

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HELEN HALL,)	
)	
Plaintiff)	
)	
v.)	Docket No. 00-171-B
)	
WILLIAM A. HALTER,)	
Acting Commissioner of Social Security,¹)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION²

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the issue of whether substantial evidence supports the commissioner’s determination that, for purposes of SSD, the plaintiff did not suffer from a severe impairment as of her date last insured, and for purposes of SSI, she was capable of performing medium work. I recommend that the decision of the commissioner be affirmed as to SSD and vacated as to SSI, with directions to award the plaintiff SSI benefits.

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

¹ Pursuant to Fed. R. Civ. P. 25(d)(1), Acting Commissioner of Social Security William A. Halter is substituted as the defendant in this matter.

² 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 April 6, 2001, 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.

administrative law judge found, in relevant part, that the plaintiff met the disability insured status requirements of the Social Security Act on December 1, 1989, the date she stated that she became unable to work, and acquired sufficient quarters of coverage to remain insured through September 30, 1996, Finding 1, Record at 36; that she suffered from chronic bronchitis, osteoporosis with back pain and essential hypertension, impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Finding 3, *id.*; that she lacked the residual functional capacity to lift and carry more than fifty pounds or more than twenty-five pounds on a regular basis, or perform work not permitting a sit/stand option, Finding 5, *id.*; that she was unable to perform her past relevant work as a nurse’s aide and laborer, Finding 6, *id.*; that her capacity for the full range of medium work was diminished by her inability to perform work not permitting a sit/stand option, Finding 7, *id.*; that, given her age (56), limited education, unskilled work experience and a finding that her capacity for medium work was “not significantly compromised,” application of Rule 203.11 of Table 3, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the “Grid”) directed a conclusion that the plaintiff was not disabled, Findings 8-12, *id.* at 36-37; and that she had not been under a disability at any time through the date her insured status expired or at any time through the date of decision, Finding 13, *id.* at 37.³ The Appeals Council declined to review the decision, *id.* at 6-7, 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

³ The administrative law judge also found that the plaintiff returned to substantial gainful activity in October 1998. Finding 2, Record at 36. However, the administrative law judge determined that inasmuch as the work did not begin until after the plaintiff filed her claim and more than twelve months after the alleged date of onset, it did not preclude entitlement to benefits. *Id.* at 29-30.

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).

In the context of the SSD decision the administrative law judge reached Step 2 of the sequential evaluation process. Although a claimant bears the burden of proof at this step, it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence “establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual’s ability to work even if the individual’s age, education, or work experience were specifically considered.” *McDonald*, 795 F.2d at 1124 (quoting Social Security Ruling 85-28).

In the context of the SSI decision the administrative law judge reached Step 5 of the sequential process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his 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).

The plaintiff asserts that the commissioner erred in (i) determining for SSD purposes that she did not suffer from a severe impairment (osteoporosis) prior to her date last insured and (ii) relying on the Grid to conclude for SSI purposes that despite her need for a sit/stand option the plaintiff could perform substantially the full range of medium work. Itemized Statement of Errors Pursuant to Rule

16.3 Submitted by Plaintiff (“Statement of Errors”) (Docket No. 4) at 2-7. As to the latter claimed flaw, the plaintiff seeks remand with instructions to award benefits. *Id.* at 7; *see also Field v. Chater*, 920 F. Supp. 240, 243 (D. Me. 1995) (“When the Commissioner had a full and fair opportunity to develop the record and meet her burden at Step 5, there is no reason for the court to remand for further factfinding.”). Counsel for the commissioner conceded at oral argument that remand is warranted with respect to the plaintiff’s SSI claim.⁴ He nonetheless argued, on the strength of one First Circuit decision, *Chester v. Callahan*, 193 F.3d 10 (1st Cir. 1999), and decisions of other circuit courts of appeal, including *Butler v. Bowen*, 865 F.2d 173 (8th Cir. 1989), that remand for payment of benefits is inappropriate. For reasons that I have previously articulated, *see, e.g., Freeman v. Apfel*, 2000 WL 1781830, at *2, Docket No. 00-120-B, Report and Recommended Decision dated December 4, 2000, at 3-5 (affirmed December 18, 2000), I continue to be unpersuaded that *Chester* overrules *Field* or that, in the face of the lengthy delays to which Social Security claimants are subject, the rationale of *Field* is otherwise unsound. I therefore recommend remand with instructions to award benefits as to the SSI claim. For the reasons that follow, I discern no reversible error in the SSD component of the commissioner’s decision.

