

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DONNA MASON,)	
)	
Plaintiff)	
)	
v.)	Docket No. 02-78-B
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant)	

**RECOMMENDED DECISION ON PLAINTIFF’S
MOTIONS TO REMAND AND TO SUPPLEMENT THE RECORD**

The plaintiff in this Supplemental Security Income (“SSI”) appeal moves for remand for consideration of new and material evidence pursuant to sentence six of 42 U.S.C. § 405(g) and for supplementation of the record. *See generally* Motion To Remand (Docket No. 5); Motion To Supplement the Record (“Motion To Supplement”) (Docket No. 6). For the reasons that follow, I recommend that the Motion To Remand be denied, the Motion To Supplement be granted in part and denied in part and the case be remanded for further consideration.

I. Applicable Legal Standards

Sentence six of section 405(g) provides, in relevant part: “The court . . . may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record in a prior proceeding[.]” 42 U.S.C. § 405(g). As the First Circuit has explained:

Sentence six and its “good cause” limitation come into play only when the district court learns of evidence not in existence or available to the applicant at the time of the administrative proceeding that might have changed the outcome of that proceeding. Sentence six has been referred to as a “pre-judgment remand,” employed where the federal court has not ruled on the validity of the Commissioner’s position[.]

Seavey v. Barnhart, 276 F.3d 1, 13 (1st Cir. 2001) (citations and internal quotation marks omitted).

II. Background

In an SSI application filed on June 2, 2000 the plaintiff alleged that she became disabled on June 1, 2000 as a result of seizures, high blood pressure, kidney problems, back problems, carpal tunnel syndrome, asthma, migraines and depression. Record at 14-15. A hearing was held on October 29, 2001 during which the plaintiff testified that the “biggest” problem she had that prevented her from working was seizures. *Id.* at 25, 36-37. She described the seizures as lasting between thirty seconds to a minute, causing trembling and blurred vision and occurring from thirty to fifty times a day. *Id.* at 37. She and her counsel stated that she had just undergone an MRI of the brain that was expected to be interpreted by her neurologist shortly. *Id.* at 30-31.¹ The administrative law judge offered to hold the record open for one week to receive this new evidence; plaintiff’s counsel replied: “I would think that would do it, sir.” *Id.* at 31.

In response to “light work” hypothetical questions from the administrative law judge, vocational expert Sharon Greenleaf identified two jobs the plaintiff could perform: receptionist and assembler. *Id.* at 70-71. However, Greenleaf testified that the seizures described by the plaintiff, if factored in, would impact both the receptionist and assembler jobs. *Id.* at 73. The administrative law judge then asked plaintiff’s counsel to attempt to obtain a “very crucial” assessment of the plaintiff’s limitations from the neurologist. *Id.* at 73-74.

¹ Counsel initially mistakenly referred to the neurologist as “Dr. Zimbronowicz.” Record at 30. He meant to say “Dr. Jozefowicz.” *Id.* at 40, 644.

By cover letter dated December 6, 2001, stamped as received by the Office of Hearings and Appeals on December 10, 2001, the plaintiff's counsel forwarded to the administrative law judge additional medical records from Acadia NeuroCare and Eastern Maine Medical Center ("EMMC"). See Letter dated December 6, 2001 from Francis M. Jackson, Esq. to the Honorable Edward Gaulin ("December 6 Letter") & attachments thereto, appended to Motion To Supplement. Among these materials were:

1. A July 30, 2001 preliminary report of Thaddeus H. Jozefowicz, M.D., noting his impression that the plaintiff "present[ed] with symptoms highly suggestive of a complex partial seizure disorder" and his plan to obtain an MRI brain scan and a sleep-deprived EEG. Preliminary Report dated July 30, 2001 by Thaddeus H. Jozefowicz, M.D. ("Preliminary Jozefowicz Report"), attached to December 6 Letter, at 4.

2. A November 2, 2001 final report of Dr. Jozefowicz stating that although the plaintiff had a normal EEG, she had an "[a]bnormal MRI scan with white matter changes in the cerebral hemispheres, but more disturbingly wedge-shaped areas of what appear to be infarction² (of indeterminate) age, but probably old) in the cerebellum, more so in the left than the right, without any clinical concomitant." Final Report dated November 2, 2001 by Thaddeus H. Jozefowicz, M.D. ("Final Jozefowicz Report"), attached to December 6 Letter, at 3. Dr. Jozefowicz noted, "I continue to feel that she has a partial complex seizure disorder, which is significantly improved since we added Topamax to the regimen." *Id.* at 2. He noted his plan to move the plaintiff to a full dose of Topamax and stop Depakote, an anti-seizure medication on which she previously had been placed. *Id.* at 3; see also, e.g., Record at 17 (recounting history of prescription for Depakote).

