

In accordance with the sequential evaluation process then in effect for claims of disabled children, 20 C.F.R. § 416.924, the administrative law judge found, in relevant part, that the plaintiff, who was born on July 10, 1982, had never engaged in substantial gainful activity, Findings 1-2, Record at 23-24; that the plaintiff suffered from a learning disorder with very mild speech and language delays, a history of alcohol abuse and dependency, a history of polysubstance abuse and dependence, and a non-severe, benign heart murmur, impairments that had lasted for a continuous period of more than 12 months, Findings 3-4, *id.* at 24; that from the alleged onset of his disability until January 1999 the plaintiff suffered from an impairment meeting the criteria of Section 112.09 of Appendix 1 to Subpart P. 20 C.F.R. Part 404 (“the Listings”), by reason of alcohol and polysubstance abuse and dependency, Findings 5-6, *id.*; that prior to January 1999 the plaintiff’s alcohol and polysubstance abuse and dependence were factors material to the determination that he was disabled, Finding 9, *id.*; that at no time subsequent to January 1999 had the plaintiff suffered from an impairment which met the criteria of any impairment included in the Listings nor had he suffered from any impairment which could be said to be medically or functionally equivalent to an Listings impairment, Finding 7, *id.*; that at no time subsequent to January 1999 had the plaintiff suffered from impairments that resulted in marked and severe functional limitations, Finding 8, *id.*; and that the plaintiff had not been under a disability as defined by the Social Security Act at any time since September 15, 1989, the alleged date of onset of his disability, Finding 10, *id.* The Appeals Council declined to review the decision, *id.* at 4-5, making it the final decision 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).

Discussion

Significant changes in the way childhood disability claims were evaluated by the Social Security Administration were made by the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Public Law 104-193. Supplemental Security Income; Determining Disability for a Child Under Age 18, 65 Fed. Reg. 54,747, 54,747 (Sept. 11, 2000). The Act required that, to qualify for childhood disability benefits, a child have “a medically determinable physical or mental impairment, which results in marked and severe functional limitations, and which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. § 1382c(a)(3)(C)(i). On February 11, 1997 the commissioner published interim final rules implementing the Act’s childhood-disability provisions. 65 Fed. Reg. at 54,747. These rules were in effect when the administrative law judge’s opinion was issued in this case on June 17, 1999. Record at 8. The final version of the rules took effect on January 2, 2001, 65 Fed. Reg. at 54,747, before the Appeals Council declined review on March 30, 2001, Record at 4.

The interim rules established a three-step sequential-evaluation process pursuant to which the commissioner inquired whether a child (i) had engaged in substantial gainful activity; (ii) suffered from one or more severe impairments; and (iii) had an impairment or combination of impairments that met, medically equaled or functionally equaled an impairment listed in the Listings. 20 C.F.R. § 416.924(a) (1997).

Pursuant to these rules, a child’s impairment(s) would be found functionally equal to a listed impairment if (i) the child’s condition resulted in “extreme limitation of one specific function, such as

walking or talking” or “extreme limitations in one [broad] area of functioning or marked limitation in two [broad] areas of functioning;” (ii) the child was subject to “episodic” limitations such as “frequent illnesses or attacks;” or (iii) the child’s condition required treatment that itself “cause[d] marked and severe functional limitations.” *Id.* § 414.926a(b)(1)-(4). In turn, broad areas of functioning were defined as (i) cognition/communication, (ii) motor, (iii) social, (iv) responsiveness to stimuli (birth to age one only), (v) personal (ages three to eighteen only) and (vi) concentration, persistence or pace (ages three to eighteen only). *Id.* § 416.926a(c)(4). For a claimant between the ages of three and eighteen, a “marked” limitation was defined as “more than moderate and less than extreme . . . interfer[ing] seriously with the child’s functioning” (internal punctuation omitted), while an “extreme” limitation would prohibit any “meaningful functioning in a given area.” *Id.* §§ 416.926a(c)(3)(i)(C) & (c)(3)(ii)(C).

On September 11, 2000 the commissioner published final regulations implementing the Act, effective January 2, 2001 and explained:

When the final rules become effective, we will apply them to new applications filed on or after the effective date of the rules. We will also apply them to the entire period at issue for claims that are pending at any stage of our administrative review process, including claims that are pending administrative review after remand from a Federal court. With respect to claims in which we have made a final decision, and that are pending judicial review in Federal court, we expect that the court’s review of the Commissioner’s final decision would be made in accordance with the rules in effect at the time of the final decision In those cases decided by a court after the effective date of the rules, where the court reverses the Commissioner’s final decision and remands the case for further administrative proceedings, on remand, we will apply the provisions of these final rules to the entire period at issue in the claim.

