

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

STEPHEN GOLDTHWAIT,)
)
 Plaintiff)
)
 v.)
)
 JO ANNE B. BARNHART,)
 Commissioner of Social Security,)
)
 Defendant)

Docket No. 04-110-P-H

REPORT AND RECOMMENDED DECISION¹

The plaintiff who brings this Social Security Disability (“SSD”) and Supplemental Security Income (“SSI”) appeal was awarded benefits beginning on October 30, 2002; he contends that he was entitled to benefits beginning March 21, 2001. I recommend that the commissioner’s decision 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 administrative law judge found, in relevant part, that the plaintiff had depression, drug and alcohol addiction in remission, migraine headaches and fibromyalgia-like symptoms, a combination of impairments that were severe but which did not meet or equal the criteria of any impairments listed in Appendix 1 to Subpart P, 20

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 his 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 he 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 December 9, 2004, 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 *(continued on next page)*

C.F.R. Part 404 (the “Listings”), Finding 3, Record at 27; that the plaintiff’s statements concerning his impairments and their impact on his ability to work prior to October 30, 2002 were not entirely credible in light of discrepancies between those statements and information contained in the documentary record, Finding 4, *id.*; that prior to October 30, 2002 the plaintiff lacked the residual functional capacity to lift and carry more than 20 pounds occasionally and 10 pounds frequently and he was limited to low-stress work environments, following simple 1-2 step instructions, carrying out simple repetitive tasks, only occasional social interaction and not being required to meet stressful production goals or quotas or a stressful productive pace, Finding 5, *id.*; that he was unable to perform his past relevant work at all relevant times, Finding 7, *id.* at 28; that given his age (younger individual), education (limited above high school), exertional capacity for light work and work experience, use of sections 202.20, 202.21 and 202.22 in Appendix 2 to Subpart P, 20 C.F.R. Part 404 (the “Grid”) as a framework for decisionmaking would direct a conclusion of “not disabled” prior to October 30, 2002, Findings 9-11, *id.*; that there were a significant number of jobs in the national economy that the plaintiff could have performed prior to October 30, 2002 including toll collector, mail clerk, security guard, office helper, automatic photograph developer, construction flagger and car wash attendant, Finding 12, *id.*; and that he had not been under a disability, as that term is defined in the Social Security Act, at any time prior to October 30, 2002, Finding 15, *id.* at 29. The Appeals Council declined to review the decision, *id.* at 12-14, 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).

page references to the administrative record.

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 made 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 reached Step 5 of the sequential review process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his 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 plaintiff contends that the administrative law judge's conclusions about his residual functional capacity before October 30, 2002 and his credibility are not supported by substantial evidence, that he failed to consider the plaintiff's assertions about pain and that he "improperly substituted his own opinion for that of the Claimant's treating physician." Plaintiff's Itemized Statement of Errors ("Statement of Errors") (Docket No. 7) at 2.

The plaintiff first contends that the administrative law judge's determination that he was capable of work at the light exertional level before October 30, 2002 is not supported by substantial evidence because the record establishes that he complained frequently of pain during the relevant period of time. *Id.* at 2-3. He also asserts that the administrative law judge failed to comply with 20 C.F.R. § 404.1529 and *Avery v.*

Secretary of Health & Human Servs., 797 F.2d 19, 21 (1st Cir. 1986), in evaluating his claims of pain.

Id. at 4-5. However, 20 C.F.R. § 404.1529 includes the following critical language:

[S]tatements about your pain or other symptoms will not alone establish that you are disabled; there must be medical signs and laboratory findings which show that you have a medical impairment(s) which could reasonably be expected to produce the pain or other symptoms alleged and which, when considered with all of the other evidence (including statements about the intensity and persistence of your pain or other symptoms which may reasonably be accepted as consistent with the medical signs and laboratory findings), would lead to a conclusion that you are disabled. In evaluating the intensity and persistence of your symptoms, including pain, we will consider all of the available evidence, including your medical history, the medical signs and laboratory findings and statements about how your symptoms affect you. . . . We will then determine the extent to which your alleged functional limitations and restrictions due to pain or other symptoms can reasonably be accepted as consistent with the medical signs and laboratory findings and other evidence to decide how your symptoms affect your ability to work.

20 C.F.R. § 404.1529(a). The plaintiff's own reports of pain, whether or not he made those reports to a physician, are not sufficient in the absence of medical signs and laboratory findings consistent with a medical impairment that could reasonably be expected to produce the pain.² Social Security Ruling 96-7p, the only other authority cited by the plaintiff, Statement of Errors at 5, also requires that the administrative law judge find that there is an underlying physical impairment that could reasonably be expected to produce the claimant's pain before the specific guidelines for evaluation of the effect of that pain on the claimant's ability to work come into play. Social Security Ruling 96-7p, reprinted in *West's Social Security Reporting Service Rulings* (Supp. 2004) at 134.

The only reference to an entry in the record other than his own reports of pain included in the plaintiff's itemized statement is a citation to his visit to the Brighton Pain Clinic on March 20, 2001.

² The plaintiff does not suggest that his pain resulted from a somatoform disorder or had any psychological basis, and the (continued on next page)

Statement of Errors at 4. The physician who examined the plaintiff did recommend additional medication, as well as physical therapy because the plaintiff was deconditioned, with consideration of opiates if the medication and physical therapy proved to be unsuccessful.³ Record at 476-77. The physician's recorded impression was as follows:

1. Potential HIV polyneuropathy. Certainly we have seen this before and certainly leads at the list of potential diagnostic possibilities.
2. Traumatic stress disorder certainly can cause major myofascial abnormalities.
3. There certainly might be some underlying cervical or lumbar pathology associated with his arm and leg problems although this is less likely.

