

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JACQUELINE ROSE,)
)
 Plaintiff)
)
 v.)
)
 WILLIAM A. HALTER,)
 Acting Commissioner of Social Security,¹)
)
 Defendant)

Docket No. 00-205-P-C

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 the plaintiff is capable of performing past relevant work as a bartender. I recommend that the decision of the commissioner be affirmed.

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 medical evidence established that the plaintiff had degenerative disc disease of the cervical spine, mild right carpal tunnel syndrome and right lateral

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.

epicondylitis, 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, Record at 24; that she lacked the residual functional capacity to lift and carry more than twenty pounds or perform tasks requiring a significant amount of fine manipulation or repetitive hand motion, Finding 5, *id.*; that in her past work as a bartender, as generally performed in the national economy, the plaintiff was not required to lift more than twenty pounds or frequently use her hands for fine or repetitive tasks, Finding 6, *id.*; that her impairments did not prevent her from performing her past relevant work, Finding 8, *id.*; and that she accordingly had not been under a disability at any time through the date of decision, Finding 9, *id.* 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 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).

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. §§ 404.1520(e), 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. §§ 404.1520(e), 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’s complaint also implicates Step 2 of the sequential process. Although a claimant bears the burden of proof at this step as well, 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).

The plaintiff asserts that the commissioner erred in (i) omitting to find that she suffered from two severe impairments, bilateral shoulder osteoarthritis and persistent hoarseness of the throat, (ii) declining at the Appeals Council level to review the decision of the administrative law judge despite the presentation of new and material evidence – specifically, a residual functional capacity (“RFC”) assessment by a treating physician, Mai Pham, M.D., (iii) determining that the plaintiff could return to her past relevant work as a bartender, and (iv) failing to find the plaintiff disabled. Itemized Statement of Errors Pursuant to Local Rule 26 Submitted by Plaintiff (“Statement of Errors”) (Docket No. 3) at 2-8. On the basis of any of these alleged errors she seeks remand with instructions to award benefits or, alternatively, remand for further proceedings. *Id.* at 8. For the reasons that follow, I conclude that no reversible error was committed.

I. Discussion

A. Shoulder-Arthritis and Hoarseness Conditions

The plaintiff complains as an initial matter that the administrative law judge failed to find that she suffered from either bilateral shoulder osteoarthritis or persistent hoarseness – conditions that in her view should have been deemed severe. Statement of Errors at 2-3.

With respect to her shoulder arthritis, the plaintiff asserts that (i) the administrative law judge inexplicably adopted all of the diagnostic impressions of rehabilitation physician Stephan Bamberger, M.D., except for that of shoulder arthritis, and (ii) there is no evidence of record contrary to that diagnosis. *Id.* at 2.³ The administrative law judge makes no express finding whatever concerning the shoulder condition – an unfortunate silence that could be construed either as a conclusion that the condition did not exist or, if it did, that it was not severe. *See id.* at 20-24. Nonetheless, the record may fairly be read as containing evidence corroborating either implicit finding.

In a January 13, 1998 report, State of Maine Disability Determination Services consultant John P. Greene, M.D., found upon examination of the plaintiff that, despite her complaint “of bilateral shoulder aching pain and discomfort with questionable limitation of shoulder motion,” an “[e]xamination of the upper extremities is completely negative with full motion at the shoulders[.]” *Id.* at 145-46. Dr. Greene concluded that the plaintiff suffered from (i) mild degenerative disc disease, (ii) multi-joint arthralgia⁴ and (iii) chronic nicotine addiction. *Id.* at 147. It is unclear whether the finding of arthralgia encompassed the plaintiff’s shoulders; in any event, Dr. Greene concluded: “Despite this patient’s multiple complaints, there is no objective evidence of significant disability at the time of this examination. I would not consider this patient disabled as far as any occupation which would be suitable for a middle-40-aged woman in reasonably good health.” *Id.* at 147-48. The finding of “arthralgia” – assuming it applies to the shoulders – is not identical to a finding of arthritis.

³ The plaintiff erroneously refers to Dr. Stephan Bamberger as “Dr. Steven Danberger.” *See* Record at 172-74 (report of Dr. Stephan Bamberger).

⁴ “Arthralgia” is defined as “[p]ain in a joint.” Taber’s Cyclopedic Medical Dictionary at 124 (14th ed. 1983). “Arthritis” is defined as
(continued on next page)

In any event, even were the Greene report construed as consistent with the Bamberger diagnosis, it would support a finding at the next step of analysis that any such condition was non-severe.⁵

In addition, Robert A. Sylvester, M.D., whose letterhead indicates that he is a diplomate of the American Board of Internal Medicine and of the subspecialty of rheumatology, did not diagnose arthritis in the plaintiff's shoulders following an examination "for evaluation for pain in her neck, pain in her shoulders, pain in her back and pain in her knees." *Id.* at 149. In his January 28, 1998 report, Dr. Sylvester recorded impressions only of (i) history of excessive smoking, (ii) question of chronic lung disease, (iii) question of early degenerative arthritis in the knees and (iv) history of hepatitis and ulcer in the past." *Id.* at 150.

Thus, rather than being a case in which the administrative law judge ignored uncontroverted evidence, this was a case in which there were conflicts in the evidence that were his province 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.").⁶

The plaintiff next contends that, with respect to her persistent hoarseness, the administrative law judge erred in determining the condition non-severe on the ground that it could be alleviated by

"[i]nflammation of a joint, usually accompanied by pain and, frequently, changes in structure." *Id.*

⁵ Dr. Bamberger, like Dr. Greene, found that the plaintiff had a full range of motion in her joints. *See Record* at 173. A full range of motion thus apparently is not inconsistent with a finding of arthritis.

