



Record at 17; that her complaints with respect to the severity of her impairments before October 17, 2001 were not entirely credible, Finding 4, *id.*; that beginning on October 17, 2001 her impairments met the requirements of the impairment listed at section 12.05(C) of Appendix 1 to Subpart P, 20 C.F.R. Part 404 (the “Listings”), but that before that date they did not, Finding 5, *id.*; that before October 17, 2001 the plaintiff had the residual functional capacity to perform work not requiring performance of complex or detailed tasks, Finding 6, *id.*; that before October 17, 2001 the plaintiff had the residual functional capacity to perform her past relevant work, Finding 7, *id.*; and that the plaintiff accordingly was not under a disability as that term is defined in the Social Security Act at any time before October 17, 2001, Finding 8, *id.* The Appeals Council declined to review the decision, *id.* at 5-7, making it the final decision 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 reached Step 4 of the sequential evaluation process, at which stage the burden is on the plaintiff to show that she cannot perform her past relevant work. *Goodermote*, 690 F.2d at 7; 20 C.F.R. § 404.1520(e). In considering the issue, the commissioner must make a finding of the

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administrative record.

plaintiff's residual functional capacity, a finding of the physical and mental demands of past work and a finding as to 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 ("SSR 82-62"), reprinted in *West's Social Security Reporting Service Rulings 1983-1991*, at 813. The plaintiff's statement of errors also implicates Step 3 of the sequential evaluation process, where the claimant bears the burden of proving that her impairment or combination of impairments meets or equals the Listings. 20 C.F.R. § 404.1520(d); *Dudley v. Secretary of Health & Human Servs.*, 816 F.2d 792, 793 (1st Cir. 1987). To meet a listed impairment the claimant's medical findings (*i.e.*, symptoms, signs and laboratory findings) must match those described in the listing for that impairment. 20 C.F.R. §§ 404.1525(a), 404.1528. To equal a listing, the claimant's medical findings must be "at least equal in severity and duration to the listed findings." 20 C.F.R. § 404.1526(a). Determinations of equivalence must be based on medical evidence only and must be supported by medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. § 404.1526(b).

### **Discussion**

At issue in this proceeding is the period between January 3, 2000, the date on which the plaintiff contends that she became unable to work, and October 17, 2001, the onset date found by the administrative law judge. Statement of Specific Errors (Docket No. 3) at 1; Record at 13, 21-22. The plaintiff contends that she met Listing 12.05(C) as of the earlier date. Statement of Specific Errors at 2-4. In this regard, the administrative law judge found as follows:

Before October 17, 2001, the claimant had marked difficulty maintaining concentration, persistence, and pace secondary to mild mental retardation. As of October 17, 2001, the claimant's depression and anxiety, considered separately from the mental retardation, produced moderate restriction of activities of daily living and moderate difficulties maintaining social functioning. There is no evidence that the claimant has experienced episodes of decompensation of extended duration. The claimant has difficulty completing some activities of daily

living. Since October 17, 2001, she has become isolative and dependent and has difficulties adapting to the normal stresses of everyday life. Because her anxiety and depression are more than slight impairments and add work related restrictions to those already imposed by mental retardation, the claimant's combination of mental impairments meet the requirements of listing 12.05(C).

Record at 15-16. The relevant Listing provides:

*Mental retardation:* Mental retardation refers to significantly subaverage general intellectual functioning with deficits in adaptive functioning initially manifested during the developmental period; i.e., the evidence demonstrates or supports onset of the impairment before age 22.

The required level of severity for this disorder is met when the requirements in A, B, C, or D are satisfied.

\* \* \*

C. A valid verbal, performance, or full scale IQ of 60 through 70 and a physical or other mental impairment imposing an additional and significant work-related limitation of function . . . .

Appendix 1, Subpart P, 20 C.F.R. Part 404, § 12.05. The plaintiff spends some time discussing the evidence with respect to IQ scores and her entitlement to a presumption that low IQ began before the age of 22, Statement of Specific Errors at 2-3, but it is apparent that the administrative law judge's decision does not rest on this portion of the test for Listing 12.05(C). Rather, the administrative law judge found that there was no evidence of a physical or mental impairment imposing an additional and significant work-related limitation of function before October 17, 2001.

