

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SHANNON M. McKAY,)	
)	
Plaintiff)	
)	
v.)	Docket No. 02-126-B
)	
JO ANNE B. BARNHART,)	
Commissioner of Social Security,)	
)	
Defendant)	

REPORT AND RECOMMENDED DECISION¹

This Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal raises the questions whether the administrative law judge failed properly to consider impairments other than those she found to be severe, whether the administrative law judge properly considered the medical evidence, whether the administrative law judge evaluated the plaintiff’s psychiatric disability as required by applicable regulation, whether the findings concerning the plaintiff’s credibility are adequate and whether there is substantial evidence in the record to support the administrative law judge’s conclusions. I recommend that the decision be vacated and the case remanded for further proceedings.

¹ 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 11, 2003, 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.

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 administrative law judge found, in relevant part, that the plaintiff had not engaged in substantial gainful activity since June 1, 2000, Finding 2, Record at 17; that she suffered from obesity and hypertension, impairments that were 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 her statements concerning her impairments and their impact on her ability to work were not entirely credible, Finding 4, *id.*; that she lacked the residual functional capacity to climb, balance, stoop, crouch or crawl more than occasionally but that she was not required to do so in her past work as a clerk/cashier, Findings 5-6, *id.*; and that because her impairments did not prevent her from performing her past relevant work, the plaintiff was not under a disability as that term is defined in the Social Security Act at any time through the date of the decision, Findings 7-9, *id.* The Appeals Council declined to review the decision, *id.* at 10-12, 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).

The administrative law judge in this case reached Step 4 of the sequential review process, at which stage the claimant bears the burden of proof of demonstrating inability to return to past relevant work. 20 C.F.R. §§ 404.1520(e), 416.920(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), 416.920(e); Social Security Ruling 82-62, reprinted in *West's Social Security Reporting Service Rulings 1975-1982* ("SSR 82-62") at 813.

Discussion

A. Severe Impairments

The plaintiff first takes issue with the administrative law judge's determination, at Step 2 of the sequential review process, Record at 15, that neither her migraine headaches nor her depression were severe, Plaintiff's Itemized Statement of Specific Errors ("Itemized Statement") (Docket No. 3) at 2-5. Although a plaintiff bears the burden of proof at Step 2, 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 determine that it is not severe only if it does not significantly limit her physical or mental ability to do basic work activities. 20 C.F.R. §§ 404.1521(a), 416.921(a). The finding that these two alleged impairments were not severe at this step is significant for the ultimate determination that was made in this case at Step 4 because the effects of severe impairments must be considered in evaluating a claimant's residual functional capacity ("RFC"). 20 C.F.R. §§ 404.1529(d)(4), 416.929(d)(4).

An evaluation by a state-agency reviewing physician dated September 25, 2000 states that the plaintiff's headaches "are under better control with medication" and finds all of the plaintiff's claimed physical impairments to be non-severe, Record at 165, but the administrative law judge did not rely on this evaluation in her decision. Similarly, two evaluations by state-agency reviewing psychologists

who found the plaintiff's depression to be non-severe, Record at 166-88, are not mentioned in the administrative law judge's decision. Instead, the administrative law judge rejected the reports of a neurologist and a psychologist who examined the plaintiff after the state-agency reviews had been completed. Record at 14-15.

With respect to the headaches, Leonard C. Kaminow, M.D., examined the plaintiff and reported on March 27 or 28, 2001 that further testing to discover the cause of the plaintiff's chronic daily headaches was indicated and that not many of the medicines prescribed for her in the past would have helped with her migraines. *Id.* at 199-200. He suggested several possible medications and noted that the plaintiff was currently unable to afford any of them. *Id.* at 200. The medical records show that the plaintiff was treated for chronic daily headaches from May 2001 to August 2001. *Id.* at 226-36. The administrative law judge discounted this treatment because "the most recent treating source record, dated September, 2001, shows no mention of this problem." *Id.* at 14-15. That record, found at pages 223-24 of the record, states that the plaintiff's visit was for the purpose of "follow up labs," and the "labs reviewed" do not appear to relate to her headaches. Given that an entry in the same provider's records dated one month earlier, *id.* at 227, states that the plaintiff has chronic daily headaches and "is undergoing disability evaluation for this," *id.* at 226, the administrative law judge's reliance on the single September 2001 record is misplaced. In support of her conclusion that the headaches were not a severe impairment, the administrative law judge also relied on the plaintiff's report of decreased frequency and severity of headaches in August 2000 as a result of medication with Calan and Zomig, her failure to seek treatment for the headaches for a period of several months in 2000 and 2001, her failure to visit an emergency room for treatment of the headaches, her statement to Dr. Kaminow that the Calan and Zomig had not been helpful and her enrollment in four college courses. *Id.* at 14-15. The record is replete with statements from the plaintiff to various medical

providers that she could not afford prescribed medications; in this regard, the administrative law judge did not consider this information as required by Social Security Ruling 96-7p (“SSR 96-7p), reprinted in *West’s Social Security Reporting Service Rulings* (2002 Supp. Pamph.) at 140 (adjudicator must not draw any inferences about functional effect of symptoms from failure to seek or pursue regular medical treatment without first considering any explanatory information).² The administrative law judge’s conclusion that the plaintiff’s statements to different providers about the efficacy of Calan were “clearly inconsistent,” Record at 14, is not correct, *id.* at 154, 198, and the inconsistency of her statements about Zomig, *id.*, standing alone, cannot be sufficient to provide a basis for finding the headaches to be non-severe in light of all of the other evidence on this point. *See also* Social Security Ruling 85-28, reprinted in *West’s Social Security Reporting Service Rulings* 1982-1991, at 393 (Step 2 evaluation is to be based on medical evidence only). The plaintiff testified that she attended college classes “two hours a day but not together,” Record at 276, which is not necessarily inconsistent with headaches that would have more than an insignificant effect on her ability to perform basic work activities.