65 Fed. Reg. at 54,751.

The final version of the rules continues the three-step evaluation process, 20 C.F.R. § 416.924 (2000), but the details of the third element differ. If one or more impairments are found to be severe,

the administrative law judge will determine whether the impairment(s) meet, medically equal or functionally equal the Listings in accordance with 20 C.F.R. §§ 416.926 and 416.926a. The plaintiff contends that the changes to these regulations are so extensive that remand is required. Statement of Errors (Docket No. 4) at 10-12. However, the statement of errors contends only that the record evidence establishes that the plaintiff met one or more listings. *Id.* at 2-8. Accordingly, as there is no significant change in the Listings, the plaintiff's argument fails. In any event, I would be inclined to follow the suggestion of the commissioner in the comments published in the Federal Register, quoted above, and apply the regulations in effect at the time of the Appeals Council's decision rather than sending the case back to the commissioner to perform that exercise. *See, e.g., Robles v. Commissioner of Soc. Sec.*, 2001 WL 194888 (S.D.N.Y. Feb. 27, 2001) at 2 n.3 (applying interim rules because they were in effect at time of Appeals Council decision).

The plaintiff contends that the administrative law judge failed to consider his alleged impairments in combination as required by *Sullivan v. Zebley*, 493 U.S. 521 (1990). Statement of Errors at 3-6. The statute at issue in *Zebley*, 42 U.S.C. § 1382c(a)(3)(A) (1982), 493 U.S. at 529, has since been substantially amended and the relevant section is now found at 42 U.S.C. § 1382c(a)(3)(C)(i) (Supp. 2001). The newer statutory language was applicable at the time of the administrative law judge's decision in this case. To the extent that *Zebley* is still applicable to child benefit claims and to the extent that it requires the commissioner to consider whether the claimant's alleged impairments in combination present a medical or functional equivalent of a listing, the administrative law judge had no reason to do so in this case, because the only impairments alleged by the plaintiff that the administrative law judge could consider were his mental impairment and his heart murmur.² Disability Report – Child, Record at 92; Transcript, *id.* at 28-50; Reconsideration Notice,

² The administrative law judge also noted impairments due to alcohol abuse and dependency and polysubstance abuse and (continued on next page)

id. at 63. The administrative law judge found that the heart murmur was not severe, *id.* at 24, making it unnecessary to consider at the third step of the sequential evaluation process. There is no medical evidence in the record that would support a conclusion that the plaintiff's heart murmur is more than a "slight abnormality . . . that causes . . . more than minimal functional limitations." 20 C.F.R. § 416.924(c).³ Accordingly, there were no impairments for the administrative law judge to consider in combination. He correctly focused on the plaintiff's alleged mental impairment.

In connection with this argument, the plaintiff contends, Statement of Errors at 5, that the verbal IQ score of 73 he attained on testing by the consultative examiner after the hearing, Record at 193, "could be below 70," based on the opinion of another clinical psychologist that there is no functional difference between a score of 70 and a score of 74 and the consultative examiner's statement that the true full-scale score, given as 75, could fall within the range of 71-80, *id.* This argument is offered in support of the plaintiff's contention that he met Listing 112.05(D), Statement of Errors at 5-6, which requires a valid verbal, performance or full scale IQ of 60 through 70 and a physical or mental impairment imposing an additional and significant limitation of function. This argument has been rejected by numerous courts. *E.g., Dover v. Apfel*, 203 F.3d 834 (table), 2000 WL 135170 (10th Cir. Feb. 7, 2000), at * 2; *Anderson v. Sullivan*, 925 F.2d 220, 223 (7th Cir. 1991); *Cockerham v. Sullivan*, 895 F.2d 492, 495-96 (8th Cir. 1990). The commissioner was entitled to rely on the score as determined by the examining psychologist.

The plaintiff also contends that the administrative law judge "effectively disregarded," "simply ignore[d]" and "simply refuse[d] to believe" the testimony of his mother, the only witness at the

dependency, Record at 24, neither of which may serve as grounds for award of benefits, 20 C.F.R. § 416.935.

