UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SHIRLEY FREEMAN,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Docket No. 02-78-P-H***
	)	
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant	)	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the question whether substantial evidence supports the commissioner's determination that the plaintiff, who suffers from headaches, degenerative joint disease, degenerative disc disease and high blood pressure, was capable of returning to past relevant work as a bookkeeper/tax preparer. 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, *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 had headaches, degenerative joint disease,

[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 19, 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.

degenerative disc disease and high blood pressure, impairments that were severe but did not meet or equal any listed in Appendix 1 to Subpart P, 20 C.F.R. § 404 (the "Listings"), Finding 3, Record at 21; that her statements concerning her impairments and their impact on her ability to work were not entirely credible in light of the reports of treating and examining medical practitioners, the medical history, the findings of non-examining medical experts and inconsistencies in her statements, Finding, 4, *id*.; that she lacked the residual functional capacity to lift and carry more than twenty pounds or more than ten pounds on a regular basis, climb or balance more than occasionally or perform work requiring frequent overhead reaching or exposure to hazards, Finding 5, *id*.; that her past relevant work as a bookkeeper/tax preparer did not require the performance of work functions precluded by her medically determinable impairments, Finding 6, *id*.; and that she therefore had not been under a disability at any time through the date her insured status expired or through the date of decision, Finding 8, *id*.[2] The Appeals Council declined to review the decision, *id*. at 4-5, making it the final determination 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 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).

The administrative law judge in this case reached Step 4 of the sequential process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work.

[2] The plaintiff had acquired sufficient quarters of coverage to remain insured through September 30, 2003. Finding 1, Record at 21.

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 of 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 1975-1982 ("SSR 82-62"), at 813.

The plaintiff asserts that the administrative law judge failed to (i) give proper weight to the opinion of a treating physician, (ii) follow the procedure set forth in SSR 82-62, (iii) consider potential mental causes of her impairments and (iv) find that her headaches caused any functional limitations despite rating them as "severe" for purposes of Step 2. *See generally* Itemized Statement of Errors Pursuant to Local Rule 16.3 Submitted by Plaintiff ("Statement of Errors") (Docket No. 4). To the extent there was error, I find it to have been harmless and accordingly recommend that the decision be affirmed.

I. Discussion

A. Treating Physician

The plaintiff initially complains that the administrative law judge dismissed a residual functional capacity ("RFC") assessment by treating physician Mark Howe, M.D., in unacceptably cursory fashion, without contacting Dr. Howe for clarification as required by Social Security Ruling 96-5p. *Id*. at 2-3. I find no error.

The weight to which a treating physician's opinion is entitled depends in part on the subject matter addressed. Determination of a claimant's RFC is reserved to the commissioner; accordingly, no "special significance" is accorded an opinion even from a treating source as to RFC. *See* 20 C.F.R. §§ 404.1527(e)(2)-(3). Nonetheless, such an opinion is entitled to consideration based on six enumerated factors: (i) length of the treatment relationship and frequency of examination, (ii) nature

and extent of the treatment relationship, (iii) supportability – *i.e.*, adequacy of explanation for the opinion, (iv) consistency with the record as a whole, (v) whether the treating physician is offering an opinion on a medical issue related to his or her specialty, and (vi) other factors highlighted by the claimant or others. *Id*. §§ 404.1527(d)(2)-(6). Regardless of the subject matter as to which a treating physician's opinion is offered, the commissioner must "always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion." *Id*. § 404.1527(d)(2).

The administrative law judge discussed the Howe RFC in some detail, commenting:

> Seemingly supporting the claimant, Dr. Howe stated on May 23, 2001 that the claimant was limited to sitting no more than seven hours in an eight hour workday and could not stand or walk at all. He further found that could [sic] lift no more than 20 pounds but only on an occasional basis and that she could carry no more than ten pounds on an occasional basis. He based his opinion on pain in the claimant's shoulder's [sic], neck, and back due to mild to moderate degenerative joint disease indicated by x-rays and to plantar fasciitis (Exhibit 14F).
>
> The undersigned is not convinced by Dr. Howe's statement. X-rays and an MRI reveal only degenerative [sic] disease. There was no apparent ongoing concern or treatment of the disorder until March 2000. The claimant's foot disorder is only of recent origin. Physical therapy in March 2000 resulted in an 80 percent improvement in headaches and neck pain (Exhibit 4F). Given this response to physical therapy, it is unclear why additional therapy was not prescribed. Moreover, there was no indication in his opinion of how long the claimant had been so limited or how long she would continue to be so limited. Further, his opinion is at variance with that of Dr. Vigna who found her symptoms to be of a "functional nature" and with those of medical experts at Maine Disability Determination Services who found that the objective evidence cited by Dr. Howe in his notes and other medical evidence did not support such severe limitations (Exhibits 7F and 9F).