² An infarction is a "[s]udden insufficiency of arterial or venous blood supply due to emboli, thrombi, mechanical factors, or pressure that produces a macroscopic area of necrosis[.]" Stedman's Medical Dictionary at 894 (27th ed. 2000).

In addition, the plaintiff's counsel forwarded to the administrative law judge, by letter dated December 13, 2001 and stamped as received by the Office of Hearings and Appeals on December 17, 2001, a residual functional capacity ("RFC") assessment completed by a treating source, Cynthia M. Leiffer, Adult Nurse Practitioner, of White Birch Medical Center. Letter dated December 13, 2001 from Francis M. Jackson, Esq. to the Honorable Edward Gaulin ("December 13 Letter") & attachment thereto, appended to Motion To Supplement; *see also, e.g.*, Record at 617-24 (Leiffer treatment notes).

By decision dated December 23, 2001 the administrative law judge found the plaintiff not disabled on the basis that, although she was unable to perform her past relevant work, she was able to perform work existing in significant numbers in the national economy. Findings 10, 15, Record at 23-24.³ The decision mentioned none of the new Jozefowicz or Leiffer materials. *Id.* at 14-24. The administrative law judge found, in relevant part:

I note that, while Dr. Nesin did write a prescription for Depakote, as well as order another sleep study and neurology consult, all tests were negative for any brain abnormalities. Therefore, there has been no objective medical correlation of the claimant's allegations of multiple daily petite [sic] mal seizures. Therefore, the claimant has failed to establish, with sufficient evidence, the existence of a medically determinable seizure disorder.

The final impairment alleged by the claimant is depression. The only records pertaining to this condition are dated June 5, 1987 to March 14, 1990. At this time, the claimant sought treatment at the Indiana County Guidance Center, complaining of family conflict. The claimant was diagnosed with adjustment disorder and underwent both couples therapy and individual therapy until March 14, 1990, when she terminated treatment because she was moving. A final progress note indicated that "virtually no improvement" was made during almost three years of therapy; however, no further treatment was sought upon the claimant's relocation. As the record fails to establish any further treatment or complaints of depressive symptoms, I find that this does not constitute a severe impairment under the Act and Regulations. In forming this

³ The administrative law judge found that the plaintiff possessed the residual functional capacity to lift and carry ten pounds frequently and twenty pounds occasionally, sit for two hours, stand and walk for six hours in an eight-hour workday and perform occasional bending and simple, routine, repetitive tasks. Finding 8, Record at 23. He found this capacity diminished by the following non-exertional limitations: the need to avoid squatting, climbing, crawling, exposure to fumes, dust or gases and workplace hazards, such as moving machinery, heights and extreme temperatures. Finding 9, *id.* He found this consistent with an ability to perform a significant range of light work, including work as a receptionist and assembler. Findings 14-15, *id.* at 23-24.

conclusion, I have considered the reports of both examining and non-examining state agency physicians who reviewed the record at the initial and reconsideration levels. The claimant underwent a consultative psychological evaluation by William DiTuillio, Ed.D., on December 26, 2000. . . . Dr. DiTuillio opined that the claimant had an adjustment disorder with depressed mood. On reconsideration, Dr. Houston reviewed the record and concluded that the claimant's depressive symptoms did not constitute a severe impairment

Id. at 17-18 (citations omitted). In discussing why he found the plaintiff "not an entirely credible witness," the administrative law judge also observed:

[The claimant] also states that Dr. Jozefowicz is familiar with her seizure disorder. However, Dr. Jozefowicz ordered a brain MRI on September 12, 2001, which showed only small vessel changes consistent with uncontrolled hypertension and possible diabetes, with "old areas of embolic infraction [sic] in the cerebellum." There is no diagnosis of a seizure disorder from Dr. Jozefowicz.

Id. at 18-19 (citations omitted).

