



19; that her statements concerning her impairments and their impact on her ability to work were not entirely credible, Finding 4, *id.*; that she lacked the residual functional capacity to lift and carry more than ten pounds, Finding 5, *id.*; that she was unable to perform her past relevant work as a cook, food service supervisor and restaurant manager, Finding 6, *id.* at 20; that her capacity for the full range of sedentary work was somewhat diminished by difficulty in concentrating on or attending to work tasks on a sustained basis,<sup>2</sup> Finding 7, *id.*; that given her age (39), educational background (bachelor of science degree), semi-skilled work experience, and exertional capacity for sedentary work, application of 20 C.F.R. Part 404, Subpart P, Appendix 2, Table 1 (“the Grid”), as a framework directs a conclusion that the plaintiff was capable of making an adjustment to work that existed in significant numbers in the national economy and that she accordingly was not disabled, Findings 8-12, *id.*; and that she had not been under a disability at any time through the date of the decision, Finding 13, *id.* The Appeals Council declined to review the decision, *id.* at 5-6, 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.*, 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).

---

<sup>2</sup> The plaintiff’s Itemized Statement of Specific Errors (“Statement of Errors”)(Docket No. 6) erroneously states that the administrative law judge found that she “could perform the full range of sedentary work.” *Id.* at 1. In fact, the administrative law judge found that the plaintiff “is unable to perform the full range of sedentary work.” Finding 12, Record at 20.

The administrative law judge in this case reached Step 5 of the sequential evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner's findings regarding the plaintiff's residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

### **Discussion**

The plaintiff contends that use of the Grid as a framework for decision-making rather than applying it strictly means that consultation of a vocation expert is required.<sup>3</sup> Statement of Errors at 5. However, that is an incorrect statement of the applicable law. The relevant regulations provide:

When the limitations and restrictions imposed by your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we consider that you have a combination of exertional and nonexertional limitations or restrictions. If your impairment(s) and related symptoms, such as pain, affect your ability to meet both the strength and demands of jobs other than the strength demands, we will not directly apply the rules of appendix 2 unless there is a rule that directs a conclusion that you are disabled based upon your strength limitations; otherwise the rules provide a framework to guide our decision.

20 C.F.R. §§ 404.1569a(d), 416.969a(d). Social Security Ruling 83-14 provides further guidance.

A particular additional exertional or nonexertional limitation may have very little effect on the range of work remaining that an individual can perform. The person, therefore, comes very close to meeting a table rule which directs a conclusion of "Not disabled." On the other hand, an additional exertional or nonexertional limitation may substantially reduce a range of work to the extent that an individual is very close to meeting a table rule which directs a conclusion of "Disabled."

Use of a vocational resource may be helpful in the evaluation of what appear to be "obvious" types of cases. In more complex situations, the

---

<sup>3</sup> A vocational expert was present at the hearing and testified briefly, but was only asked about the plaintiff's involvement with the state vocational rehabilitation service. Record at 349-50.

assistance of a vocational resource may be necessary. The publications listed in sections 404.1566 and 416.966 of the regulations will be sufficient for relatively simple issues. In more complex cases, a person or persons with specialized knowledge would be helpful. State agencies may use personnel termed vocational consultants or specialists, or they may purchase the services of vocational evaluation workshops. Vocational experts may testify for this purpose at the hearing and Appeals Council levels.

Social Security Ruling 83-14, reprinted in *West's Social Security Reporting Service Rulings 1983-1991* (1992) at 45. Under this Ruling, the testimony of a vocational expert is not necessary if the case is "obvious." "If a non-strength impairment, even though considered significant, has the effect only of reducing that occupational base marginally, the Grid remains highly relevant and can be relied on exclusively to yield a finding as to disability." *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). However, "[w]here there is more than a slight impact on the individual's ability to perform the full range of sedentary work, if the adjudicator finds that the individual is able to do other work, the adjudicator must cite examples of occupations or jobs the individual can do and provide a statement of the incidence of such work in the region where the individual resides or in several regions of the country." Social Security Ruling 96-9p, reprinted in *West's Social Security Reporting Service Rulings 1983-1991* (Supp. 2000) at 156.

Here, the administrative law judge found that the plaintiff's capacity for a full range of sedentary work was "somewhat diminished" by pain and depression which "have had some mild impact on her ability to concentrate on or attend to work tasks on a sustained basis." Record at 18, 20. Contrary to the plaintiff's claim, Statement of Errors at 4, the administrative law judge did not "ignore" her depression. The appropriate question is whether there is substantial evidence in the record to support the administrative law judge's necessarily implied conclusion that the plaintiff's depression did not reduce the sedentary occupational base more than marginally.