³ As medical evidence to support his contention that the heart murmur is a serious medical condition, the plaintiff relies, Statement of Errors at 8, on the record of his own report to a physician on October 21, 1997 that he had "a couple of episodes of near syncope both occurring during basketball games," Record at 178. However, the physician actually determined that there was "[c]ertainly nothing on exam to suggest a significant valvular abnormality," *id.* at 179, and there is nothing in the record to suggest that the
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hearing. Statement of Errors at 9. While an administrative law judge may not “tacitly reject a witness’s testimony as not credible,” *Ceguerra v. Secretary of Health & Human Servs.*, 933 F.2d 735, 738 (9th Cir. 1991), and “must make specific findings as to the relevant evidence he considered in determining to disbelieve the [witness],” *DaRosa v. Secretary of Health & Human Servs.*, 803 F.2d 24, 26 (1st Cir. 1986), there is no suggestion in the administrative law judge’s decision in this case that he determined to disbelieve the testimony of the plaintiff’s mother. In fact, he specifically summarized the mother’s testimony. Record at 16-17. He did not reject that testimony but rather tied most of the symptoms she mentioned to the plaintiff’s use of drugs and alcohol. *Id.* at 19-20. This determination does not constitute rejection of the mother’s testimony or refusal to believe it. Indeed, it credits her testimony. It simply adopts a different basis for the symptoms than the plaintiff would prefer. The plaintiff is not entitled to remand based on any credibility determination made by the administrative law judge.

The plaintiff also contends that the evidence established that his mental impairment met or equaled Listing 112.02, organic mental disorders. In accordance with the comments to the promulgation of the revised regulations, I will consider this claim in light of the regulations as they existed on March 30, 2001, the date of the Appeals Council’s decision and the day before the final regulations took effect. As the plaintiff notes, at the time of the hearing the listing provided, in relevant part:

Abnormalities in perception, cognition, affect, or behavior associated with dysfunction of the brain. The history and physical examination or laboratory tests, including psychological or neuropsychological tests, demonstrate or support the presence of an organic factor judged to be etiologically related to the abnormal mental state and associated deficit or loss of specific cognitive abilities, or affective changes, or loss of previously acquired functional abilities.

echocardiogram apparently obtained at this physician’s recommendation, *id.* at 180, resulted in any findings that would suggest a severe impairment as that term is defined in the regulations.

The required level of severity for these disorders is met when the requirements in both A and B are satisfied.

A. Medically documented persistence of at least one of the following:

1. Developmental arrest, delay or regression; or
* * *
5. Disturbance in personality (e.g., apathy, hostility); or
6. Disturbance in mood (e.g., mania, depression); or
* * *
8. Impairment of impulse control (e.g., disinhibited social behavior, explosive temper outbursts); or
9. Impairment of cognitive function, as measured by clinically timely standardized psychological testing; or
10. Disturbance of concentration, attention, or judgment;

AND

B. Select the appropriate age group to evaluate the severity of the impairment:

* * *

2. For children (age 3 to attainment of age 18), resulting in at least two of the following:

a. Marked impairment in age-appropriate cognitive/communicative function, documented by medical findings (including consideration of historical and other information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, the results of appropriate standardized psychological tests . . . ; or

b. Marked impairment in age-appropriate social functioning, documented by history and medical findings (including consideration of information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, the results of appropriate standardized tests; or

c. Marked impairment in age-appropriate personal functioning, documented by history and medical findings (including consideration of information from parents or other individuals who have knowledge of the child, when such information is needed and available) and including, if necessary, appropriate standardized tests; or

d. Deficiencies of concentration, persistence, or pace resulting in frequent failure to complete tasks in a timely manner.

20 C.F.R. Part 404, Subpart P, Appendix 1, § 112.02 (2000). The plaintiff contends that the administrative law judge and the state-agency evaluators erroneously required that any deficiencies of concentration, persistence or pace be “marked,” when the regulation did not require this level of

severity. Statement of Errors at 7-8. The listing in effect since April 2, 2001 specifically requires these deficiencies to be “marked,” like the other three “B” criteria. 20 C.F.R. Part 404, Subpart P, Appendix 1, § 112.02(B)(2)(d) (2001).

