

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

FRANCESKA ST. PIERRE,)	
)	
Plaintiff)	
)	
v.)	Docket No. 01-99-P-C
)	
LARRY G. MASSANARI,)	
Acting Commissioner of Social Security,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) appeal raises questions concerning the sufficiency of the evidence to support the commissioner’s decision concerning the plaintiff’s alleged mental impairments and his use of the testimony of a vocational expert. Because counsel for the commissioner did not dispute at oral argument the fact that the plaintiff applied again for benefits after the decision of the administrative law judge that provides the basis for this proceeding was issued and was granted benefits as of October 23, 1998,² only the period from June 1, 1996, Record at 12, to

¹ This action is properly brought under 42 U.S.C. § 405(g). 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 November 20, 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.

² The statement of errors includes a motion to supplement the record with four exhibits attached to the motion, one of which provides evidence to support this fact. Counsel for the commissioner objected to the motion at oral argument on the grounds that *Mills v. Apfel*, 244 F.3d 1 (1st Cir. 2001), prohibits the admission of evidence relevant to Step 4 review that is submitted after the administrative law judge has made a decision. Of the four exhibits the plaintiff seeks to add, the first, Itemized Statement of Specific Errors, etc. (“Statement of Errors”) (Docket No. 5), Attachment I, is the cover letter which accompanied the submission of additional evidence to the administrative law judge after the hearing, which is part of the record, Exhibit 19F. The cover letter itself merely
(continued on next page)

October 23, 1998 is at issue here. 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. § 404.1520; *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 requirements of the Social Security Act on June 1, 1996, the date she stated she became unable to work, and had acquired sufficient quarters of coverage to remain insured at least through December 31, 2001, Finding 1, Record at 21; that the plaintiff had not engaged in substantial gainful activity since June 1, 1996, Finding 2, *id.*; that the medical evidence established that the plaintiff had scoliosis with lower back pain, an impairment that was 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 (the "Listings"), Finding 3, *id.*; that the plaintiff's statements concerning her impairment and its impact on her ability to work were not entirely credible in light of inconsistencies in her own reports, her medical history and the reports of the treating and examining practitioners, Finding 4, *id.* at 22; that the plaintiff lacks the residual functional

presents additional argument from counsel. There is no indication in the transcript that additional argument would be submitted after the hearing, and I see no need for the letter to be included in the record. The motion is denied as to Attachment I. Attachment II consists of a letter from counsel for the plaintiff to the local office of the Social Security Administration and five pages of medical records. The letter is part of the administrative record. Record at 9. Inexplicably, the medical records are not. Contrary to the position of counsel for the commissioner at oral argument, *Mills* does not require the court to deny the motion with respect to these documents because there is no indication in the record that the Appeals Council ever considered them, and there certainly is no way, on the record presented, that this court could determine whether the Appeals Council "mistakenly rejected" them, 244 F.3d at 6. Because I conclude that remand is required based on other evidence, it is not necessary to determine whether remand would be required to remedy this omission from the record. However, I will grant the motion to supplement as to this document to ensure that it does appear in the record before the commissioner on remand. The first page of Attachment III is a letter from an appeals judge stating that the additional evidence submitted on January 18, 2001 was received after the Appeals Council had denied review and notes that it is "not material to the issue of disability on or before October 23, 1998." Despite the fact that the letter also states that "[t]he additional evidence will be entered into the court record, which was not done, *Mills* requires that the motion to supplement the record with this evidence be denied because the Appeals Council correctly found that it is not material, given that the medical records included relate only to a period after October 23, 1998. See 20 C.F.R. § 404.970(b) (additional evidence submitted after administrative law judge's opinion is issued must relate to period before date of that decision). The motion is denied as to Attachment III. The final attachment to the motion is a letter informing the plaintiff that benefits have been awarded as of October 23, 1998. Statement of Errors, Attachment IV. Because there is no dispute about this point, addition of this document to the record is unnecessary and the motion is denied as to Attachment IV.