Id. at 476. The plaintiff subsequently underwent a clinical neurophysiological evaluation which found no evidence of neuropathy or myopathy. *Id.* at 481. He was being treated by a psychiatrist during this time and the psychiatrist's records do not mention the possibility of a traumatic stress disorder. *Id.* at 399-414; 548-55.⁴ There is no evidence in the record of any testing or evaluation of the plaintiff for any cervical or lumbar pathology.

This evidence is insufficient to require the administrative law judge to consider further the plaintiff's claims of disabling pain before October 30, 2002. The residual functional capacity that was assigned to the plaintiff is supported by the reports of the state-agency physician consultants who completed physical residual functional capacity assessment forms. *Id.* at 506-13 (finding no exertional limitations and stating that the claimant's "pain is disproportionate to objective medical evidence"); 529-36. This evidentiary support is all that is required.

medical records do not suggest such a diagnosis even as a possibility.

³ The physician who continued to treat the plaintiff after this neurological consultation was reported to be reluctant "as yet" in September 2001 to refer the plaintiff for methadone treatment for his pain. Record at 406.

⁴ On January 16, 2002, the psychiatrist "encouraged [the plaintiff] to think about trying to find some regularly scheduled work activity." Record at 410.

This evidence also supports the administrative law judge's conclusion concerning the credibility of the plaintiff's testimony with respect to the relevant period. The plaintiff suggests that the administrative law judge did not comply with SSR 06-7p because he "did not itemize" the medical signs, diagnosis, opinions, medical treatment history, daily activities, and information about the plaintiff's symptoms and how they affected his "ability to work and consistency." Statement of Errors at 7. As already noted, the analytic requirements of SSR 96-7p do not apply in the absence of medical signs and laboratory findings that would reasonably be expected to produce the plaintiff's pain. In this case, there were no such signs and certainly no diagnosis. In addition, there was no evidence other than the plaintiff's own report about how his pain affected his ability to work. The administrative law judge remarked on the absence of objective medical evidence to support the plaintiff's claims of pain, Record at 22-24, and considered the plaintiff's daily activities to be consistent with work in the light exertional range, *id.* at 24. To the extent that the administrative law judge's evaluation of the plaintiff's credibility could be considered as an independent ground for reversal in this case, no reversible error has been demonstrated.

Finally, the plaintiff asserts, Statement of Errors at 7-8, that the administrative law judge improperly engaged in medical judgment by observing that the therapy progress notes of the plaintiff's psychiatrist "often noted the lack of objectively demonstrated pain behavior, suggesting that [the psychiatrist] himself did not find the claimant's pain complaints to be supported," Record at 22. Counsel for the plaintiff asserts, without citation to authority, that "[t]he term 'pain behaviors' is most often utilized by clinicians in reference to patients suffering from somatoform disorder or who are malingering, as opposed to patients who are legitimately suffering pain," and concludes therefrom that the psychiatrist's "statement that the Claimant did not demonstrate 'pain behaviors' validates [the plaintiff's] complaints." Itemized Statement at 8. Counsel cannot provide medical testimony, and the manner in which medical "clinicians" most often utilized the term

“pain behaviors” is far from common knowledge. The psychiatrist’s notes include the following observations during the relevant period:

Initially he presented in much the same fashion as previously with very little evidence for any pain-type behavior. However, as the session progressed, he did several times clutch his neck and upper back area and move around as if he was either stiff or in some discomfort.

Record at 414 (March 27, 2002).

Though Steve continues to complain of chronic pain there is no obvious pain behavior during the session.

Record at 553 (October 16, 2002).

Neither the administrative law judge nor counsel for the plaintiff have cited any other specific entry in the record with respect to this issue. While an observation that pain behavior was lacking would certainly appear to support a diagnosis of pain due to mental impairment, there is, as I have noted, no suggestion of such a diagnosis in the record, and the plaintiff does not press any claim of mental impairment. In any event, these two entries support the administrative law judge’s conclusion. There is no evidence that he substituted his medical judgment for that of the psychiatrist.

At oral argument, counsel for the plaintiff emphasized the contention that the administrative law judge acted arbitrarily in finding disability as of October 30, 2002, the date the plaintiff entered a pain program, because the record as a whole demonstrated that he suffered from the same pain both before and after that date. As counsel for the commissioner pointed out in response, no medical source before that date indicated that any work restrictions were imposed by the plaintiff’s reported pain. After that date, the records of his physical and occupational therapy assessment at Health Works noted decreased range of motion, decreased functional tolerances and “severe physical functional limitation [secondary to] pain,

impacting tolerance for activity, sleep and stress management.” Record at 574-75. This is evidence that differentiates the period before October 30, 2002 from the period thereafter.⁵

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 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 13th day of December, 2004.

/s/ David M. Cohen
David M. Cohen
United States Magistrate Judge

Plaintiff

STEPHEN GOLDTHWAIT

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⁵ Counsel for the government also cited statements on pages 569-70 and 573 suggesting functional limitations, but those are all notes of the plaintiff’s subjective reports and suffer from the same infirmities as evidence at Step 2 as does the evidence cited by the plaintiff and discussed in the text.

V.

Defendant

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