The state-agency evaluators found the plaintiff to have a “marked” degree of limitation in the cognitive-communicative category and a “less than marked” but more than “no evidence of limitation” degree of limitation in the social, personal and concentration, persistence or pace categories of the “B” listing criteria. Record at 151, 155. The administrative law judge did not discuss these findings and accordingly cannot be said to have required that the deficiencies of concentration, persistence or pace be “marked,” in excess of the applicable regulatory requirement. He appears instead to have discounted these evaluations as evidence of symptoms caused by drug or alcohol abuse and dependency. Record at 19. The evaluators’ reports were completed before the plaintiff underwent drug rehabilitation in January 1999, shortly before the hearing, and the administrative law judge understandably did not refer to those reports once he determined that symptoms reported before that date were due primarily to the plaintiff’s substance abuse.

Contrary to the plaintiff’s argument, there is evidence in the record to support the administrative law judge’s conclusion that his mental impairments do not meet or equal a listing absent the effects of substance abuse. The decision cites exhibits 4F, 6F and 9F in support of the conclusion that the plaintiff suffers from “a learning disorder with very mild speech and language delays,” Record at 16, and discusses his functional limitations in the relatively brief period between the time he stopped using drugs and alcohol and the hearing in considerable detail, *id.* at 21-23. In Exhibit 4F, at a time when the plaintiff claimed to have been abusing marijuana and alcohol but before he claimed to have begun abusing other drugs, *id.* at 192, a consulting examining physician reported to the state disability agency that the plaintiff had a “[l]earning/developmental delay with underlying speech and

learning disability. John seems to be doing relatively well despite his lear[n]ing disability. No recommendations for further intervention,” *id.* at 179. In Exhibit 6F, a treating psychologist at the inpatient substance abuse facility where the plaintiff received treatment in January 1999 was unable to determine whether the plaintiff’s symptoms were biologically based, as opposed to arising from his substance abuse. *Id.* at 185-86. In Exhibit 9F, a consulting psychologist who examined the plaintiff at the request of the administrative law judge diagnosed a learning disorder independent of substance dependence only in the area of short-term verbal memory functioning. *Id.* at 195. Thus, there is evidence that even with early alcohol and marijuana use, the plaintiff’s mental disability was found by a medical source to be less than severe, and that after he stopped abusing alcohol and drugs a medical source found his disability to be limited to short-term verbal memory functioning. This evidence is sufficient to support the administrative law judge’s conclusions.

In the section of his statement of errors headed “Introduction,” and before the section titled “Specific Errors,” the plaintiff states, *inter alia*, “The administrative law judge . . . failed to complete the required PRT form.” Statement of Errors at 2-3.⁴ This is the only reference to the form in the statement of errors, and ordinarily I would conclude that the plaintiff has waived consideration of this issue by his failure to develop and argue the point. *See, e.g., United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). However, I did ask counsel for both parties about this issue at oral argument. Counsel for the plaintiff contended that the requirement that a PRTF be completed applies to all Social Security benefit claims; counsel for the commissioner contended that it does not apply to cases in which children seek benefits. The applicable regulation in this case, 20 C.F.R. § 416.920a, in the form in which it existed when the Appeals Council denied review, requires the use of a particular technique in evaluating the severity of mental impairments for “persons under age 18 when Part A of

⁴ An administrative law judge has been required in the past to complete a psychiatric review technique form (“PRTF”) by Social
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the Listing of Impairments is used.” 20 C.F.R. § 416.920a(a). Here, Part A was “used” in the sense that it was considered by the administrative law judge. Record at 17. Assuming *arguendo* that this section of the regulation therefore required the application of the technique it sets forth, the most important element of the regulation for present purposes states that a standard document to record how the technique was applied is to be used only “[a]t the initial and reconsideration levels of the administrative review process.” 20 C.F.R. § 416.920a(e). The administrative law judge is directed to “document application of the technique in the decision.” *Id.*

The record includes forms that record evaluation of the severity of the plaintiff’s mental impairment at the initial and reconsideration levels in the manner required by the regulations then in effect. Record at 150-57. While these forms do not precisely track the technique described in the later-adopted version of section 416.920a(b)-(d), the differences are not significant for the purposes of this case. The administrative law judge’s opinion documents application of an evaluation technique, *id.* at 12-23, that is also sufficiently similar to that required by the current regulation to make remand unnecessary. The current regulation does not require the administrative law judge to complete a specific form in addition to the analysis set forth in his opinion.

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.

Security regulations under certain circumstances. See 20 C.F.R. §§ 404.1520a, 416.920a (before April 1, 2001).

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 26th day of November, 2001.

David M. Cohen
United States Magistrate Judge

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