

**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

**SHAWN M. FARRIS,** )  
 )  
 **Plaintiff** )  
 )  
 v. ) **Docket No. 01-104-B**  
 )  
 **JO ANNE B. BARNHART,** )  
 **Commissioner of Social Security,** )  
 )  
 **Defendant** )

**REPORT AND RECOMMENDED DECISION<sup>1</sup>**

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises three issues, all of which involve the claimant’s non-exertional impairments: whether the administrative law judge improperly discounted the claimant’s testimony, whether the evidence supports the administrative law judge’s finding that the claimant’s non-exertional impairments did not significantly limit her ability to perform light work and whether the administrative law judge improperly relied on Appendix 2 to Subpart P, 20 C.F.R. § 404 (the “Grid”) in reaching his conclusion. 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

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<sup>1</sup> 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. 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 March 21, 2002, 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.

administrative law judge found, in relevant part, that the plaintiff remained insured for purposes of the benefits sought through the date of the decision, Finding 1, Record at 17; that she had not engaged in substantial gainful activity since the date of alleged onset of her disability, December 15, 1997, Finding 2, *id.* & at 13; that she had an impairment or combination of impairments that were severe but did not meet or equal those listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the “Listings”), Findings 3-4, *id.* at 18; that her allegations concerning the limitations imposed by her impairments were not totally credible, Finding 5, *id.*; that she had a residual functional capacity for light work with slight non-exertional limitations, so that she could perform substantially all of the full range of light work, Findings 7 & 12, *id.*; that she was unable to perform any of her past relevant work, Finding 8, *id.*; that, in view of her age (32 on July 20, 1999), education (limited), lack of transferable work skills and residual functional capacity, application of Rule 202.18 of the Grid would direct a conclusion of “not disabled,” Findings 9-11, 13, *id.*; that, because her capacity for light work was not significantly compromised by non-exertional limitations, use of the Grid as a framework for decision-making led to the conclusion that the plaintiff was not disabled, Finding 14, *id.*; and that she had not been under a disability at any time through the date of the decision, Finding 15, *id.* The Appeals Council declined to review the decision, *id.* at 5-6, making it the final determination 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).

In this case the administrative law judge reached Step 5 of the sequential evaluation process, at which stage the burden shifts to the commissioner to show that a claimant can perform work other than her past relevant work. 20 C.F.R. §§ 404.1520(f), 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).

### **Discussion**

The commissioner may rely exclusively on the Grid to support her decision if “a non-strength impairment . . . has the effect only of reducing [the relevant] occupational base marginally.” *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). Even “moderate” restrictions in the mental categories of a residual functional capacity assessment may not compromise a claimant's capacity for the full range of work at a particular strength level. *Id.* at 527-28. Here, the plaintiff asserts that depression and pain are non-exertional impairments that were not appropriately considered by the administrative law judge. Plaintiff's Itemized Statement of Errors (“Statement of Errors”) (Docket No. 4) at 2, 3.

With respect to the depression, the plaintiff relies on the report of Adrienne J. Butler, Ed.D., to the effect that she had moderate limitations in “dealing with work stresses; maintaining attention, concentration, persistence or pace; understanding, remembering, and carrying out complex job instructions; and demonstrating reliability.” Statement of Errors at 2. Under *Ortiz*, these findings, which were not specifically rejected by the administrative law judge, Record at 15-16, do not necessarily constitute impairments that reduce the light work occupational base more than marginally.

Here, the administrative law judge found that the plaintiff had no transferable skills, so the necessarily-implied finding, as was the case in *Ortiz*, 890 F.2d at 526, is that the plaintiff's depression did not interfere more than marginally with the performance of the full range of unskilled work at the light exertional level. The commissioner has described the mental capabilities required for unskilled work as follows:

The basic mental demands of competitive, remunerative, unskilled work include the abilities (on a sustained basis) to understand, carry out, and remember simple instructions; to respond appropriately to supervision, coworkers, and usual work situations; and to deal with changes in a routine work setting. A substantial loss of ability to meet any of these basic work-related activities would severely limit the potential occupational base.

Social Security Ruling 85-15, reprinted in *West's Social Security Reporting Service Rulings 1983-1992* at 347 (quoted in *Ortiz*, 890 F.2d at 526). Dr. Butler's finding concerning ability to understand, remember or carry out complex instructions is thus irrelevant. Her other findings cited by the plaintiff do not necessarily mean that the plaintiff could not deal with changes in a routine work setting or respond appropriately to supervision, coworkers and usual work situations. In addition, medical evidence to support such limitations is required. 20 C.F.R. §§ 404.1529(a), 416.929(a). With respect to her finding concerning moderate difficulty in demonstrating reliability, Dr. Butler cites in support only the plaintiff's own reports of her physical symptoms. Record at 186. A claimant's testimony is not the equivalent of medical or clinical findings. *See* 20 C.F.R. §§ 404.1529(a); 416.929(a). In addition, as discussed more fully below, there is evidence in the record to support the administrative law judge's decision to discount the plaintiff's testimony concerning her symptoms. In summary, therefore, the record evidence supports the administrative law judge's finding that the plaintiff's depression did not interfere more than marginally with her ability to perform the full range of unskilled light work.