Record at 19.

In so stating, the administrative law judge adequately addressed the Howe RFC, supportably rejecting it. As the plaintiff complains, not every single Howe RFC finding is mentioned; for example, Dr. Howe also found limitations on reaching, handling, fingering, grasping, pushing and pulling, among other things. *See* Statement of Errors at 2; Record at 243-46 (Howe RFC). However, the

administrative law judge addressed the underlying bases on which Dr. Howe found these limitations: plantar fasciitis and fatigue and pain in the neck, shoulders and back stemming from mild to moderate degenerative joint disease. *Compare* Record at 16-17, 19 *with id*. at 243-46. No useful purpose would have been served by addressing each of Dr. Howe's individual findings *seriatim.*

Nor can the discussion fairly be characterized as "cursory." To the contrary, the administrative law judge discussed at some length the supportability of the Howe opinion and its consistency with other evidence of record. *See id*. at 19. Her findings are supported by substantial evidence of record. *See, e.g., id*. at 146 (interpretation of MRI of cervical spine describing "some early degenerative changes . . . including a combination of posterior bulging and spurring at these levels having very little mass effect on the cervical cord which is otherwise normal"), 154 (impression of examining neurologist Bernard P. Vigna, Jr., M.D., that plaintiff had "a normal neurologic exam in the face of a rather tortuous and disjointed history as noted above. I get a strong indication that by and large her symptoms are of a functional nature[.]"), 155 (Parkview Hospital physical therapy note that, "[h]aving completed six physical therapy visits, the patient currently reports approximately 80% improvement in her headache and cervical spine symptom level."), 175-82, 192-99 (RFC assessments of non-examining Disability Determination Services ("DDS") physicians Robert Hayes, D.O., and Lawrence P. Johnson, M.D., finding fewer limitations than does Howe RFC).

Nor did the administrative law judge commit error in failing to recontact Dr. Howe for clarification. Social Security Ruling 96-5p provides in relevant part:

> Because treating source evidence (including opinion evidence) is important, if the evidence does not support a treating source's opinion on any issue reserved to the Commissioner and the adjudicator cannot ascertain the basis of the opinion from the case record, the adjudicator must make "every reasonable effort" to recontact the source for clarification of the reasons for the opinion.

Social Security Ruling 96-5p, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991 (Supp. 2002) ("SSR 96-5p"), at 127. As counsel for the plaintiff conceded at oral argument, Dr. Howe made clear the bases for his opinion. Hence, there was no need to recontact Dr. Howe for clarification.

B. SSR 82-62

The plaintiff next complains that the administrative law judge failed to follow SSR 82-62 in determining that she could return to her past relevant work, omitting to: (i) make inquiry of the plaintiff as to the requirements of her work, (ii) include the required findings, including a finding of the physical and mental demands of the work, (iii) provide any basis for the statement that the limitations found would not prevent performance of work as a bookkeeper/tax preparer, or (iv) make a sufficiently detailed finding regarding RFC, including limitations on the repetitive use of the upper extremities. Statement of Errors at 3.

SSR 82-62 provides, in relevant part:

> The claimant is the primary source for vocational documentation, and statements by the claimant regarding past work are generally sufficient for determining the skill level, exertional demands and nonexertional demands of such work. Determination of the claimant's ability to do PRW [past relevant work] requires a careful appraisal of (1) the individual's statements as to which past work requirements can no longer be met and the reason(s) for his or her inability to meet those requirements; (2) medical evidence establishing how the impairment limits ability to meet the physical and mental requirements of the work; and (3) in some cases, supplementary or corroborative information from other sources such as employers, the *Dictionary of Occupational Titles*, etc., on the requirements of the work as generally performed in the economy.
>
> The decision as to whether the claimant retains the functional capacity to perform past work which has current relevance has far-reaching implications and must be developed and explained fully in the disability decision. Since this is an important and, in some instances, a controlling issue, every effort must be made to secure evidence that resolves the issue as clearly and explicitly as circumstances permit.

