10. The Appeals Council declined to review the decision, *id.* at 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. § 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).

### **Discussion**

On March 29, 1996 Congress enacted Pub. L. No. 104-121, eliminating drug or alcohol addiction as a basis for obtaining disability benefits. *See* Historical and Statutory Notes to 42 U.S.C. § 1382c; *Jones v. Apfel*, 997 F. Supp. 1085, 1093 (N.D.Ind. 1997). Under the new provision, “an individual shall not be considered to be disabled for purposes of this subchapter if alcoholism or drug addiction would (but for this subparagraph) be a contributing factor material to the Commissioner’s determination that the individual is disabled.” 42 U.S.C. § 1382c(a)(3)(J).

The applicable regulation provides that:

(1) The key factor we will examine in determining whether drug addiction or alcoholism is a contributing factor material to the determination of disability is whether we would still find you disabled if you stopped using drugs or alcohol.

(2) In making this determination, we will evaluate which of your current physical and mental limitations, upon which we based our current disability determination, would remain if you stopped using drugs or alcohol and then determine whether any or all of your remaining limitations would be disabling.

(i) If we determine that your remaining limitations would not be disabling, we will find that your drug addiction or alcoholism is a contributing factor material to the determination of disability.

(ii) If we determine that your remaining limitations are disabling, you are disabled independent of your drug addiction or alcoholism and we will find that your drug addiction or alcoholism is not a contributing factor material to the determination of disability.

20 C.F.R. § 416.935(b).

The possible existence of a severe impairment is evaluated at Step 2 of the sequential evaluation process, where the plaintiff bears the burden of demonstrating that she has a severe

impairment or combination of impairments that significantly limit her ability to do basic work activities. 20 C.F.R. § 416.920(c); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987). While this burden is *de minimis*, “designed to do no more than screen out groundless claims,” *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1124 (1st Cir. 1986), if the plaintiff fails to demonstrate that the alleged impairment somehow limits her ability to do basic work activities, the impairment is not severe and there accordingly is no need to consider the effect of alcoholism or drug addiction with respect to that impairment. Several of the impairments claimed by the plaintiff to be severe in this case fall into this category.

The plaintiff’s attorney conceded at oral argument that the administrative record contains no medical evidence that demonstrates that her hepatitis, pancreatitis, or diabetes has any effect on her ability to perform basic work activities, confirming my conclusion after a review of the record. None of these impairments can be considered severe based on this record.

With respect to the plaintiff’s ankle fracture, the administrative law judge found that:

Ms. Gould underwent an open reduction internal fixation procedure for a right ankle fracture in February, 1997 (Exhibit 10F). In October, 1997, she complained of pain in that ankle (Exhibit 18F). Physical examination of that joint was essentially normal, and she was advised to do exercises to stretch the Achilles’ tendon, and return in six months for followup. There is no record of any such followup. In October, 1998, the orthopedic hardware was removed (Exhibit 28F). The undersigned does not find that the claimant has a “severe” ankle impairment.

Record at 16. The plaintiff refers to a February 1998 note of her treating physician as support for her contention that the ankle fracture “continued to be a chronic problem.” Itemized Statement of Errors Pursuant to Local Rule 26 Submitted by Plaintiff (“Statement of Errors”) (Docket No. 4) at 4-5. The physician does note under the heading “Assessment,” following the statement “Basically stable,” chronic foot pain as one of five items. Record at 333. However, there is no indication in that report that the foot pain had any effect on the plaintiff’s ability to perform basic work activities; indeed, no

treatment for the reported foot pain is prescribed. There is simply no medical evidence to support a finding that the plaintiff's pain resulting from the ankle fracture was a severe impairment. A medical consultant reported, six months after the fracture, that "[a]t present, I see no physical impairment which should warrant less than a full work capacity." *Id.* at 137. *See also* the report of consultant J. H. Hall, M.D., dated March 3, 1998, stating that the ankle fracture "has not, does not, or is not expected to limit [the plaintiff's] ability to perform basic work-related functions for 12 consecutive months." *Id.* at 155. The record supports the administrative law judge's implied conclusion that the plaintiff's ankle fracture did not represent a severe impairment.

The plaintiff contends that the borderline intellectual functioning diagnosed in 1988, when she was sixteen years old, *id.* at 339-40, is a severe impairment and also that the administrative law judge erred by failing to determine that she met the listing at section 12.05(C) of Appendix 1 to Subpart P of Part 404 of Title 20 of the Code of Federal Regulations (mental retardation). Statement of Errors at 4, 8-9. This issue, by the nature of the alleged impairment, appears to be independent of the plaintiff's alcohol and drug addiction. The question whether a plaintiff meets the criteria of a listed impairment, which is addressed at Step 3 of the evaluative process, is reached only if the plaintiff carries her burden at Step 2 of demonstrating the existence of a severe impairment. 20 C.F.R. § 416.920a(c)(3). As required, I will first consider whether the plaintiff has established that her borderline intellectual functioning constitutes a severe impairment. The regulations state that a claimed mental impairment will be found to be severe if the medical evidence demonstrates that the degree of functional loss resulting from the impairment meets stated criteria in four areas: activities of daily living; social functioning; concentration, persistence or pace; and deterioration or decompensation in work or work-like settings. 20 C.F.R. § 416.920a(b)(3). The plaintiff does not identify any medical evidence in the record concerning these areas with respect solely to her intellectual functioning; no such analysis is