With respect to the portion of the Listing that is at issue, the plaintiff points to the notes of Dr. John Tkach, her treating physician, Record at 172, which record that she complained of mood swings, anxiety and depression in 1997, when he prescribed Xanax, Statement of Specific Errors at 3, asserting without citation to the record that these symptoms "waxed and waned from that point forward," *id.* at 4. Also without citation to the record, she asserts that she "had additional musculoskeletal problems, upper GI problems, and an ongoing cyst on her knee" which "caused more than slight limitations." *Id.* By her own

testimony, the plaintiff had been working as a cashier until January 3, 2000, Record at 30, *see also id.* at 74 (earnings record showing substantial gainful activity from 1990 through 1999), a fact that casts doubt on her claims that she suffered from significant mental or physical work-related limitations prior to that time.<sup>2</sup> However, the disability report dated October 3, 2001 submitted by the plaintiff also asserts that her knee began to bother her in 1991 or 1992 and her back in 1999, causing her to reduce her work hours. *Id.* at 84, 92. I have therefore reviewed her medical records for entries that would suggest that work-related limitations were imposed by either of these conditions as of January 3, 2000.

The administrative law judge found that

[i]n all of 2000, [the plaintiff] did not complain to her treating physician of back, knee, or mental problems. Physical examinations and radiological studies showed no significant problems, and she was treated with anti-inflammatory medications. She was not referred to a specialist or given work restrictions. There is nothing indicating that her daily activities were unusually restricted prior to October 17, 2001.

*Id.* at 16. At oral argument, counsel for the plaintiff was unable to identify any entries in the medical records that contradict this finding. My own review of the records supports the administrative law judge's conclusion. The fact that the plaintiff sought treatment for back or knee pain well before the alleged disability onset date does not, standing alone, require the inference that these conditions caused significant

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<sup>2</sup> At oral argument, counsel for the plaintiff stated that the commissioner may not consider the fact that the plaintiff was actually working at the time she contends she was suffering from an impairment that imposed significant limitation of a work-related function for purposes of Listing 12.05C, citing *Durham v. Apfel*, 34 F.Supp.2d 1373 (N.D. Ga. 1998). However, the opinion in that case does not stand for that proposition. The court in that case held only that “[a] claimant whose impairment meets a listing is disabled when not working, even if he or she worked in the past with the impairments, and even if he or she could return to his or her past work. . . . Listing 12.05C anticipates in its definition that a person with an IQ of 60 to 70 may be able to work unless there is another impairment imposing additional work-related limitations.” *Id.* at 1381 (citations omitted). The issue in that case was not the date of onset. In *Cobb v. Barnhart*, 296 F.Supp.2d 1295 (N.D. Ala. 2003), another case cited by counsel for the plaintiff at oral argument as supporting the plaintiff's position on this point, the administrative law judge found that the claimant had impairments “which cause significant vocationally relevant limitations” in addition to an IQ score within the limits of Listing 12.05C, *id.* at 1298. That case accordingly did not present the question at issue here, which is whether such evidence was presented to the administrative law judge.

work-related limitations at the time of alleged onset. There is nothing inherent in the nature of a cyst in the knee, unspecified “upper GI problems” or unspecified “musculoskeletal problems” that would make any of these conditions necessarily progressive, so that their existence in 1992 or 1999 would make them likely to be continuing to cause limitations, and more importantly, to cause more significant limitations, in January 2000. *See generally* Social Security Ruling 83-20, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991*, at 51-52 (discussing inferences that may be drawn about onset of progressive impairments); *Ricci v. Apfel*, 159 F.Supp.2d 12, 17 (E.D.Pa. 2001) (“Disability is not determined by the presence of impairments, but by the effect the impairments have on the individual’s ability to perform substantial gainful activity.” (Citation omitted.)).

At oral argument, counsel for the plaintiff stated that he relied only on the plaintiff’s knee problem as evidence of a physical impairment for purposes of Listing 12.05C. He cited a March 2001 MRI of her knee with follow-up treatment in October 2001, Record at 138-39, and a reference to knee pain in a medical record dated October 7, 1999, *id.* at 170. Nothing in the 2001 records can reasonably be interpreted to show the existence of an impairment existing before January 3, 2000 that caused a significant work-related limitation of function. The MRI was interpreted to show small cysts “of doubtful current clinical significance” and was “[o]therwise unremarkable,” *id.* at 138, and the treating physician seven months later, while noting that the plaintiff reported “problems with her right knee” since 1990 or 1992, opined that the problem “should resolve” with exercise, knee support and anti-inflammatory medication. *Id.* at 139. This is apparently what happened, since there is no medical record indicating any further contact with the treating physician, who noted at the time that he would see her in four to six weeks “and if symptoms do not resolve, proceed with arthroscopic examination.” *Id.* The 1999 record, which notes the plaintiff’s report that she “[h]as been noting [right] knee and leg pain — sharp fluttering pain — worse at

night” and that she had taken Darvocet “[without] much relief,” includes a diagnosis of restless leg syndrome. *Id.* at 170. There is no indication of further treatment for this pain; the only reasonable inference is that the pain resolved. Again, there is nothing in this record that would allow, let alone require, an administrative law judge to conclude that the 1999 knee pain imposed a significant work-related limitation of function at any time between October 1999 and January 3, 2000.

