

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PAULETTE R. WHITTEN,)
)
 Plaintiff)
)
 v.)
)
 LARRY G. MASSANARI,)
 Acting Commissioner of Social Security,¹)
)
 Defendant)

Docket No. 01-05-B

REPORT AND RECOMMENDED DECISION²

This Supplemental Security Income (“SSI”) appeal raises the issue whether substantial evidence supports the commissioner’s determination that the plaintiff, who has no history of past relevant work, is capable of making a successful vocational adjustment to work existing in significant numbers in the national economy. I recommend that the decision of the commissioner be vacated and the case remanded for further proceedings.

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 suffered from anxiety and dependent personality

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

² 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 August 9, 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.

disorder, but only as of March 1997 and continuing, Finding 2, Record at 20; that these impairments were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), *id.*; that the plaintiff’s statements concerning her impairments and their impact on her ability to work were not entirely credible, Finding 3, *id.*; that she had no history of past relevant work, Finding 5, *id.* at 21; that considering her age (50), education (high school) and residual functional capacity, she was able to make a successful vocational adjustment to work existing in significant numbers in the national economy, Findings 7-9, *id.*; and that she therefore had not been under a disability at any time through the date of decision, Finding 10, *id.* The Appeals Council declined to review the decision, *id.* at 4-5, making it the final determination 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 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 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 her past relevant work. 20 C.F.R. § 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 complains that the administrative law judge failed to (i) comply with Social Security Ruling 96-7p in assessing credibility, (ii) determine mental residual functional capacity (“MRFC”) in accordance with the requirements of Social Security Ruling 96-8p or (iii) include in hypothetical questions posed to a vocational expert any nonexertional limitations stemming from the plaintiff’s anxiety or dependent-personality disorders. Plaintiff’s Itemized Statement of Specific Errors (“Statement of Errors”) (Docket No. 5) at 3-11. The plaintiff in addition seeks remand to the commissioner for the consideration of allegedly new and material evidence, the late proffer of which she asserts is excused for good cause shown. *Id.* at 12-15. On any of these bases she seeks remand to the commissioner for further proceedings. *Id.* at 15.

I agree with the plaintiff that the administrative law judge made no meaningful assessment of MRFC. That error cannot confidently be characterized as harmless inasmuch as it calls into question the accuracy of hypothetical questions posed to the vocational expert. The vocational expert’s testimony, in turn, provided the basis for the Step 5 finding that the plaintiff retained the capacity to work. Remand accordingly is warranted.

I. Discussion

Social Security Ruling 96-8p provides in relevant part:

When an individual is not engaging in substantial gainful activity and a determination or decision cannot be made on the basis of medical factors alone (i.e., when the impairment is severe because it has more than a minimal effect on the ability to do basic work activities yet does not meet or equal in severity the requirements of any impairment in the Listing of Impairments), the sequential evaluation process generally must continue with an identification of the individual’s functional limitations and restrictions and an assessment of his or her remaining capacities for work-related activities.

Social Security Ruling 96-8p, reprinted in *West’s Social Security Reporting Service Rulings* 1983-1991 (Supp. 2001), at 144. “The RFC assessment is a function-by-function assessment based upon all

of the relevant evidence of an individual's ability to do work-related activities." *Id.* at 145. Work-related mental activities include the abilities to "understand, carry out, and remember instructions; use judgment in making work-related decisions; respond appropriately to supervision, co-workers and work situations; and deal with changes in a routine work setting." *Id.* at 149; *see also* 20 C.F.R. § 416.945(c) ("A limited ability to carry out certain mental activities, such as limitations in understanding, remembering, and carrying out instructions, and in responding appropriately to supervision, coworkers, and work pressures in a work setting, may reduce your ability to do past work and other work.").

The administrative law judge in this case determined that the plaintiff suffered as of March 1997 from two severe mental conditions, anxiety and dependent-personality disorder, and that a residual functional capacity assessment was necessary inasmuch as a severe impairment was present that did not meet or equal the Listings. Record at 16, 22; *see also* 20 C.F.R. § 416.920a(c)(3) ("If you have a severe [mental] impairment(s) but the impairment(s) neither meets nor equals the listings, we must then do a residual functional capacity assessment, unless you are claiming benefits as a disabled child."). Inexplicably, no MRFC assessment was made (or, at least, none appears in the record). As concerns mental-health matters, the medical evidence of record consists only of (i) the report of a consultative evaluation by A.J. Butler, Ed.D., Record at 178-84, (ii) two psychiatric review technique forms ("PRTFs") completed by non-examining consultants Peter G. Allen, Ph.D., and S. Hoch, Ph.D, *id.* at 140-48, 157-65, and (iii) an evaluation by the plaintiff's treating physician, Noah Nesin, M.D., *id.* at 189-90.