capacity to lift and carry more than 20 pounds or more than 10 pounds on a regular basis, to squat, stoop or crouch, or to climb ladders, ropes or scaffolds more than occasionally, Finding 5, *id.*; that the plaintiff's past work as a cashier did not require her to lift more than 10 pounds, to squat, stoop or crouch, or to climb ladders, ropes or scaffolds more than occasionally and accordingly did not require the performance of work functions precluded by her impairment, Findings 6-7, *id.*; that the plaintiff's impairment did not prevent her from performing her past relevant work and that she therefore had not been under a disability as defined in the Social Security Act at any time through the date of the decision, Findings 8-9, *id.* After considering additional exhibits from counsel for the plaintiff, *id.* at 218-80, 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; *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); *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 conclusions 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 4 of the sequential evaluation process, at which stage the plaintiff bears the burden of proof to demonstrate inability to return to past relevant work. 20 C.F.R. § 404.1520(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); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service Rulings 1975-82*, at 813.

Discussion

The plaintiff's first claimed error, however, implicates Step 2 of the sequential evaluation process. The plaintiff bears the burden of proof at this step, but 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." *Id.* at 1124 (quoting Social Security Ruling 85-28). Here, the plaintiff contends that the administrative law judge should have found her depression to be a severe mental impairment at Step 2. Statement of Errors at 2-5.

The plaintiff's argument on this point relies heavily on her own testimony. Statement of Errors at 2-3. A claimant's testimony about symptoms is insufficient to establish a severe impairment at Step 2 in the absence of medical evidence of an underlying disease or medical condition that could cause the symptoms. 20 C.F.R. § 404.1508. The plaintiff refers as well to medical evidence in support of her argument. Statement of Errors at 4. Some of that evidence was submitted to the Appeals Council after the administrative law judge had issued her opinion. The evidence submitted to the administrative law judge supports her conclusion that the plaintiff's depression was not severe. There is no evidence of more than a minimal impact on the plaintiff's ability to work due to the depression. As noted by the administrative law judge, Record at 17, the plaintiff's counselor, who reported in the

record submitted before the hearing seeing her three times, *id.* at 4, 214, stated that the plaintiff “perhaps[] began her depression” in 1993 and that “I do not feel that the depression in itself is incapacitating,” *id.* at 214-15. The plaintiff did not claim any inability to work before June 1, 1996. *Id.* at 12. The record also indicates that the plaintiff began taking medication for depression in February 1998, *id.* at 216, which had provided “some correction,” *id.* at 215. Accordingly, the administrative law judge did not err at Step 2 of the evaluative process.

The plaintiff also relies on an additional report of her counselor and an evaluation performed by a clinical psychologist nine months after the hearing. Statement of Errors at 3-4; Record at 250. These reports are included in the record as Appeals Council exhibits, Record at 5, meaning that they were submitted to the Appeals Council after the administrative law judge had issued her decision. Although counsel for the commissioner did not mention these exhibits in connection with *Mills* at oral argument, the *Mills* analysis does apply to these documents as well. As will become apparent, I conclude that the Appeals Council’s statement that these exhibits do not “provide[] a basis for changing the Administrative Law Judge’s decision,” *id.* at 6, is not reasonable and that this material evidence does in fact require a different outcome, *see Mills*, 244 F.3d at 6-7.

The plaintiff’s counselor completed a psychiatric review technique form in December 1998 in which she found, *inter alia*, that the plaintiff met Listing 12.04 (affective disorders)³ and suffered marked restriction of activities of daily living and frequent deficiencies of concentration, persistence or pace resulting in failure to complete tasks in a timely manner, as well as moderate difficulties in maintaining social functioning, although the counselor apparently did not complete the further section of the form on the duration and effects of the deficiencies, as the form directs. Record at 239, 246.