⁶ Although the administrative law judge did not expressly discuss the Bamberger diagnosis of shoulder osteoarthritis, he referred in the context of discussing claimed pain, including shoulder pain, to a lack of evidence of significant pathology, citing the reports of Drs. Greene and Sylvester as well as a report by Dr. Pham indicating that arthritis discomfort was adequately managed by Tylenol. *Record* at 21; *see also id.* at 156 (note of Dr. Pham that plaintiff taking Tylenol for arthritis; to notify office if symptoms become worse). On the other side of the scale, there is evidence of record besides the Bamberger report indicating both that the shoulder-arthritis condition existed and that it was severe. *See, e.g., id.* at 42-43 (plaintiff's testimony), 52 (testimony of medical expert William J. Hall, M.D.). However, even assuming *arguendo* that this conflicting evidence could be described as "considerable," the administrative law judge's explanation, though hardly a model to emulate, meets the "minimal level of articulation . . . required in cases in which considerable evidence is presented to counter the agency's position." *Taylor v. Schweiker*, 739 F.2d 1240, 1244 (7th Cir. 1984).

simple measures, including quitting smoking. Statement of Errors at 3; *see also* Record at 21. The plaintiff protests that there is no evidence of record that quitting smoking is simple; in fact, she asserts that the converse is true. Statement of Errors at 3.

The administrative law judge did indeed collapse two separate analyses into one – whether a condition is severe and whether compliance with treatment would restore a claimant’s ability to work. *See, e.g., McGuire v. Heckler*, 589 F. Supp. 718, 723 n.34 (S.D.N.Y. 1984) (“The Secretary’s regulations do not explicitly authorize an ALJ to consider the ease with which an impairment could be cured when determining whether that impairment is ‘severe.’ Rather, a separate rule, 20 C.F.R. § 404.1530(a) (1983), states that the Secretary will not award benefits unless the claimant ‘follow[s] treatment prescribed by [her] physician *if this treatment can restore [claimant’s] ability to work.*’”) (emphasis in original); *see also* 20 C.F.R. § 416.930(a).

Nonetheless, the error is harmless. Had the administrative law judge properly categorized the persistent hoarseness as severe, he nonetheless supportably could have concluded that the condition could have been alleviated by compliance with treatment – namely, ceasing smoking. *See* Record at 27 (report of Frederick C. Holler, M.D., that “I have recommended strongly that she discontinue smoking and that she go on a program of voice rest for which I gave her some instructions. . . . Hopefully, these simple measures will alleviate the problem.”); *compare, e.g., Shramek v. Apfel*, 226 F.3d 809, 813 (7th Cir. 2000) (“In *Rousey v. Heckler*, 771 F.2d 1065, 1069 (7th Cir. 1985), we reversed an ALJ’s denial of benefits premised in part on the claimant’s failure to quit smoking where the claimant suffered from chronic obstructive pulmonary disease. We held that no evidence demonstrated that she would be restored to a non-severe condition if she quit smoking.”).

Nor would the difficulty of quitting have excused the plaintiff’s non-compliance. Failure to follow prescribed treatment can be excused for “good reason.” 20 C.F.R. §§ 404.1530(b),

416.930(b). However, in this case there is no record evidence concerning the onerousness of quitting smoking either in general or for the plaintiff specifically. Even assuming *arguendo* that there were, I find no caselaw – and plaintiff’s counsel at oral argument could point to none – indicating that this particular difficulty constitutes “good reason” within the meaning of the rules.

The commissioner accordingly did not commit reversible error as to the plaintiff’s shoulder-arthritis and hoarseness conditions.

B. “New and Material” Evidence

The plaintiff next contends that the commissioner erred in declining to review the decision of the administrative law judge when presented with “new and material” evidence in the form of an RFC assessment from Dr. Pham dated July 28, 1999. Statement of Errors at 4-5; *see also* Record at 196-99 (Pham report).⁷ Although “an Appeals Council refusal to review the ALJ may be reviewable where it gives an egregiously mistaken ground for this action,” *Mills v. Apfel*, No. 00-1446, slip op. at 9 (1st Cir. Mar. 22, 2001), evidence submitted for the first time to the Appeals Council must “relate[] to the period on or before the date of the administrative law judge hearing decision,” 20 C.F.R. §§ 404.970(b), 416.1470(b); *see also, e.g., Perez v. Chater*, 77 F.3d 41, 45 (2d Cir. 1996) (same). Inasmuch as appears, the Pham report describes the plaintiff’s condition as of July 1999. *See* Record at 196-99. The Appeals Council accordingly committed no error in declining review despite the presentation of this evidence.

C. Past Relevant Work

The plaintiff argues, based primarily on the Pham RFC assessment as well as her own testimony at hearing regarding her functional limitations, that she lacked the residual functional capacity to return to her past relevant work as a bartender as that job is described in the Dictionary of

⁷ The plaintiff’s hearing was held November 24, 1998. *See* Record at 28. The administrative law judge issued his decision on January (continued on next page)

Occupational Titles. Statement of Errors at 5-6. As discussed above, the Pham RFC assessment does not meet the requisites for consideration at the Appeals Council stage. It thus cannot form the predicate for a finding that the administrative law judge erred in his assessment of RFC.

D. Finding of Disability

The plaintiff finally argues that because she is unable to perform her past relevant work as a bartender, she should have been found disabled. Statement of Errors at 6-8. Inasmuch as this argument hinges on the plaintiff's contention regarding RFC, it too fails.⁸

II. 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 9th day of April, 2001.

David M. Cohen
United States Magistrate Judge

ADMIN

U.S. District Court

8, 1999. *See id.* at 25.

⁸ In any event, remand with instructions to award benefits is inappropriate in a Step 4 case. *See 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.").

District of Maine (Portland)

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