III. Analysis

Technically, the plaintiff seeks remand solely on the basis of new psychiatric evidence that reflects inpatient hospitalization for suicidal ideation in March 2002 and follow-up treatment as a result of which Katherine Rice (title unknown) noted, "The general clinical picture suggests an anxiety disorder and a bi-polar disorder. . . . Donna's depressive episodes are severe." Clinical assessment dated March 18, 2002 by Katherine Rice ("Rice Assessment"), attached to Motion To Remand, at 3; *see also generally* Motion To Remand. As to the December 6 and December 13 letters and attachments thereto, the plaintiff "moves that the court supplement the record to reflect the additional evidence and argument that was submitted to the ALJ following the hearing at his request but which was omitted from the administrative record." Motion To Supplement at 1.

However, the commissioner (correctly, in my judgment) views all of the materials in issue as implicating sentence six of section 405(g). *See generally* Defendant's Memorandum of Law in Response to Plaintiff's Motion To Supplement the Record and To Remand Under Sentence Six of 42

U.S.C. § 405(g) (“Opposition”) (Docket No. 8). Typically, a request for a sentence-six remand concerns “new evidence . . . presented after the ALJ decision[.]” *Mills v. Apfel*, 244 F.3d 1, 5 (1st Cir. 2001). In this case, the materials submitted by the plaintiff’s counsel in December 2001 were tendered prior to the issuance of the administrative law judge’s decision; however, for all practical purposes, they might as well have been submitted afterwards. They were not made a part of the record and evidently were not placed before the administrative law judge for his review. As the First Circuit sensibly has observed, “The ALJ has not ‘made a mistake’ in ignoring new evidence that was never presented to him.” *Id.* Further, the controlling statute speaks not to the issue of timing of submission of evidence but rather to “failure to incorporate such evidence into the record in a prior proceeding[.]” 42 U.S.C. § 405(g).

The commissioner “acknowledges that the evidence submitted on December 6, 2001 should have been made part of the administrative record” – in effect conceding that “good cause” exists for remand. Opposition at 2.⁴ However, she argues that none of the evidence appended to either motion entitles the plaintiff to a sentence-six remand inasmuch as none of it possesses the requisite materiality. *Id.*

Evidence is considered “material” for purposes of a sentence-six remand “if, were the proposed new evidence to be considered, the Secretary’s decision might reasonably have been different.” *Evangelista v. Secretary of Health & Human Servs.*, 826 F.2d 136, 140 (1st Cir. 1987) (citation and internal quotation marks omitted). The commissioner fails to identify any respect in which the evidence in issue is immaterial. *See generally* Opposition. However, I am constrained to

⁴ The commissioner makes no issue of the fact that this evidence was submitted later than anticipated at hearing. *See generally* Opposition. In acknowledging that the December 6 material should have been made part of the record, she overlooks the December 13 Letter and attached RFC assessment. *See generally* Opposition. However, I take her admission to encompass both letters inasmuch as both were received by the Office of Hearings and Appeals prior to issuance of the administrative law judge’s decision.

agree that, with respect to the psychiatric evidence that is the subject of the Motion To Remand, the test of materiality is unmet.

To satisfy section 405(g), new evidence must relate to a claimant's condition on or before the date of the administrative law judge's decision. *See, e.g., Jones v. Sullivan*, 949 F.2d 57, 60 (2d Cir. 1991) (to be "material," new evidence must be "relevant to the claimant's condition during the time period for which benefits were denied") (citation and internal quotation marks omitted); *Hargis v. Sullivan*, 945 F.2d 1482, 1493 (10th Cir. 1991) (the "proffered evidence [must] relate to the time period for which the benefits were denied").

The evidence appended to the Motion To Remand concerns the aftermath of an acute episode of suicidal ideation in March 2002, approximately three months after issuance of the administrative law judge's decision. *See Rice Assessment; Progress Note – Adult by Katherine Rice* dated March 18, 2002, attached to Motion To Remand. Neither document purports to, or does, shed light on the claimant's condition on or before December 2001. *See generally id.* This alone is fatal; however, I note that the proffered evidence is problematic in additional respects that tend to undermine its materiality: It is unsigned, no mention is made of Rice's credentials (as a result of which it is unclear whether she is an acceptable treating source for purposes of establishing the existence of an impairment per 20 C.F.R. § 416.913(a)) and one cannot discern how Rice arrived at the diagnoses listed. Accordingly, the Motion To Remand should be denied.

