

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**THERESA DYER, on behalf of DUSTIN )  
DYER, )**

**Plaintiff )**

**v. )**

**Docket No. 00-233-P-H**

**WILLIAM A. HALTER, Acting )  
Commissioner of Social Security,<sup>1</sup> )**

**Defendant )**

**REPORT AND RECOMMENDED DECISION<sup>2</sup>**

The plaintiff in this Supplemental Security Income (“SSI”) appeal presents two claims on behalf of her minor son: the administrative law judge improperly failed to state any reasons for discounting her testimony in support of a general award of benefits and the administrative law judge should have at least awarded benefits for a closed period of disability. I recommend that the court affirm the commissioner’s decision.

The sequential evaluation process generally followed by the commissioner in making disability determinations, *see* 20 C.F.R. § 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), is somewhat modified when the claimant is a child, 20 C.F.R.

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<sup>1</sup> 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.

<sup>2</sup> This 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 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 *(continued on next page)*

§ 416.924, *Wilson v. Apfel*, 179 F.3d 1276, 1277 n.1 (11th Cir. 1999). In accordance with that section, the administrative law judge found, in relevant part, that the claimant (Dustin Dyer) had not engaged in substantial gainful activity at any time since the date of alleged onset of disability, Finding 1, Record at 16; that he had attention deficit hyperactivity disorder (“ADHD”) and fibromyalgia syndrome, impairments that were severe but did not, either alone or in combination, meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (“the Listings”), Findings 2 & 3, *id.*; and that he accordingly had not been disabled at any time through the date of the decision, Finding 4, *id.* The Appeals Council declined to review the decision, *id.* at 4-5, making it the final determination of the acting 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 conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Richardson v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

A person under age 18 will be considered disabled if he has “a medically determinable physical or mental impairment or combination of impairments that causes marked and severe functional limitations, and that can be expected to cause death or that has lasted or can be expected to last for a continuous period of not less than 12 months. 20 C.F.R. § 416.906. When a claim for benefits is made on behalf of a child, the commissioner must first determine whether the alleged disability is severe. 20 C.F.R. § 416.924(a), (c). If the disability is found to be severe, as was the

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relevant statutes, regulations, case authority and page references to the administrative record.

case here, the question becomes whether the disability is one that is listed in Appendix 1, or “is medically or functionally equal in severity to a listed impairment.” 20 C.F.R. § 416.924(d)(1). If the impairment does not meet this standard, the child is not disabled. 20 C.F.R. § 416.924(d)(2).

The plaintiff contends that the administrative law judge “failed to fairly evaluate the evidence on the mental problems . . . , giving preference to evidence from the child’s pediatrician over that of the treating specialist psychiatrist and the child’s mother without giving any reasonable rationale for such a position.” Statement of Errors (Docket No. 8) at 1-2. The commissioner may give more weight to the opinion of one treating medical professional than another and resolve any conflicts in medical evidence. *Rodriguez Pagan v. Secretary of Health & Human Servs.*, 819 F.2d 1, 3 (1st Cir. 1987). In this case, while the administrative law judge did note that he “accorded the findings and opinions of [the pediatrician] great weight,” Record at 14, there is no indication that in doing so he found it necessary to reject any opinion of Dr. Sally Guimaraes, a psychiatrist whose reports dated August 29 and September 30, 1997, and February 12, April 2, and July 28, 1998<sup>3</sup> are in the administrative record, *id.* at 193-96, 228, 229-30, 233.<sup>4</sup> The opinions of those physicians do not in fact conflict on any point relied upon by the administrative law judge in reaching his decision. Accordingly, there can be no requirement that the administrative law judge state his reasons for “preferring” Dr. Hall’s opinion.