present in the report of the psychologist who conducted the IQ testing upon which the plaintiff now relies. Record at 339-42. The report of the psychiatric examination requested by the administrative law judge does not refer to this issue. The administrative law judge did not evaluate the plaintiff's claimed mental retardation in this regard, *id.* at 19, other than to note that "the overall record does not suggest that the claimant's functional ability is limited by cognitive difficulties," *id.* at 16.<sup>2</sup> In light of the lack of medical evidence on point and the fact that it is the plaintiff's burden at Step 2 to demonstrate that an impairment is severe, I can only conclude that the borderline intellectual functioning identified by the plaintiff has not been shown to be a severe impairment.

Even if that were not the case, the plaintiff could not establish on the basis of this record that her borderline intellectual functioning meets the criteria of the mental retardation listing upon which she relies. That listing requires both a verbal, performance or full-scale IQ of 60 through 70 and the existence of another mental or physical impairment imposing additional and significant work-related limitation of function. Listing § 12.05(C). The medical record indicates that the plaintiff's verbal, performance and full-scale IQ scores were 80, 71 and 74 respectively. Record at 340. The plaintiff contends that her performance score "is merely one point away from a listing level" and that the *Diagnostic and Statistical Manual of Mental Disorders*, Fourth Edition ("DSM-IV"), notes that "it is possible to diagnose mental retardation in individuals with I.Q.'s between 70 and 75 who exhibit significant deficits in adaptive behavior." Itemized Statement at 4. The plaintiff cites no authority for her necessarily implied argument that statements in the DSM-IV have any weight in the interpretation of Social Security regulations or that a deviation of one point from the range specified by the

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<sup>2</sup> The plaintiff places great weight, Statement of Errors at 5, on the administrative law judge's apparent misinterpretation of the psychologist's report, shared by other professionals at the medical facility where the plaintiff was being treated at the time, Record at 360, to the effect that the plaintiff was "sleepy and lethargic" during the testing and that the test results could therefore be rejected as invalid, *id.* at 16. In fact, the psychologist reported that the plaintiff was sleepy and lethargic during the interview, but that she had undertaken the testing, a few days before the interview, "with considerable energy and generally good effort." *Id.* at 339. My analysis (continued...)

regulation may otherwise be disregarded. These arguments have been rejected by several courts of appeals, *e.g.*, *Dover v. Apfel*, 203 F.3d 834 (table), 2000 WL 135170 (10th Cir. Feb. 7, 2000), at 1-2 and cases cited therein; *Anderson v. Sullivan*, 925 F.2d 220, 223 (7th Cir. 1991) (I.Q. 71); *Cockerham v. Sullivan*, 895 F.2d 492, 495-96 (8th Cir. 1990) (same). I see no reason to deviate from the reasoned decisions of these courts. *See generally Martinez Nater v. Secretary of Health & Human Servs.*, 933 F.2d 76, 77 (1st Cir. 1991) (discussing requirements to meet or equal listing).

In addition, even if the plaintiff could meet the first prong of section 12.05(C), she has failed to provide medical evidence of another physical or mental impairment — which would be present in the absence of the her drug and alcohol addiction — that imposes a significant limitation of a work-related function, the second prong of the listing, for the reasons discussed above with respect to diabetes, hepatitis, pancreatitis and the ankle fracture, and for the reasons discussed below with respect to dysthymia, depression and personality disorder.

The plaintiff asserts that her diagnosed mental impairments of dysthymia, depression and personality disorder are severe impairments that are “separate and apart” from her substance abuse disorder, unrelated to substance abuse. Itemized Statement at 3. If she is correct in this assertion, the administrative law judge should have proceeded to evaluate those mental impairments through Steps 3 to 5 of the evaluative process. She relies primarily on the report of the psychiatrist who examined her at the request of the administrative law judge. *Id.* at 3, 6-7. The administrative law judge addressed these mental impairments as follows:

In the course of some of her hospitalizations for treatment of substance abuse, Ms. Gould has been diagnosed with depression and a personality disorder (Exhibits 8F, 13F, 15F, 16F, 21F, 24F). Because these diagnoses have always been made within the context of the claimant’s considerable, ongoing use of drugs and alcohol, the undersigned cannot conclude that these problems would exist to a significant degree if Ms. Gould were to achieve

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assumes the validity of the reported test results.

prolonged sobriety. . . . The earliest diagnosis of depression . . . was made when she was 16 years old, and that was described as a single episode, related to her having to put her child up for adoption (Exhibits 21F, 24F). The claimant's substance abuse disorder clearly precedes the emergence of any other mental impairment, and no treating or examining source has suggested that these other impairments would persist at a severe level if she were to stop using drugs and alcohol.

