

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HEATHER GIGUERE,)
)
 Plaintiff)
)
 v.)
)
 LARRY G. MASSANARI,¹)
 Acting Commissioner of Social Security,)
)
 Defendant)

Docket No. 00-374-P-C

REPORT AND RECOMMENDED DECISION²

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the questions whether the commissioner gave appropriate weight to the opinions of the plaintiff’s treating physicians, failed to consult one of those physicians under circumstances requiring him to do so and failed to comply with applicable Social Security Rulings. 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 plaintiff met the disability insured status

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. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. This 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.

requirements of the Social Security Act on October 1, 1995, the date the plaintiff stated she became unable to work, and acquired sufficient quarters of coverage to remain insured only through June 30, 1998, Finding 1, Record at 20; that she had not engaged in substantial gainful activity since October 1, 1995, Finding 2, *id.*; that the medical evidence established that she suffered from fibromyalgia and migraine headaches, impairments that were severe but did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404, Finding 3, *id.*; 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 20 pounds or more than 10 pounds on a regular basis, Finding 5, *id.*; that in her past relevant work as sales clerk, billing clerk and food court attendant, as that work generally was performed in the national economy, she was not required to lift more than 20 pounds, Finding 6, *id.*; that her referenced past relevant work did not require the performance of work functions precluded by her medically determinable impairments and that her impairments therefore do not prevent her from performing her past relevant work, Findings 7-8, *id.*; and that she therefore had not been under a disability as defined in the Social Security Act at any time through the date on which her insured status expired or through the date of the decision, Finding 9, *id.* The Appeals Council declined to review the decision, *id.* at 6-7, 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).

Discussion

The administrative law judge reached Step 4 of the sequential evaluation process, at which stage the plaintiff 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 concerning 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 1975-82*, at 813.

The plaintiff asserts that the administrative law judge misconstrued and failed to give proper weight to the opinions of her treating physicians. Itemized Statement of Errors Pursuant to Local Rule 16.3, etc. ("Itemized Statement") (Docket No. 3) at 2-4. Specifically, she contends that the administrative law judge wrongly discounted limitations imposed by Syed Kazmi, M.D., as being due to pregnancy and nursing and therefore limited in time and that his decision fails to take into account her long-standing inability to perform repetitive tasks. The plaintiff bases the former contention on the following statement from the administrative law judge's decision:

Although the undersigned has considered the limitations placed on the claimant by Dr. Syed Kazmi (Exhibit 12F) [sic]³ he finds that these are based primarily on Ms. Giguere's pregnancy and nursing of her new baby; therefore, are considered to be only a temporary condition rather than based on her diagnosed impairments.

³ Exhibit 12F is the report of Dr. Steven Johnson, a consulting physician. Record at 268-69. Dr. Kazmi's reports are Exhibits 17F and 18F. Record at 424, 427-28.

Record at 19. Contrary to the plaintiff's position, it is not clear from Dr. Kazmi's letter that the limitations he imposed — part-time work while avoiding repetitive work, extremes of temperature, frequent bending and lifting more than five to ten pounds — while “based on pain from fibromyalgia,” Itemized Statement at 3, might not also be ameliorated once the plaintiff were able to pursue the “pharmacological interventions” that Dr. Kazmi discussed with her, Record at 424, for which she was not a candidate while nursing her newborn. This interpretation is borne out by the doctor's clinic note bearing the same date as his letter, one week before the hearing. *Id.* at 427. Dr. Kazmi also stated that the plaintiff would benefit from a formal rehabilitation program, *id.* at 424, but pointed out that such a program might “not be appropriate” while the plaintiff was breastfeeding, *id.* at 428. The administrative law judge's interpretation of this evidence, while not the only possible interpretation, is not unreasonable.⁴ It is not inconsistent with 20 C.F.R. § 404.1527, the regulation cited by the plaintiff.

With respect to her inability to perform repetitive tasks, the plaintiff contends that the administrative law judge “fails to mention or give adequate weight to” the clinic note of Robert Haile, M.D., Itemized Statement at 3-4, made almost three years before the hearing, to the effect that she “will continue to have permanent work restrictions because of her fibromyalgia. Usually, patients with fibromyalgia are unable to perform heavy work or highly repetitive work,” Record at 266. Since none of the past relevant work to which the administrative law judge found that the plaintiff could return is properly classified as heavy work, Record at 59-60, any possible error in failing to mention this limitation is harmless. At Step 4 of the sequential evaluation process, it is the plaintiff's burden to

⁴ Although the administrative law judge awkwardly stated that he found that the “limitations” identified by Dr. Kazmi stemmed from pregnancy and breastfeeding, Record at 19, it is clear from the context of his overall discussion, *see id.* at 18 (summarizing Kazmi letter), that he understood Dr. Kazmi to be opining that the plaintiff's pain stemmed from fibromyalgia but that the universe of pain-relief interventions available to her at that time was sharply limited by pregnancy and breastfeeding. Her limitations in that sense were “imposed” by pregnancy and breastfeeding.

show that she is unable to return to her former employment, and the administrative law judge may rely on her own descriptions of the duties involved in that work. *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991). Here, while the plaintiff did testify that her past work as a billing clerk involved repetitive tasks, Record at 34, she also testified that her past work as a child care attendant did not, *id.* at 36. She provided no evidence that her work as a sales clerk and food counter attendant involved repetitive tasks. The administrative law judge found that the plaintiff could return to her past relevant work as a sales clerk, billing clerk and food counter attendant. While any error in failing to discuss the limitation on repetitive work might affect the administrative law judge's conclusion with respect to the billing clerk position, there is no evidence to support a finding that such an error would affect his conclusion with respect to the other two positions. Again, therefore, any such error is harmless.