The plaintiff contends that the administrative law judge could not find that her depression only mildly affected her ability to concentrate on or attend to work tasks because the medical expert who testified at the hearing stated that the “B criteria” for section 12.06 of the Listings (personality disorders) were met. Record at 344-45. Of course, deficiencies of concentration resulting in frequent failure to complete tasks in a timely manner is only one of four criteria found at section 12.06(B) of the Listings, and only three of those four must be met in order for the Listing to apply. In addition, the medical expert immediately qualified his testimony by stating “But I think it’s her pain that really is the limiting factor so I’m not sure I can say it meets 12.06.” *Id.* at 345. Assuming *arguendo* that the medical expert’s ambiguous testimony can be taken to state that the criteria of section 12.06(B) were met and that one of the three factors involved was a deficiency in concentration, the medical expert’s opinion on whether a claimant meets a Listing is not binding on the commissioner. 20 C.F.R. §§ 404.1527(e)(2) & (f)(2)(iii), 416.927(e)(2) & (f)(2)(iii). The administrative law judge relied specifically on the report of Dr. Ginn in this regard. Record at 18. Dr. Ginn conducted a psychological evaluation of the plaintiff and found that

[t]here was nothing to suggest any significant decline in cognitive functioning or any cognitive related restrictions to her ability to work. There may be some mild problems with memory and some mild problems with concentration and persistence. Social interaction skills are good. Psychologically, she has good ability to adapt to work environment. Probably the main barriers to her ability to work would be her physical health. At the present time she is experiencing moderate to significant depression which significantly interferes with her motivation and ability to get up and get out and work and/or socialize.

*Id.* at 225. This is sufficient evidence to support the finding that the effect of the plaintiff’s depression on her ability to perform sedentary work is only slight. Dr. Ginn’s findings are not consistent with those of Dr. Luongo, the other medical evidence upon which the plaintiff relies, Statement of Errors at 3, but the administrative law judge may credit the report of a consulting medical witness who

examines the claimant over the conflicting report of a treating medical witness.<sup>4</sup> *Barrientos v. Secretary of Health & Human Servs.*, 820 F.2d 1, 2-3 (1st Cir. 1987).

The plaintiff also contends that the administrative law judge failed to consider limitations imposed by the fatigue that is a symptom of her fibromyalgia, citing in conclusory fashion the report of Dr. Johnson, an examining consultant, and the testimony of the medical expert at the hearing. Statement of Errors at 2-3. While Dr. Johnson states that the plaintiff's "major problems are [sic] easy fatigue," Record at 229, he does not identify any limitations on her ability to work as a result. The medical expert who testified at the hearing stated that the fibromyalgia was "a diffuse pain syndrome," *id.* at 341, and the administrative law judge's opinion does recognize pain as a limitation on the plaintiff's ability to perform the full range of sedentary work, *id.* at 18, 20. There is no support in the report of Dr. Johnson or the testimony of the medical expert for a claim that the fatigue suffered by the plaintiff affects her ability to perform the full range of sedentary work more than slightly. Accordingly, there was no need for the administrative law judge to consult a vocational expert and no need for him to state his conclusion regarding the availability of sedentary jobs with more specificity. The plaintiff's entire testimony concerning fatigue was the statement

---

<sup>4</sup> Dr. Luongo is a "treating" medical source only in the sense that the plaintiff chose to consult him. His report states that the plaintiff "was referred by her attorney . . . as part of the disability determination process." Record at 311. There is no indication that Dr. Luongo expected to see the plaintiff for treatment after he completed his evaluation.

“I’m tired a lot.” *Id.* at 325. In light of the lack of medical evidence on this point, the administrative law judge did not err in failing to find that the plaintiff’s fatigue affected her ability to perform the full range of sedentary work. *See generally* 20 C.F.R. §§ 404.1529(c), 416.929(c).

Finally, the plaintiff suggests that the administrative law judge wrongly discounted her credibility when he did not himself observe her testimony but only listened to a tape recording of her testimony before a different administrative law judge who subsequently retired. Statement of Errors at 1. At oral argument, the plaintiff’s attorney stated that he did not intend to argue that credibility may only be evaluated based on direct personal evaluation of a witness by the administrative law judge, but only that in such circumstances the administrative law judge must make a clearer and more detailed statement of his or her reasons for discounting the claimant’s testimony than was made by the administrative law judge in this case. Counsel cited no authority for this position. In any event, it is not necessary to address this issue because the plaintiff’s credibility is not an element of any of the commissioner’s findings that are attacked by the plaintiff.

### **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 4th day of December, 2000.

---

David M. Cohen  
United States Magistrate Judge

HEIDI S VANDERPLAS  
plaintiff

FRANCIS JACKSON, ESQ.  
[COR LD NTC]  
JACKSON & MACNICHOL  
85 INDIA STREET  
P.O. BOX 17713  
PORTLAND, ME 04112-8713  
207-772-9000

v.

SOCIAL SECURITY ADMINISTRATION  
COMMISSIONER  
defendant

JAMES M. MOORE, Esq.  
[COR LD NTC]  
U.S. ATTORNEY'S OFFICE  
P.O. BOX 2460  
BANGOR, ME 04402-2460  
945-0344

WAYNE G. LEWIS, ESQ.  
[COR LD NTC]  
JFK FEDERAL BUILDING  
ROOM 625  
BOSTON, MA 02203-0002  
617/565-4277