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> The rationale for a disability decision must be written so that a clear picture of the case can be obtained. The rationale must follow an orderly pattern and show clearly how specific evidence leads to a conclusion.
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> ***
>
> In finding that an individual has the capacity to perform a past relevant job, the determination or decision must contain among the findings the following specific findings of fact:
>
> 1. A finding of fact as to the individual's RFC.
>
> 2. A finding of fact as to the physical and mental demands of the past job/occupation.
>
> 3. A finding of fact that the individual's RFC would permit a return to his or her past job or occupation.

SSR 82-62 at 811-13.

Inasmuch as appears, the plaintiff was asked at least twice to fill in forms regarding the nature of her past relevant work. In a questionnaire signed on January 31, 2000 she was asked how many hours per day she did certain things, *e.g.*, walked, stood, sat, climbed, stooped. Record at 95, 102. She stated that she sat "most of the time when I with [sic]" and placed a checkmark near a line asking whether she wrote, typed or handled small objects. *Id*. at 95. She did not fill in a line inquiring about lifting and carrying, stated that the heaviest weight lifted "varied" and indicated that she frequently lifted less than ten pounds. *Id*. In a form completed on February 12, 2000 she was again invited to provide more information about her job and to respond to the open-ended question: "Describe this job. What did you do all day?" *Id*. at 108, 114. She replied, "She [sic] previous report." *Id*. at 108. The Record also contains a copy of a *Dictionary of Occupational Titles* description of the job of tax preparer. *Id*. at 139. At hearing, neither the administrative law judge nor the plaintiff's counsel inquired concerning the physical or mental demands of her past work. *See id*. at 28-44.

To the extent the plaintiff suggests that the administrative law judge was obligated to inquire at hearing about the demands of her past relevant work, she errs. The First Circuit has made clear that the burden is on a claimant to "initially produce relevant evidence of the physical and mental demands of her prior work." *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991). "That evidence may be testimonial or take the form of historical or subjective statements made in the application or other documents provided by the agency, but the claimant must at least furnish some minimal information about the activities that her past usual work required, including those which can no longer be performed." *Id*. (citations omitted). The plaintiff was represented at hearing by counsel; to the extent she desired to place further information on the record concerning the nature of her past work, she had ample opportunity to do so.

The plaintiff's next two complaints – which can be grouped together – have merit. The administrative law judge did indeed fail to make the second finding required by SSR 82-62 (the physical and mental demands of the past job), leaving the third finding (that RFC would permit a return to past work) seemingly unmoored. Nonetheless, the error in this case is harmless. None of the RFC limitations found by the administrative law judge (inability to lift or carry more than twenty pounds or more than ten pounds on a regular basis; climb or balance more than occasionally; or perform work requiring frequent overhead reaching or exposure to hazards) is inconsistent with performance of the plaintiff's past work as a bookkeeper/tax preparer as described by the plaintiff herself. *Compare* Finding 5, Record at 21 *with id*. at 95. Nor are those limitations inconsistent with the jobs of "tax preparer" or "bookkeeper" as described in the *Dictionary of Occupational Titles*. *See id*. at 139; *Dictionary of Occupational Titles* (U.S. Dep't of Labor, 4th ed. rev. 1991) ("DOT") §§ 210.382-014

(bookkeeper), 219.362-070 (tax preparer).[3] Thus, no useful purpose would be served in remanding the case for further explication.

The plaintiff's final complaint under this heading – that the administrative law judge failed to make a sufficiently detailed finding of RFC – is without merit. The plaintiff identifies only one respect in which the RFC findings lack detail: as concerns limitations on repetitive use of the upper extremities. *See* Statement of Errors at 3. The administrative law judge found that the plaintiff was incapable of frequent overhead reaching. That in itself is a sufficiently detailed finding. Presumably, the omission of further "details" was not an oversight, but rather a deliberate finding that the claimed restrictions did not exist.