I. Discussion

The plaintiff complains that, in assessing her eligibility for SSD, the administrative law judge erroneously relied on the testimony of an independent medical examiner present at the hearing, William J. Hall, M.D., as well as on two “partially completed” Maine Disability Determination Service (“DDS”) reports that in the plaintiff’s view cannot reasonably be viewed as substantial evidence. Statement of Errors at 3-4; *see also* Record at 30-31 (portion of administrative law judge’s decision addressing plaintiff’s condition as of her date last insured).

⁴ Prior to oral argument, the commissioner moved to remand this case for the purpose of obtaining evidence from a vocational expert. (*continued on next page*)

I agree that the testimony of Dr. Hall does not support a finding that the plaintiff's condition on or before September 30, 1996 was non-severe. Dr. Hall neither was asked about, nor took it upon himself to address, the plaintiff's condition prior to her date last insured. *See id.* at 62-67 (testimony of Dr. Hall). Nonetheless, the DDS reports, by Lawrence P. Johnson, M.D., and by a consultant whose signature and title are illegible, provide substantial support for a finding that the plaintiff's impairments were non-severe prior to her date last insured. *See id.* at 167 (report of Dr. Johnson), 169 (report by consultant).⁵

The plaintiff points out that the Johnson report consists only of pages 7 and 8 of what one would presume was a longer report. Statement of Errors at 3. However, the fashion in which the report is laid out (a notation of date last insured; a summary of medical evidence prior to that date; and a conclusion) indicates that it contains Dr. Johnson's entire findings on the subject matter of status of impairments prior to date last insured. *See Record* at 167. The plaintiff next objects that Dr. Johnson provides merely a summary conclusion, without explanation, that "physical is non-severe." Statement of Errors at 3; *Record* at 167. Dr. Johnson's conclusion nonetheless self-evidently flows from his examination of the medical evidence summarized. In the second DDS report a box is checked indicating that (per the medical evidence) the plaintiff did not have a combination of impairments as of her date last insured that limited her ability to perform basic work-related functions for twelve consecutive months. *Record* at 169. The plaintiff objects that it is unclear who signed the second report or even whether that person was a health-care professional of any type. Statement of Errors at 3. Counsel for the plaintiff also asserted at oral argument that, inasmuch as the second report is merely a "Medical Assessment Worksheet," it cannot constitute substantial evidence. Despite the illegibility

Defendant's Motion To Remand (Docket No. 5). The motion was denied in light of the plaintiff's objection. Endorsement to *id.*
⁵ Counsel for the commissioner stated at oral argument that the latter report was prepared by Floyd B. Goffin, M.D., whose name is mentioned, but whose signature does not appear, in a Disability Determination and Transmittal reproduced at page 70 of the *Record*.

of the signature on the second report, it is clear that the report was made for the state DDS. Per relevant regulations, “State agency medical and psychological consultants and other program physicians and psychologists are highly qualified physicians and psychologists who are also experts in Social Security disability evaluation. Therefore, administrative law judges must consider findings of State agency medical and psychological consultants or other program physicians or psychologists as opinion evidence” 20 C.F.R. § 404.1527(f)(2)(i). The plaintiff points to no authority for the proposition that conclusions drawn in a document labeled a “worksheet” are not “determinations” or are otherwise entitled to less weight than conclusions embedded in documents bearing other labels.

As the plaintiff points out, there is evidence of record that (at least per her own contemporaneous reports) her condition was severe prior to her date last insured. Statement of Errors at 4; *see also, e.g.*, Record at 166 (December 3, 1993 note of treating physician’s assistant that, per plaintiff’s report, back pain had been so bad she had to quit her job as CNA, although x-rays had revealed nothing wrong). Nonetheless, conflicts in the evidence are the province of the administrative law judge to resolve. *See 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.”)

II. Conclusion

For the foregoing reasons, I recommend that the commissioner’s decision as to the plaintiff’s SSD application be **AFFIRMED**, and his decision as to the plaintiff’s SSI application be **VACATED** and the cause **REMANDED** with instructions to award the plaintiff SSI benefits.

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

SOCIAL SECURITY ADMINISTRATION JAMES M. MOORE, Esq.

COMMISSIONER [COR LD NTC]

defendant U.S. ATTORNEY'S OFFICE

P.O. BOX 2460

BANGOR, ME 04402-2460

945-0344

PETER S. KRYNSKI, Esq.

[COR LD NTC]

SOCIAL SECURITY DISABILITY

LITIGATION - ANSWER SECTION

OFFICE OF THE GENERAL COUNSEL

5107 LEESBURG PIKE ROOM 1704

FALLS CHURCH, VA 22041-3255

(703) 305-0183

RICHARD H. FOX, ESQ.

[COR LD NTC]

ASSISTANT REGIONAL COUNSEL

OFFICE OF THE CHIEF COUNSEL,

REGION 1

2225 J.F.K. FEDERAL BUILDING

BOSTON, MA 02203

617/565-4277