As to the December 2001 materials, I recommend the court rule as follows:

1. EMMC Electroencephalogram Report dated May 8, 2000 by Valerie L. Curtis, M.D.: Deny. The report is already of record. *See Record* at 452-53.
2. EMMC History and Physical Examination dated March 27, 2001 by Edward J. Zimmerman, PA-C, and attached ECG report: Deny. This report, made in response to complaints of

chest pain, in the main simply rules out myocardial infarction. To the extent it notes a history of chronic hypertension and congestive heart failure, it adds nothing to the mix before the administrative law judge, who found that the plaintiff did suffer from “poorly controlled hypertension” and “mild congestive heart failure.” *See* Record at 16. To the extent it notes a past history of seizure disorder, it is not in itself a diagnosis (in contrast to the Jozefowicz materials, discussed below).

3. EMMC Coronary Angiography Report dated March 27, 2001 by M. Theodore Silver, M.D.: Deny. This study, again undertaken in response to complaints of chest pain, found normal coronary arteries and a normal left ventricle. It is consistent with the administrative law judge’s findings concerning the plaintiff’s repeated complaints of chest pain. *See* Record at 16.

4. EMMC Discharge Order/Summary dated March 28, 2001 by Sarah Folsom, PA-C: Deny. For reasons noted above, this summary of the results of diagnostic testing performed at EMMC in March 2001 following reports of chest pain is consistent with the administrative law judge’s findings.

5. Preliminary and Final Jozefowicz Reports:⁵ Grant. As the plaintiff suggests, Motion To Supplement at 1, the administrative law judge thought the new Jozefowicz evidence significant enough to warrant holding the record open to obtain it. Unfortunately, as plainly appears from the face of his decision, he never saw it. The Jozefowicz reports necessarily would have altered his assessment of the plaintiff’s alleged seizure disorder, which he dismissed out of hand on the basis of lack of an objective medical diagnosis. Regardless whether, at Step 2, he then found the impairment severe, he would have been compelled to assess its sequelae and factor them into his determination of the plaintiff’s RFC. *See, e.g.*, 20 C.F.R. § 416.945(e) (“When you have a severe impairment(s) . . .

⁵ The plaintiff appends two differently formatted copies of the Preliminary Jozefowicz Report to the Motion To Supplement, one of which is followed by a report of an electroencephalogram performed by Dr. Curtis at Dr. Jozefowicz’s request. To simplify matters, I recommend that all of the Jozefowicz materials be considered on remand, including the Curtis report dated August 9, 2001.

we will consider the limiting effects of all your impairment(s), even those that are not severe, in determining your residual functional capacity.”). Given that (i) the plaintiff described the seizures as her greatest work-precluding problem and (ii) the vocational expert testified that the seizures as described would impact the finding that the plaintiff was able to do receptionist and assembler work, I conclude that the decision might reasonably have been different if the Jozefowicz evidence had been before the administrative law judge.

6. Leiffer RFC: Deny. While the commissioner on remand may change her assessment of the plaintiff’s RFC as a result of the Jozefowicz evidence, possibly needing to recontact treating sources or Disability Determination Services (“DDS”) physicians for assistance in measuring the impact of the plaintiff’s seizure disorder, there is no indication that the Leiffer RFC assessment addresses that issue. *See* Medical Source Statement of Ability To Do Work-Related Activities (Physical), attached to December 13 Letter. The fact that a treating-source RFC opinion is more hospitable to a claimant than previous such assessments of record is not in itself sufficient to vault the hurdle of “materiality” for purposes of a sentence-six remand. *See, e.g., Evangelista*, 826 F.2d at 140-41.

IV. Conclusion

For the foregoing reasons, I recommend that the Motion To Remand be **DENIED**, the Motion To Supplement be **GRANTED** in part and **DENIED** in part, and the decision of the commissioner be **VACATED** and the case **REMANDED** for 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 8th day of November, 2002.

David M. Cohen
United States Magistrate Judge

MAG PORTLD
ADMIN

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

CIVIL DOCKET FOR CASE #: 02-CV-78

MASON v. SOCIAL SECURITY, COM
Assigned to: Judge GEORGE Z. SINGAL

Filed: 05/15/02

Referred to: MAG. JUDGE DAVID M. COHEN

Demand: \$0,000

Nature of Suit: 863

Lead Docket: None

Jurisdiction: US Defendant

Dkt# in other court: None

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

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