With respect to the additional mental impairments alleged by the plaintiff to have existed on or prior to the alleged onset date, she cites pages 128 and 172 of the record. Statement of Specific Errors at 3. An entry dated August 18, 1997 on page 172 notes “Mood swings — crying & agitated. Notes hot flashes.” The diagnosis was “Menopausal syndrome.” Xanax was prescribed. An entry dated August 21, 1997 on that page notes a telephone conversation with the plaintiff and states, in part: “Having difficult time with anxiety and depression.” No medication is prescribed, although the entry reports that the plaintiff “[n]eeds a note for medical leave from work in order to get self together.” There is no indication that such a note was written or that the plaintiff actually took time off from work as a result. Page 128 of the record is the second page of a two-page form entitled “Activities of Daily Living” completed by the plaintiff’s treating physician on February 14, 2002. The plaintiff relies on the physician’s statement in response to a question about changes in the plaintiff’s behavior, as follows:

Has been staying home more; doesn’t do activities with children; less visiting; does not go to bingo. Has decrease in sex drive. Feels different — no ambition, no motivation.

*Id.* at 128. In response to the question “How long have you noticed this change?” the physician writes: “4 years but only recently sought help — Notes in chart go back to 1996.” *Id.* Whether the physician first noticed these changes in 1998, four years before his report, or 1996, none of them necessarily imposes a significant limitation on work-related activities.

After the 1997 entry, there are no further notes in the medical record concerning psychological symptoms or any treatment for mental problems of any kind until October 17, 2001. Record at 165. This medical evidence is simply insufficient to allow, let alone to require, the administrative law judge to infer the presence of work-related limitations resulting from anxiety or depression before the alleged date of onset. *See Ricci*, 159 F.Supp.2d at 17-18 (scarcity of medical evidence of treatment for mental condition prior to relevant date constitutes substantial evidence supporting administrative law judge's finding of no severe mental impairment before that date). The plaintiff asserts, without apparent support in the medical record, that her psychiatric symptoms "waxed and waned" from 1997 on. Statement of Specific Errors at 4. Even if there were medical evidence to support this assertion, the Listing cannot be met unless the symptoms were sufficiently severe at the time of the alleged onset, or within 12 months of that date, to establish a significant work-related limitation of function. "Waxing and waning" is not enough. *Vogt v. Barnhart*, 85 Soc.Sec.Rep.Serv. 522, 2003 WL 403345 (D. Neb. Feb. 21, 2003), at \*6-\*8.

The plaintiff is not entitled to remand based on her Step 3 argument.

The plaintiff's Step 4 argument asserts that the administrative law judge failed to comply with Social Security Ruling 82-62 because his finding that she had marked difficulty maintaining concentration, persistence and pace due to her mental retardation, Record at 15, is not included in his assessment of her residual functional capacity.<sup>3</sup> Statement of Specific Errors at 4-5. She contends that such findings require a determination of disability. *Id.* at 5.

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<sup>3</sup> The only evidence in the record on this point, one of four areas of functional limitation under the "B" criteria of Listings for mental impairments, is found in the reports of the state-agency consultants, who completed psychiatric review technique forms. One indicated that the plaintiff had mild difficulties in maintaining concentration, persistence and pace, Record at 158; the other indicated that she had moderate difficulties in this area, *id.* at 194.