The Butler report does not purport to address, in a manner comprehensible to a layperson, the functional limitations stemming from the plaintiff's anxiety and dependent-personality disorders, *id.* at 178-84, and the PRTFs do not by definition constitute MRFC assessments, *see, e.g.*, SSR 96-8p at 147

(“The adjudicator must remember that the limitations identified in the ‘paragraph B’ and ‘paragraph C’ criteria [of a PRTF] are not an RFC assessment but are used to rate the severity of mental impairment(s) at steps 2 and 3 of the sequential evaluation process. The mental RFC assessment used at steps 4 and 5 of the sequential evaluation process requires a more detailed assessment[.]”); *see also* 20 C.F.R. § 416.920a(c)(3).³ Dr. Nesin, who apparently is not a mental-health expert and never was consulted by the plaintiff specifically for mental-health concerns, commented: “I do not have a great deal of insight into her capabilities, although by her own history and her father’s history over the course of the past 8 years that I have known them, she has very little energy and very little ability to attend to tasks, thereby relying on other people to help her manage with her daily affairs. She is capable of doing her own personal care but she is likely to have difficulty with persistent understanding, memory, sustained concentration. Her social interactions are normal. Adaptations likely to be limited.” Record at 190.

The administrative law judge discounted Dr. Nesin’s report, noting that “Dr. Nesin, who is not a psychiatrist, stated that the claimant has been seen only occasionally since 1988,” that the plaintiff’s care had been “truly episodic” and that he did not have “a great deal of insight into her capabilities.” *Id.* at 18 (emphasis in original). However, even assuming *arguendo* the propriety of the disregard of Dr. Nesin’s report, the administrative law judge was left with no positive evidence of record supporting any finding that the plaintiff’s severe mental conditions did or did not impose functional restrictions. In posing hypothetical questions to the vocational expert the administrative law judge included only one restriction flowing from the two mental conditions, which – not surprisingly given the lack of evidence of record – was based on the administrative law judge’s personal observations.

³ Inasmuch as appears, Drs. Allen and Hoch did not complete MRFC forms because they judged the plaintiff’s mental disorders non-severe. *See* Record at 140, 157. However, what matters for purposes of this appeal is that the administrative law judge determined the conditions to be severe, thus triggering the need for an MRFC assessment.

Id. at 53 (“And if we added in just based on observations, my observation, if a person would need routine non complex tasks . . . would there be a substantial base of jobs in all categories?”). Personal observation, standing alone, is not a proper foundation for assessment of functional limitation in a case (such as this) in which those kinds of sequelae are not obvious to a layperson. *See, e.g., Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 6-7 (1st Cir. 1991) (“The kind of foundation that the claimant initially must lay requires no more than putting into issue functional loss that precludes performance of pertinent prior work activities. Once this threshold is crossed, the ALJ has the obligation to measure the requirements of former work against the claimant’s capabilities; and, to make that measurement, an expert’s RFC evaluation is ordinarily essential unless the extent of functional loss, and its effect on job performance, would be apparent even to a lay person.”).⁴

This error, in turn, undermined the substantiality of evidence supporting the commissioner’s Step 5 finding – which hinged on the accuracy of the data transmitted via hypothetical questions to the vocational expert. *See, e.g., Arocho v. Secretary of Health & Human Servs.*, 670 F.2d 374, 375 (1st Cir. 1982) (responses of vocational expert are relevant only to extent offered in response to hypotheticals that correspond to medical evidence of record).⁵

⁴ Counsel for the commissioner acknowledged at oral argument that the functional restrictions caused by the plaintiff’s mental impairments would not be obvious to a layperson.

⁵ For purposes of remand I briefly address the plaintiff’s remaining two points of error. I agree that the administrative law judge’s credibility determination leaves something to be desired. Although the administrative law judge stated in her “Findings” section that the plaintiff’s statements concerning her impairments and their impact on her ability to work were “not entirely credible,” Finding 3, Record at 20, she seems in fact to have credited the plaintiff’s statements, which she found tended to demonstrate work capacity, *id.* at 18. To the extent she meant to discredit any of the plaintiff’s statements, she did not explain, nor is it otherwise clear, which statements they were or why they were less than credible. While I do not agree that the plaintiff has demonstrated “good cause” for her prior omission of the asserted new and material evidence – she essentially acknowledges that she obtained the new material as a result of a change in counsel, *see* Statement of Errors at 12, 14 – counsel for the commissioner conceded at oral argument that upon remand on any basis the commissioner would have a duty to consider all available evidence (which of course includes the proffered reports of David W. Booth, Ph.D. and Kenneth Senter, M.D., attached as Exhs. A & B to the Statement of Errors).

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the case **REMANDED** for further proceedings not inconsistent herewith.

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 13th day of August, 2001.

*David M. Cohen
United States Magistrate Judge*

PORTLD ADMIN

U.S. District Court
District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-5

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Cause: 42:405 Review of HHS Decision (SSID)

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