Dr. Hall’s opinion that Dustin, as of November 25, 1998, “ha[d] no functional limitations,” was able to undertake “the usual tasks of going to school and being at home,” and could “communicate and socialize normally,” *id.* at 224, is inconsistent in some respects with the plaintiff’s testimony concerning Dustin’s abilities as of June 17, 1999, the date of the hearing, *id.* at 18. Her testimony is

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<sup>3</sup> The date of onset of Dustin’s disability alleged by the plaintiff is April 1, 1998. Record at 11.

<sup>4</sup> Indeed, the pediatrician, Dr. David L. Hall, evaluated the reports of Dr. Guimaraes and the rheumatologist who diagnosed fibromyalgia in Dustin and did not suggest that his opinions conflicted with those reports. Record at 223- 25.

also inconsistent with her reports to Dr. Hall recorded in his note dated May 4, 1999 that “[t]hings are going much better in school” and “[b]ehavior in the home seems to have settled down.” *Id.* at 257. Contrary to the plaintiff’s characterization, Statement of Errors at 4 & 5, the portions of her testimony on which she relies are not “uncontradicted” or “undisputed.” An administrative law judge may resolve a conflict between a claimant’s testimony and that of a medical professional by choosing to credit that of the medical professional. 20 C.F.R. § 416.929(a), (c) & (d); *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 523 (1st Cir. 1989). Although the case law cited by the plaintiff does not support her argument on this point, an administrative law judge is required to explain his reasons for finding a claimant’s uncontradicted testimony lacking in credibility. *E.g., Halvorsen v. Heckler*, 743 F.2d 1221, 1226 (7th Cir. 1984).<sup>5</sup> Here, the plaintiff has not identified any of her testimony that was uncontradicted by the medical evidence. In addition, the administrative law judge in fact does set forth his reasons for discounting the plaintiff’s testimony suggesting that Dustin’s decline in academic performance during the sixth grade (the 1998-99 school year, Record at 163) was due to “increased fibromyalgia-related fatigue.” *Id.* at 15-16. While further analysis by the administrative law judge of the conflicts between the medical evidence and those portions of the plaintiff’s testimony that might reasonably be construed to relate to ADHD rather than fibromyalgia would have been helpful, it was not required under the circumstances. *See Nyman v. Heckler*, 779 F.2d 528, 531 (9th Cir. 1985) (administrative law judge not obliged to detail reasons for rejecting report of psychologist that was not uncontradicted).

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<sup>5</sup> The plaintiff’s reliance on *DaRosa v. Secretary of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986), in this regard is misplaced because the First Circuit in that case was dealing with a claimant’s testimony regarding his own pain. Such testimony is not present in this case, and the plaintiff’s claims are based on ADHD and fatigue from fibromyalgia, not pain.

With respect to the plaintiff's claim that that administrative law judge should, at the least, have awarded benefits for a closed period ending in March 1999,<sup>6</sup> I note that this closed period would be less than a year from the alleged date of onset of disability of April 1, 1998. Record at 66. The definition of a disability that is applicable to this claim requires that the impairment at issue "can be expected to cause death or that has lasted or can be expected to last for a continuous period of not less than 12 months." 20 C.F.R. § 416.906. The plaintiff has offered no evidence that Dustin's alleged impairments can be expected to cause death. Counsel for the plaintiff and counsel for the respondent agreed at oral argument that benefits are available for a closed period of less than one year from the date of application if the disability itself began sufficiently before the date of application so that the disability lasted for a continuous period of 12 months or more. Counsel also agreed that the claimant's failure to inform the administrative law judge or the Appeals Council that she was seeking benefits for a closed period does not constitute a waiver of such a claim. In any event, Dr. Hall's reports from July and November 1998, Record at 223-25, well before the end of the closed period now advocated by the plaintiff, are sufficient to establish that Dustin was not disabled within the meaning of 20 C.F.R. §§ 416.906 and 416.924 during the relevant period.

### **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.*

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<sup>6</sup> The plaintiff also refers to the end of the closed period as "the winter of 1998/spring of 1999." Statement of Errors at 3.

***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 9th day of April, 2001.

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David M. Cohen  
United States Magistrate Judge

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