Social Security Ruling 82-62 (“SSR 82-62”) deals with the determination at Step 4 of the question whether the claimant had the capacity to perform past relevant work at the time in issue. Social Security Ruling 82-62, reprinted in *West’s Social Security Reporting Service Rulings 1975-1982*, at 809-813. The administrative law judge must determine the claimant’s residual functional capacity and the physical and mental demands of the claimant’s past relevant work, and then compare the two. *Id.* at 811-12.<sup>4</sup> While it is not entirely clear from her statement of errors, the plaintiff apparently contends that the administrative law judge did not correctly determine her residual functional capacity as of her alleged onset date; this would address the first element of the Step 4 test. She contends, without citation to authority, that “[a]n individual who has marked difficulty maintaining concentration in a work setting, marked difficulty in persisting at a task, and marked difficulty with maintaining a pace, is not going to perform any work that exists in the national economy.” Statement of Specific Errors at 5. Of course, the marked difficulty at issue concerns one of four criteria that are used as elements of most Listings for mental impairments, and two such elements (called “Part B” criteria) must be present in each case in order for a Listing to be met. *E.g.*, Listings 12.02(B), 12.03(B), 12.04(B). The plaintiff chose to assert that she met Listing 12.05(C), which does not involve the four criteria, but Listing 12.05(D) does include the requirement that two, not just one, of the elements be met. Given this use of the criterion of difficulties in maintaining concentration, persistence, or pace in the Listings, it is not accurate to say that the existence of marked difficulties in this single area means that a claimant must be found to be disabled.

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<sup>4</sup> Counsel for the plaintiff contended at oral argument that the administrative law judge did not determine the mental and physical demands of the plaintiff’s past jobs nor “reconcile” those demands with the finding that she had moderate difficulties with concentration, persistence and pace. I agree with counsel for the commissioner that the administrative law judge’s discussion at page 16 of the record meets the requirements of SSR 82-62, although barely.

The commissioner's Program Operations Manual System ("POMS") provides that, when a claimant alleges a mental limitation which is found not to meet or equal a listing, the administrative law judge must consider whether the claimant has the ability to meet the mental demands of her past relevant work by considering whether she can meet the basic mental demands of unskilled work, which include the ability to do the following on a sustained basis:

- ? understand, carry out and remember simple instructions;
- ? make judgments that are commensurate with the functions of unskilled work, i.e., simple work-related decisions
- ? respond appropriately to supervision, coworkers and work situations; and
- ? deal with changes in a routine work setting.

Social Security Administration Program Operations Manual System, § DI 25020.010(A)(3), Mental Limitations (reprinted at 2001 WL 1933437). A substantial loss of ability to meet any of these basic mental demands would justify a finding that the claimant was unable to perform other work. *Id.* With respect to these abilities, the administrative law judge made no specific findings concerning the plaintiff before October 17, 2001, stating only that she then had the residual functional capacity to perform work not requiring the performance of complex or detailed tasks. Record at 16. This apparently constitutes a finding that the plaintiff could meet the first and second of these mental demands at the relevant time.

These considerations are applicable, however, only in the event that the administrative law judge reaches Step 5 of the sequential evaluation process and needs to determine whether a claimant can perform work other than her past relevant work. Here, the administrative law judge only reached Step 4, finding that the plaintiff could have returned to her past relevant work before October 17, 2001. Since more than one of the past relevant jobs to which the administrative law judge found the plaintiff could return is compatible with a limitation to work not requiring the performance of complex or detailed tasks, *see Dictionary of Occupational Titles* §§ 311.472-010 (fast-foods worker); 311.477-038 (waitress, take

out) (U.S. Dep't of Labor, 4th ed. rev. 1991), the plaintiff can only succeed in her argument if she demonstrates that all of these jobs are incompatible with marked difficulties in maintaining concentration, persistence and pace.<sup>5</sup> The fact that the plaintiff's mental retardation, which the administrative law judge found gave rise to the single area of "marked" difficulty on which the plaintiff relies, existed while she performed her past relevant work is significant evidence of her ability to return to that work at a time before other medical conditions were found to impose additional work-related limitations. Record at 16. The plaintiff offers no authority to support her position on this point, and my research has located none.<sup>6</sup>

### **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 30th day of April, 2004.

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<sup>5</sup> Contrary to the plaintiff's suggestion, nothing in the psychiatric review technique forms nor in the administrative law judge's findings suggests that the marked difficulty involved is difficulty maintaining concentration "in a work setting." Statement of Specific Errors at 5.

<sup>6</sup> *But see Black v. Barnhart*, 237 F.Supp.2d 1099, 1107 (S.D. Iowa 2002) (vocational expert testified that deficiencies of concentration, persistence and pace would preclude work if they often resulted in failure to complete tasks in timely manner); *Alsip v. Barnhart*, 84 Soc.Sec.Rep.Serv. 686, 2002 WL 31770483 (N.D. Ill. Dec. 6, 2002) at \*7 (ALJ notes that significant problem with concentration would preclude work as cashier); *cf. Baladi v. Halter*, 2001 WL 527406 (E.D.N.Y. May 4, 2001) at \*10 (poor concentration not inconsistent with work as cashier).

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

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