With respect to the depression, Brian Rines, Ph.D., examined the plaintiff in March 2001 and issued a report in May 2001. *Id.* at 201. He found that the plaintiff had a major depression that was recurrent and of moderate to severe proportions which would make it “quite difficult to find or maintain employment.” *Id.* at 204. The administrative law judge discounted this report because Dr. Rines found that the plaintiff’s responses to one of the tests he administered were “suggestive of purposeful magnification of symptomology, in order to indicate a greater degree of emotional difficulties than, in fact existed,” because the plaintiff had not been treated for depression from 1993

² At oral argument, counsel for the commissioner contended that the administrative law judge could have rejected the evidence concerning the plaintiff’s inability to afford medications because a medical record dated May 2001 stated that the plaintiff “currently has Medicaid.” Record at 204. The fact that the plaintiff was receiving Medicaid benefits in May 2001 does not necessarily mean that she (*continued on next page*)

through August 2000 and because the plaintiff had been noncompliant with the use of prescribed antidepressant medication. *Id.* at 15. The third reason is puzzling, since the administrative law judge also noted that the first medication prescribed had caused unwelcome side effects and the plaintiff did not take the second medication prescribed because of her inability to pay for it. *Id.* The decision does not suggest that the administrative law judge rejected these explanations. After mentioning the possibility of symptom magnification, Dr. Rines nonetheless found that the plaintiff had a major depression that was recurrent and moderate to severe. *Id.* at 203-04. The administrative law judge was not entitled to reject this evidence from a medically acceptable source, resulting from an examination conducted after the period without treatment, merely because that period existed. Similarly, the administrative law judge could not reject Dr. Rines' opinion on the basis of a qualifying factor that he took into account in reaching his conclusions, at least without reliance on a contradictory report from an acceptable medical source. *See generally Andrade v. Secretary of Health & Human Servs.*, 985 F.2d 1045, 1048-50 (10th Cir. 1993).³

The plaintiff's headaches and her depression⁴ should have been found to be severe at Step 2. Because they were not, it is not possible to conclude how the remainder of the sequential analysis would have been affected by consideration of the effect of these conditions on her RFC. *See, e.g.*, 20 C.F.R. §§ 404.1523, 416.923 (requiring consideration of severity of combined effect of multiple impairments). Accordingly, the case must be remanded.

B. Other Issues

was receiving such benefits at any earlier time.

³ Counsel for the plaintiff noted at oral argument that evaluations by non-examining state-agency psychologists, who did not have Dr. Rines' report, found the plaintiff's depression to be non-severe, Record at 166-88, but there is no suggestion in the administrative law judge's decision that she relied on these evaluations in any way and I accordingly will not discuss them further.

⁴ This conclusion makes it unnecessary to address the plaintiff's contention that the administrative law judge's failure to complete a psychiatric review technique form or to include the same analysis in the body of her decision with respect to the plaintiff's depression requires remand. Itemized Statement at 5-6. I expect that the commissioner will comply with 20 C.F.R. §§ 404.1520a and 416.920a on remand.

The plaintiff also attacks the administrative law judge's evaluation of her credibility and of her statements regarding pain. Itemized Statement at 7-13. She contends that the administrative law judge based her conclusion that "[t]he claimant's statements concerning her impairments and their impact on her ability to work are not entirely credible," Record at 17, on "Dr. Rines' comment about the MMPI (a comment which does not indicate that any symptom magnification was conscious or purposeful . . .), and a lack of medical treatment despite [the plaintiff's] statements that the lack of treatment was due to a lack of money to pay for the medicine," Itemized Statement at 8. The complete statement in the decision of the reasons supporting the administrative law judge's conclusion on this point follows:

Dr. Rines questioned the accuracy of her representation of her psychological symptoms. As indicated above, the considerable gaps in the treatment record since her alleged date of onset are inconsistent with her allegations of disabling pain and depression. Her enrollment in college courses is also somewhat incongruent with her claim of disability.

Record at 16. Again, there is no consideration of the plaintiff's repeated statements to health care providers and at the hearing, *id.* at 282, that she was unable to pursue treatment due to lack of funds. While Dr. Rines' statement that magnification of the plaintiff's psychological symptoms might be present, that does not appear to provide a basis for discounting physical symptoms, particularly where, as here, Dr. Rines stated a possibility, not a conclusion. If the plaintiff had not testified that she only attended classes two hours per day, the administrative law judge's observation based on her enrollment would carry more weight. In sum, I conclude that the administrative law judge did not comply with SSR 96-7p in her assessment of the plaintiff's credibility.

With respect to the administrative law judge's evaluation of the plaintiff's claims of pain, the plaintiff discusses only her headache pain. Itemized Statement at 10-13. The decision does not discuss the plaintiff's headache pain, perhaps because the administrative law judge found the

headaches not to be a severe impairment. On remand, I expect that the allegations of headache pain will be addressed.

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 13th day of March, 2003.

David M. Cohen
United States Magistrate Judge

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