³ A treating medical source’s opinion that a claimant meets the criteria of a listing is not binding on the commissioner. 20 C.F.R. § 404.1527(e); Social Security Ruling 96-5p, reprinted in *West’s Social Security Reporting Service* 1983-1991 (Supp. 2001) at 122-24.

This form does not tie the counselor's conclusions to any time period other than the date on which she completed the form. The licensed clinical psychologist, Richard B. Rau, PhD., reported in March 1999 that the results of his testing of the plaintiff were "consistent with those reported by [the counselor] on December 28, 1998 (Psychiatric Review Technique Form,)" that the affective disorder which he diagnosed "results in: marked restriction of activities of daily living, marked inability to maintain social functioning, deficiency in concentration, persistence and pace and the inability to complete tasks in a timely manner," and that she suffered from dysthymic disorder and avoidant personality disorder. Record at 265-66. While none of the psychologist's discussion is directed specifically to the period between June 1, 1996 and October 23, 1998, he does note that "[t]he essential feature of Dysthymic Disorder is a chronically depressed mood that occurs for most of the day more days than not for at least 2 years" and that "[t]he essential feature of Avoidant Personality Disorder is a pervasive pattern of social inhibition, feelings of inadequacy, and hypersensitivity to negative evaluation that begins by early adulthood." *Id.* at 266-67. The plaintiff was almost 56 years old on the date of the report. *Id.* at 250. The psychologist also concludes that the plaintiff "certainly is not able to function on a consistent basis at a work setting." *Id.* at 267. This is sufficient medical evidence to require a finding that at Step 2 of the evaluative process that the plaintiff's depression was a severe impairment at the relevant time.

The Appeals Council action may nonetheless be upheld if the record reflects that the commissioner considered the effects of this impairment at Step 4 of the process, where his decision to deny benefits, which was upheld by the Appeals Council, was made. *See, e.g., King v. Commissioner of Soc. Sec. Admin.*, 69 Soc.Sec.Rep.Ser. 219, 2000 WL 633561 (D. Or. May 11, 2000) at *4 n.1; *Holland v. Apfel*, 55 Soc.Sec.Rep.Ser. 1235, 1998 WL 205691 (E.D. Pa. April 28, 1998) at *5. The plaintiff attacks the commissioner's alleged reliance on the testimony of a vocational expert at Step 4,

pointing out that the expert's testimony was that the plaintiff could not return to her past relevant work, contrary to the administrative law judge's conclusion. Statement of Errors at 5-6. She also contends that the commissioner did not consider at Step 4 her non-exertional limitations due to her depression. *Id.* at 8. The plaintiff's latter contention is correct, although only because the evidence before the Appeals Council, submitted after the administrative law judge had reached her decision, required consideration of those limitations at Step 4. There is no suggestion in either the administrative law judge's opinion or the letter from the Appeals Council declining review that the limitations found by the clinical psychologist to have existed for at least two years before March 1999 were considered with respect to the plaintiff's ability to return to her past relevant work. Remand is therefore necessary.

For the purpose of confining the scope of that remand to consideration of only the questions requiring further attention from the commissioner, I note that the alleged inconsistency between the vocational expert's testimony and the administrative law judge's conclusion at Step 4 does not require remand. The administrative law judge never reached the vocational expert's testimony because she concluded that the plaintiff was capable of returning to her past relevant work, making irrelevant her question to the vocational expert including limitations that she ultimately found not to be supported by the evidence. The plaintiff disagrees, citing her own testimony concerning her problems with her right shoulder and her hands. Statement of Errors at 7. The plaintiff's testimony concerning her hands is that "[s]ometimes my hands bother me and I have a hard time to pick up things," "I still have soreness in my hands," and "[s]ometimes my hands, like, mostly it's in my left thumb and my other, my right hand, it's just that it feels weak at times, like I can't pick up anything." Record at 36, 42-43, 49. When asked at oral argument to identify medical evidence in the record to support this testimony concerning symptoms, counsel for the plaintiff referred the court to page 7 of the statement of errors. The mention