C. Mental Impairment

The plaintiff next asserts the administrative law judge committed error in discrediting some of her claimed impairments on the basis that they were "of a functional nature," as found by Dr. Vigna, without having considered whether they had a root mental cause. *Id*. at 4. Assuming *arguendo* that, as posited by the plaintiff's counsel at oral argument, either Dr. Vigna or the administrative law judge meant to imply by the phrase "functional nature" that the plaintiff's claimed impairments were to some degree "psychogenic" in nature, the commissioner did not overlook the possibility of mental impairment in this case. The Record contains a report of a psychological examination of the plaintiff by DDS psychologist Richard J. Parker, Ph.D., on the basis of which two non-examining DDS

[3] I note that although, according to the DOT, both the tax-preparer and bookkeeper jobs require frequent reaching, they are not noted to require frequent overhead reaching. DOT §§ 210.382-014, 219.362-070. Nor did the plaintiff otherwise signal, so as to place the matter in issue, that her past job required frequent overhead reaching. *See Santiago*, 944 F.2d at 5-6 ("[A]n ALJ may not simply rely upon the failure of the claimant to *demonstrate* [that] the physical and mental demands of her past relevant work can no longer be met, but, *once alerted by the record to the presence of an issue*, must develop the record further. The problem here is that neither claimant's testimony nor the other evidence of record goes far enough to raise a meaningful issue as to her incapacity to perform her prior work.") (citation and internal quotation marks omitted) (emphasis in original).

psychologists, David R. Houston, Ph.D., and Scott Hoch, Ph.D., completed Psychiatric Review Technique Forms. Record at 161-74, 183-91. No more was required.

D. Headaches

The plaintiff lastly contends that the administrative law judge erred in failing to find that her headaches resulted in any functional limitations despite the fact that a "severe" impairment by definition significantly limits ability to do basic work activities. Statement of Errors at 4.

The commissioner defines "severe" impairments as those that "significantly limit[] [a claimant's] physical or mental ability to do basic work activities[.]" 20 C.F.R. § 404.1520(c). Yet there is an important gloss: "[T]he Step 2 regulation, as currently construed by the Secretary in Ruling 85-28, constitutes no more than . . . a *de minimis* screening policy" that requires a claimant merely "to make a reasonable threshold showing that the impairment is one which could conceivably keep him or her from working." *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1122 (1st Cir. 1986). Thus, a finding that an impairment passes muster at Step 2 is not necessarily inconsistent with a finding upon closer examination at Step 4 that the same impairment does not restrict RFC in a manner ultimately worthy of mention. *See, e.g., Sykes v. Apfel*, 228 F.3d 259, 268 n.12 (3rd Cir. 2000) ("A finding under step two of the regulations that a claimant has a 'severe' nonexertional limitation is not the same as a finding that the nonexertional limitation affects residual functional capacity.").

In any event, even assuming *arguendo* that there were such an inconsistency, the error is harmless. The administrative law judge's determination that the plaintiff's headaches were "infrequent and of short duration," Record at 19, imposing no functional limitation worthy of mention, is supported by substantial evidence, *see, e.g., id.* at 152 (report of Dr. Vigna), 243-46 (RFC assessment by Dr. Howe omitting mention of headaches as causing functional limitations). Thus, once

more, no useful purpose would be served by remand for further clarification. *See, e.g.*, *Bryant ex rel. Bryant v. Apfel*, 141 F.3d 1249, 1252-53 (8th Cir. 1998) (despite confusing juxtaposition of finding at Step 2 that headaches were "severe" and finding at Step 3 that headaches imposed no more than slight limitation of function, "arguable deficiency in opinion-writing technique" would not prevent affirmance inasmuch as substantial evidence of record supported Step 3 finding).

II. Conclusion

For the foregoing reasons, I recommend that the decision of the commissioner 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 and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge 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 20th day of November, 2002.

David M. Cohen
United States Magistrate Judge

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                                                        ADMIN
                    U.S. District Court
               District of Maine (Portland)

             CIVIL DOCKET FOR CASE #: 02-CV-78

FREEMAN v. SOCIAL SECURITY, COM                         Filed: 04/09/02
Assigned to: JUDGE D. BROCK HORNBY
             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
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Cause: 42:405 Review of HHS Decision (DIWC)

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