On the other hand, Richard Fortier Jr., M.D., who conducted a psychiatric evaluation of Ms. Gould in November, 1998, indicates that the claimant's substance abuse is a material factor contributing to her inability to do certain work-related activities (Exhibits 25F, 26F). Dr. Fortier stated that her irritability, which she described as a major obstacle to her ability to function in a workplace, was "likely due to substance abuse, which is also destabilizing (her) mood and impacting (her) judgment."

Record at 15-16. None of the medical records that refer to the diagnoses of dysthymia, depression or personality disorder states whether these conditions are secondary to, or independent of, the plaintiff's substance abuse. The claimant bears the burden of proving that drug or alcohol addiction is not a contributing factor material to her disability. *Brown v. Apfel*, 192 F.3d 492, 498 (5th Cir. 1999). *Accord, Mittlestedt v. Apfel*, 204 F.3d 847, 852 (8th Cir. 2000).

In order for any of these mental impairments to be considered severe if the plaintiff were to stop using drugs and alcohol, the medical evidence must meet the criteria discussed above with respect to mental retardation. 20 C.F.R. § 416.920a(b). Contrary to the plaintiff's contention that "[n]o effort has been made to determine what impact [the mental impairments] have on the Claimant's ability to do basic work activity," Itemized Statement at 6, the administrative law judge appropriately applied the regulation and completed a Psychiatric Review Technique Form, Record at 19-22, as required by 20 C.F.R. § 416.920a(d), recording his determinations both with the effect of the plaintiff's addictions ("with DAA") and independent of her addictions ("without DAA"). He clearly found, in each category, that the limitations caused by the plaintiff's mental impairments, if she were to stop using alcohol and drugs, were below the regulatory threshold for a severe impairment. 20 C.F.R.

§ 416.920a(b)(3). At oral argument, counsel for the commissioner correctly pointed out that this conclusion is supported by the reports of two consulting experts. Ake Akerberg, M.D., found that the plaintiff's "depression, if present, is probably secondary to her [drug and alcohol abuse]," Record at 140, and Daniel R. Houston, Ph.D., found that the plaintiff's "probable personality disorder" was non-severe "without D[rug and] A[lcohol] A[buse]," *id.* at 148.

The plaintiff essentially contends that the report of the post-hearing psychiatric examiner is to the contrary, because the examiner states that "[i]n addition to her substance abuse history, [the plaintiff] appears to suffer from some affective disturbance with suicidality [sic] and self destructive behavior," Record at 367, and "[t]he only limitations that [the examiner] correlates with substance abuse is [sic] irritability, destabilization of mood and impacting judgment," Itemized Statement at 6-7.

Where, as here, the burden of proof is on the plaintiff, she cannot recover benefits based on an absence of evidence. While the form used by the examiner indicates that the plaintiff's dysthymia and unspecified personality disorder<sup>3</sup> may be severe, *compare* Record at 368-69 *with* 20 C.F.R. §§ 416.920a(c)(1) & 416.921, it does not establish that either would exist if the plaintiff were to stop using drugs and alcohol. The statement in the body of the report, to the effect that the plaintiff suffers from "some" affective disturbance "[i]n addition to" her history of substance abuse, can be interpreted as the plaintiff does, to suggest that the affective disturbance is independent of the

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<sup>3</sup> The psychiatrist did not diagnose depression in any form, and accordingly the plaintiff's claims based on depression will not be considered further.

plaintiff's substance abuse, but that is not the only possible interpretation of this reference to the diagnosis of dysthymia. Further, and contrary to the plaintiff's interpretation, the psychiatrist's remark concerning substance abuse at page 3 of the form, Record at 370, can be interpreted to relate to many of the limitations noted on the previous two pages as "moderate," and clearly does relate to the only limitation noted as "marked," the limitation on the plaintiff's ability to use judgment, *id.* at 368. Even if Dr. Fortier's report could only be interpreted in the manner suggested by the plaintiff, it is inconsistent with the reports of the medical and psychological consultants who reviewed the plaintiff's records, and the administrative law judge may rely on a consultant's report when it conflicts with other medical evidence. *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 4 (1st Cir. 1987).

On the administrative record, the plaintiff has not carried her burden to show that her addiction to drugs and alcohol is not a contributing factor to her disability, if any, arising out of her impairments of dysthymia and nonspecified personality disorder.

In light of the conclusions set forth above, it is not necessary to address the plaintiff's contention that the administrative law judge was required to consult a vocational expert.

### **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.*

Date this 6th day of October, 2000.

BRENDA WILLIAMS GOULD  
plaintiff

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David M. Cohen  
United States Magistrate Judge

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