of only medical evidence at that page of the statement of errors is in reference to the plaintiff's alleged "problems with the right shoulder." Statement of Errors at 7. One of the cited pages is a medical report that includes the plaintiff's report that she is taking medication prescribed by another physician for tendonitis in the left thumb and one finger on the right hand, but, to the extent that the report may reasonably be interpreted to present the signing physician's evaluation of the medical condition of the plaintiff's hands, his conclusion is that "[t]here is no impairment." Record at 180. The plaintiff also reported to this physician that the thumb and finger would give her "discomfort" on days when she did not take the medication. *Id.* As the administrative law judge noted, Record at 16, 20, the medical evidence does not support a finding that the plaintiff has any significant limitation due to the condition of her hands, even when this evidence is considered.

With respect to her right shoulder and reaching above shoulder level, the plaintiff cites her own testimony and medical records. Statement of Errors at 7. The administrative law judge discounted the finding of a reviewing physician at the state disability determination service that the plaintiff should have "no above shoulder reaching," Record at 149, because "[n]owhere in the record does a treating or examining physician say that the claimant has difficulty reaching overhead. . . . No objective signs have been noted by any practitioner that the claimant has an impairment that would prevent activity over shoulder level," *id.* at 20. A different reviewing physician did not suggest any such limitation. *Id.* at 138-45. The plaintiff's testimony was merely that she has "problems with my [right] shoulder" and that a physician told her that she has a 15% disability in her arm and shoulder. *Id.* at 41-43. She did not testify about any functional limitations in the use of that shoulder. Of the medical records cited by the plaintiff on this point, only two concern the time frame at issue here, and both of those state merely "She has decreased range of motion of . . . the right shoulder." *Id.* at 162, 195. This statement is insufficient to establish a limitation on reaching above shoulder level with the

right arm. The plaintiff has not identified any entry in the medical records submitted after the hearing that address the relevant time period that provide any basis for a limitation on gripping with the hands or on reaching above shoulder level with the right arm. Accordingly, the commissioner need not revisit this issue on remand.

Finally, the plaintiff contends that her claim should be remanded for payment of benefits pursuant to *Field v. Chater*, 920 F. Supp. 240, 244 (D. Me. 1996), because “the Commissioner attempted to buttress his infirm finding at Step 4 with an alternative finding at Step 5.” Statement of Errors at 9. The mere fact that some of the discussion included in an administrative law judge’s opinion might be relevant to a decision at Step 5 of the evaluative process, even though the decision actually rests at an earlier step, does not and cannot mean that *Field* requires remand for payment of benefits if the decision is not supported by substantial evidence. *Field* is clearly limited by its terms to decisions made at Step 5, for reasons set forth in that opinion. The plaintiff’s argument would open all decisions denying benefits to the possibility of remand with an order that benefits be paid, allocating to the court a task that should remain with the commissioner except under the limited circumstances described in *Field*. The court should reject the plaintiff’s invitation to so broadly increase the scope of *Field*.

Conclusion

For the foregoing reasons, I recommend that the commissioner’s decision be **VACATED** and the case **REMANDED** for further proceedings consistent 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 26th day of November, 2001.

David M. Cohen
United States Magistrate Judge

FRANCESKA ST PIERRE MICHAEL A. BELL
plaintiff 786-0348
 [COR LD NTC]
 621 MAIN STREET
 LEWISTON, ME 04240
 786-0348

v.

SOCIAL SECURITY ADMINISTRATION JAMES M. MOORE, Esq.
COMMISSIONER [COR LD NTC]
defendant U.S. ATTORNEY'S OFFICE
 P.O. BOX 2460
 BANGOR, ME 04402-2460
 945-0344

ESKUNDER BOYD, ESQ.
[COR LD NTC]
ASSISTANT REGIONAL COUNSEL
OFFICE OF THE CHIEF COUNSEL,
REGION 1
2225 J.F.K. FEDERAL BUILDING
BOSTON, MA 02203
617/565-4277