The plaintiff next argues that the administrative law judge committed a fatal error by failing to consult Dr. Kazmi, as required by Social Security Ruling 96-5p because his "limitations are explicitly based on pain from fibromyalgia rather than complications from pregnancy" and the administrative law judge thus was required to seek clarification of the basis for that opinion. Itemized Statement at 4. As I have already noted, the administrative law judge reasonably interpreted Dr. Kazmi's statements as suggesting that the plaintiff would be able to ameliorate her pain after completing pregnancy and breastfeeding; he did not take the position that Dr. Kazmi said that the pain itself was caused by the pregnancy. There is no indication in the written decision that the administrative law judge concluded that the evidence did not support Dr. Kazmi's opinion. Accordingly, there was no reason for the administrative law judge to seek clarification directly from Dr. Kazmi.⁵

⁵ At oral argument, counsel for the commissioner characterized the administrative law judge as having rejected Dr. Kazmi's opinion on the plaintiff's limitations as inconsistent with the record evidence. As counsel for the plaintiff noted in response, SSR 96-5p requires that an adjudicator in such a situation attempt to recontact the treating source for clarification. However, counsel for the commissioner (*continued on next page*)

Next, the plaintiff contends that the administrative law judge failed to “set forth a function by function RFC considering exertional and nonexertional limitations as required by” Social Security Ruling 96-8p. Itemized Statement at 5. The only specific error noted by the plaintiff in this context is the assertion that “the Decision gives no basis for rejecting . . . limits on repetitive work specified by Dr. Kazmi and Dr. Haile.” *Id.* As I have already noted, the plaintiff failed to establish that each of the past relevant jobs to which the administrative law judge found she could return involved repetitive physical motions, so any such error would be harmless. In addition, Dr. Haile merely stated in general that patients with fibromyalgia “usually” are unable to perform “highly repetitive work.” Record at 266. He did not state that this was true of the plaintiff, nor did he describe “highly” repetitive work.

The plaintiff next faults the administrative law judge for an asserted failure to find limitations related to headaches, citing only her own testimony on this point. Itemized Statement at 5. Given the fact that the administrative law judge found that the plaintiff’s migraine headaches “cause[d] significant vocationally relevant limitations,” *id.* at 15, he should have discussed those limitations in connection with his assessment of the plaintiff’s ability to return to her past relevant work. However, the record does contain substantial evidence to support his necessarily-implied conclusion that, as of the time of the hearing, those headaches did not render her incapable of returning to her past relevant work. The most recent medical reports provided by the plaintiff were prepared by Dr. Kazmi. The clinic notes from July and August 1999 do not mention headaches, Record at 420-23, and the November 1999 notes specifically state that the current headaches are tension headaches, not migraine, *id.* at 427. In addition, neither Dr. Kazmi, Dr. Haile nor Dr. Johnson identifies functional restrictions stemming from the headaches. *See id.* at 266-67, 268-69, 424.

misconstrued the administrative law judge’s decision, which purported to credit, rather than reject, the Kazmi opinion but reasonably interpreted it as suggesting that the plaintiff would not be so limited were she able to attempt pain-relief measures proscribed by her pregnancy and breastfeeding.

Finally, the plaintiff contends that the administrative law judge “fail[ed] to adequately evaluate limitations from pain.” Itemized Statement at 5. She asserts that the discussion of pain in the written decision is “cursory, slanted and inadequate, failing to even mention the Plaintiff’s pain from headaches[,] pain in her upper extremities, or her testimony that pain at times would force her to miss work altogether.” *Id.* at 6 (citations omitted). Contrary to the tenor of the plaintiff’s argument, it is not necessary that the administrative law judge mention each instance or type of pain about which the plaintiff testified before he may decide to reject that testimony in whole or in part. Social Security Ruling 96-7p directs that the written decision “must contain specific reasons for the finding on credibility [with respect to testimony concerning pain], supported by the evidence in the case record, and must be sufficiently specific to make clear to the individual and to any subsequent reviewers the weight the adjudicator gave to the individual’s statements and the reasons for that weight.” Social Security Ruling 96-7p, reprinted in *West’s Social Security Reporting Service Rulings 1982-1991* (Supp. 2001) at 134. The administrative law judge’s discussion of the plaintiff’s testimony concerning pain in this case meets, although it does not exceed, this standard. *See Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987).

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.

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