The plaintiff also relies on her “history of pain resulting from scoliosis,” citing the records of a Dr. Gerbracht, and her own testimony. Statement of Errors at 3-5. Dr. Gerbracht did diagnose “[l]ower back and lateral hip myofascial pain which may be related to mild paravertebral muscle spasm related to the insertion of the fixation device,” Record at 156, which was inserted to treat the plaintiff’s kyphosis and secondary scoliosis at the age of 13, *id.* at 138. However, Dr. Gerbracht does not discuss any non-exertional limitations resulting from this pain; indeed, he states that x-rays taken that day “reveal[] no scoliosis.” *Id.* at 156. He prescribed exercise, one dose of Flexeril and continuing use of Tylenol Extra Strength. *Id.* At a single follow-up appointment, Dr. Gerbracht stated that he was “confident that with regular exercise her myofascial symptoms will improved [sic]” and prescribed one to two tablets of Tylenol Extra Strength per day. *Id.* at 154. This medical evidence as of October 1998 does not support the plaintiff’s testimony concerning disabling pain at the time of the hearing in July 1999. A lack of medical evidence to support a plaintiff’s alleged degree of pain supports the administrative hearing officer’s decision to discount the credibility of the plaintiff’s testimony on this point. *Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 194-95 (1st Cir. 1987). *See generally* Social Security Ruling 96-7p, reprinted in *West’s Social Security Reporting Service Rulings 1983-92* (Supp. 2001), at 133.

The administrative hearing officer evaluated the plaintiff’s subjective claims of pain as required by *Avery v. Secretary of Health & Human Servs.*, 797 F.2d 19, 21 (1st Cir. 1986), discussing her work record, daily activities and testimony, Record at 16. *Avery* instructs that an adjudicator “be aware that symptoms, such as pain, can result in greater severity of impairment than may be clearly demonstrated by the objective physical manifestations of a disorder.” *Avery*, 797 F.2d at 23 (citation and internal quotation marks omitted). “Thus, before a complete evaluation of this individual’s RFC can be made, a full description of the individual’s prior work record, daily

activities and any additional statements from the claimant, his or her treating physician or other third party relative to the alleged pain must be considered.” *Id.* (citation and internal quotation marks omitted).

Social Security Ruling 96-7p, promulgated subsequent to *Avery*, describes evidence relevant to evaluation of pain and other claimed symptomatology as including:

1. The individual’s daily activities;
2. The location, duration, frequency, and intensity of the individual’s pain or other symptoms;
3. Factors that precipitate and aggravate the symptoms;
4. The type, dosage, effectiveness, and side effects of any medication the individual takes or has taken to alleviate pain or other symptoms;
5. Treatment, other than medication, the individual receives or has received for relief of pain or other symptoms;
6. Any measures other than treatment the individual uses or has used to relieve pain or other symptoms (e.g., lying flat on his or her back, standing for 15 to 20 minutes every hour, or sleeping on a board); and
7. Any other factors concerning the individual’s functional limitations and restrictions due to pain or other symptoms.

Social Security Ruling 96-7p, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (Supp. 2001) (“SSR 96-7p”), at 135.

After obtaining information of the type contemplated by SSR 96-7p, an administrative law judge must make a credibility finding regarding the claimed pain or other symptomatology. *See, e.g., id.* at 137 (“The determination or decision must contain specific reasons for the finding on credibility, 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.”). Determinations pursuant to *Avery* – as well as

credibility assessments in general – are entitled to deference when so supported. *See, e.g., Frustaglia v. Secretary of Health & Human Servs.*, 829 F.2d 192, 195 (1st Cir. 1987) (“The credibility determination by the ALJ, who observed the claimant, evaluated his demeanor, and considered how that testimony fit in with the rest of the evidence, is entitled to deference, especially when supported by specific findings.”).

Contrary to the plaintiff’s contention, Statement of Errors at 4, the administrative law judge did not take her statements concerning her daily activities “out of context.” The plaintiff did in fact report to Dr. Butler that she was “capable of all household chores and self-care activities,” as the administrative law judge states, Record at 16, 181-82. She also reported that these activities take longer than she liked. *Id.* at 182. Specifically, the administrative law judge found that the plaintiff’s activities of daily living were not severely limited, that she drove and did her own shopping, that she reported visiting friends weekly, that the opinions of the state agency physicians that the plaintiff was capable of light work were well supported by medical evidence, and that her testimony that her primary problem was fibromyalgia was not supported by a medical diagnosis or the medical evidence in the record. *Id.* at 16.

Given the overall testimony, including the fact that the plaintiff self-medicates for pain only with Tylenol, *id.* at 181, I cannot conclude (although further development of the administrative law judge’s opinion on this point would have been helpful and advisable) that his credibility determination failed to meet the requirements of *Avery*. Accordingly, I conclude that the record contains sufficient evidence to support the administrative law judge’s finding that the plaintiff’s pain would not interfere more than marginally with her ability to perform the full range of light work.

### **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.*

Dated this 25th day of March, 2002.

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David M. Cohen  
United States Magistrate Judge

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